



ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE

COSAC Presidency

*Mr. Philippe Mahoux
Chairman of the Federal Advisory Committee on
European Affairs of the Belgian Senate
Palais de la Nation
Place de la Nation 1
B - 1009 Bruxelles*

*Mr. André Flahaut
Chairman of the Federal Advisory Committee on
European Affairs of the Belgian House of Representatives*

Of. nº 228 /4ª-CAE – Refª 17.1
N.U. 371254

21 September 2010

*Dear Mr. Mahoux,
Dear Mr. Flahaut,*

Following my last letter, from 30 June 2010, I would like to bring to your attention the decision of the Portuguese *Assembleia da República's* European Affairs Committee on the definition of "Legislative Act in the Treaty of Lisbon".

As you may recall this matter was raised by the former Chairman of the House of Commons' European Scrutiny Committee, Mr. Michael Connarty MP, at the meeting of COSAC Chairpersons in Madrid, on 5 February 2010. At the time, the Chairman informed that the UK Government had informed the House of its understanding that certain provisions of the Treaty on the Functioning of the European Union (TFEU) require the Council to adopt Regulations, Directives and Decisions and where the applicable legal acts are not legislative acts. In fact, the UK Government sustained its position on the grounds of its interpretation of Article 289(2) and (3) TFEU, which established, in its view, that only acts adopted by ordinary legislative procedure or by special legislative procedure are legislative acts. As such, the legal acts mentioned above should not be subject to an analysis of their compliance with the principle of subsidiarity, as defined in the Protocol on the role of national Parliaments in the European Union (Protocol 1) and the Protocol on the application of the principles of subsidiarity and proportionality (Protocol 2), given that both refer solely to the analysis of draft legislative acts.

The House of Commons' European Scrutiny Committee, on the other hand, felt that although these provisions do not explicitly say that they entail the adoption of acts by special legislative procedure, they do so in substance. In the light of all this, the House of Commons' European Scrutiny Committee not only disagrees with the UK Government's position, but has urged the other national Parliaments to pronounce themselves on this question.



**ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE**

Following that request, the Portuguese *Assembleia da República's* European Affairs Committee took several debates around this issue and I've the pleasure to send you, in attach, its final decision, which sustains the interpretation made by the House of Commons' European Scrutiny Committee, which is in line with the spirit of the Treaty of Lisbon in what concerns the role of the national Parliaments.

Finally, I would be grateful if you could bring this letter and the attached written opinion to the attention of participating committee delegations and their advisers.

Yours sincerely,

(Vitalino Canas)

Chairman on the European Affairs Committee



**ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE**

WRITTEN OPINION

On the Definition of “Legislative Act” in the Treaty of Lisbon

The question before us concerns the interpretation of Article 289 TFEU, and consequently the correct application to be attributed to the provisions of Protocol 2 and to the consequent implications for the national Parliaments. The interpretation that the EU Institutions and the UK Government are defending could be called a “declarative interpretation”, which looks solely to the literal element, whereas the interpretation for which the House of Commons is arguing looks to the systematic element. However, when one interprets a norm, one must always combine both the literal element and the teleological element, which must include an analysis of the *ratio legis*, but must also bear in mind the systematic and historical elements.

Without going at length into the historical evolution of the decision-making process in the European Union, we must nonetheless go back to the draft Treaty establishing a Constitution for Europe. That text proposed many of the solutions that were adopted in the Treaty of Lisbon, particularly its two Protocols. It is important to recall that the latter, which were adopted without any amendment, were written in the light of the aforementioned draft version of the Treaty. This is an undisputed fact, but it is equally consensual that one of the subjects that underwent the most amendments between the draft and the actual Treaty was the list and the architecture of the sources of Law in the European Union framework.

The fact is that the draft Treaty establishing a Constitution for Europe proposed making an effort to simplify the normative complex that then existed within the Union. To this end the text introduced a normative ranking, a clarification of the legal acts by which the institutions applied the Union's competences, and the procedures for adopting them. The text thus proposed a distinction between acts that are legally binding (laws, framework laws, regulations, decisions) and those that are not (recommendations and opinions); but where the legally binding acts were concerned, it also provided for a distinction between legislative acts (laws and framework laws) and non-legislative acts (regulations and decisions).



**ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE**

However, it is important to clarify that in practice, the laws and framework laws were intended to replace the existing regulations and directives; whereas the regulations and decisions were to replace joint actions and common positions, respectively. With regard to decision-making procedures leading to the adoption of a legislative act, the draft Treaty establishing a Constitution for Europe created an ordinary legislative procedure, which consisted of the former co-decision procedure, and a list of special legislative procedures, which included all the other procedures leading to the adoption of a legislative act.

The Treaty of Lisbon took up part of the ideas on decision-making procedures, but completely abandoned the list of acts and the idea of ranking them. The current Treaty provides for the ordinary legislative procedure in exactly the form set out in the draft Treaty establishing a Constitution for Europe, but when it comes to the special legislative procedure, the Treaty omits some of the procedures included in the draft text. Having said this, it does retain the idea that underlay the draft proposed by the Convention – i.e. the creation of procedures in parallel to the ordinary legislative procedure, which would replace the abolished consultation, concertation and cooperation procedures among others, but would possess an aspect that would enable them to be presented with a single “face”.

As such, the special legislative procedure came about as a replacement for the earlier panoply, but not with the idea of its being just a single procedure. It is hard to believe that the intention with regard to the simplification of decision-making procedures was only to create two procedures and to leave a range of situations, which are identical in every respect, without a framework. Even taking the literal element into account, it does not appear credible to think that the expression “*in the specific cases provided for by the Treaties*” seeks to exclude the situations which, even if they do not say they entail a special legislative procedure, are substantially the same thing as that procedure.

With regard to the list of acts and their ranking, notwithstanding the fact that the Treaty of Lisbon abandoned the architecture defined in the draft Treaty establishing a Constitution for Europe, it did retain some of the concepts, albeit displaced from the context in which they had existed in the draft text.

The fact is that under the terms of the draft Treaty establishing a Constitution for Europe, regulations and directives (known as laws and framework laws) were always legislative acts, whatever the



**ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE**

legislative procedure undertaken to adopt them. Similarly, "legislative act" was explicitly defined in substantial and formal terms, unlike under the Treaty of Lisbon, which defines them on the basis of the procedure.

Now the thing is that Protocols 1 and 2 to the Treaty of Lisbon reflect the architecture of the draft Treaty establishing a Constitution for Europe, given that the latter is the context in which they were written. The "draft legislative act" to which they refer is therefore conceptually closer to the draft Treaty establishing a Constitution for Europe and, at the end of the day, the latter is the best resource with which to interpret them.

Given all this, it seems to us that the intention was for the special legislative procedure to encompass all those decision-making procedures which, while they were not an ordinary legislative procedure, implied the adoption of a legislative act by either the Council or the European Parliament, in consultation, or with the intention of reaching an agreement, with the other. Similarly, bearing in mind the moment in time at, and the framework within, which it was written, it appears to us possible that the wording of the text fell short of the spirit of the norm when it came to the expression "draft legislative acts", as referred to in Protocols 1 and 2 to the Treaty of Lisbon.

Following on from what we have already said, it does not seem that Article 289(2) TFEU can be interpreted to mean that only the norms that explicitly refer to "special legislative procedure" are such a procedure. According to the position defended by the UK Government, the Council of the European Union and the European Commission, to be a special legislative procedure it is not sufficient for the act to be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament; the Article must explicitly say that what is at stake is a special legislative procedure.

As an example, let us look at Article 81(3) TFEU. The first paragraph states that: "(...) *measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.*" (emphasis added); while the second paragraph states that: "*The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications (...). The Council shall act unanimously after consulting the European Parliament.*"



**ASSEMBLEIA DA REPÚBLICA
EUROPEAN AFFAIRS COMMITTEE**

In this case the first paragraph constitutes a legislative act, whereas the second paragraph is just a legal act. So the difference between the first and second paragraphs is that the national Parliaments can pronounce themselves under Protocols 1 and 2 on the measures which the Council establishes under the first paragraph, but not on the decision referred to in the second paragraph. Although they apparently involve similar procedures in which the Council takes unanimous decisions after consulting the European Parliament, in practice, when the Council, acting with the participation of the European Parliament (and by definition, this results in the use of a special legislative procedure), adopts the decision provided for in the second paragraph, given that the norm does not explicitly say that what is at stake is a special legislative procedure, the Council is not adopting a legislative act.

Now, this interpretation means that identical procedures lead to the adoption of acts with different legal values. What is more, in modern state legal orders, the production of general legal norms possesses the nature of a legislative act in the substantial sense. Such acts are those which possess a normative content, whatever their external form may be. It thus seems to us that the act that is adopted possesses a legislative nature in both situations.

Conclusion

In the light of all the above and the arguments presented, we consider that all those acts in which the Council with the participation of the European Parliament, or the European Parliament with the participation or the agreement of the Council, adopt a regulation, a directive or a decision are legislative acts adopted by special legislative procedure, however the norm that establishes the procedure identifies it. The fact is that the acts that are adopted under these conditions possess a normative content, whatever their external form may be, so they possess a legislative nature in the substantial sense and, in practice, are legislative acts *propter sensu*.

Lisbon, 14th September 2010