Chapter 22: Legislative Instruments and Procedures

Introduction

22-1 This chapter considers:
- the Institutions and bodies empowered to adopt secondary legislation,
- the five categories of legislative act,
- the three procedures for the adoption of a legislative act,
- the procedure for adopting a Commission act,
- the requirements on justification and publication of secondary legislation and
- the enforcement of decisions imposing a pecuniary obligation on persons.

The Institutions and bodies empowered to adopt secondary legislation

22-2 In the European Union there are three secondary legislators in the general field of Community law:
- the European Parliament acting jointly with the Council,
- the Council (acting in its own right) and
- the Commission (acting as a body adopting and not just proposing laws).[1]

22-3 In addition to the three secondary legislators referred to above, there is a body which is entitled to adopt secondary legislation, other than directives, but only in the context of the Treaty provisions on Economic and Monetary Union; this is the European Central Bank.[2]

The five categories of legislative act

22-4 Secondary legislators may:
- make regulations,
- issue directives[3],
- take decisions,
- make recommendations or
- deliver opinions.[4]

These measures are intended to carry out the tasks of the law-makers in accordance with the Treaty.[5]

22-5 Regulations have general application. They are binding in their entirety and directly applicable in all Member States.[6] They do not depend for their validity on changes in national laws, though national laws may need to be changed as the result of the adoption of a regulation. The importance of regulations varies from the relatively trivial, such as the day-to-day adjustments in agricultural prices, to the creation of a new body of European Union law, such as the trade mark system, including a major office, with a legal jurisdiction, Boards of Appeal and a substantial staff.[7]

22-6 Directives are binding, as to the result to be achieved, upon each Member State to which they are addressed, but leave to the national authorities the choice of form and methods.[8] Typically, they provide an outline of the law to be introduced, leaving it to Member States to implement the

provisions as appropriate within their national legal systems, within a time-limit normally specified in the directive itself. The main purpose of most directives is to harmonise national laws, particularly with a view to completing the internal market.[9]

22-7 Decisions are binding in their entirety upon those to whom they are addressed.[10] Typically, they are used for quasi-judicial purposes in such areas as dumping and competition[11]; but many administrative acts are also in the form of decisions.

22-8 Recommendations and opinions have no binding force.[12] They are moderately useful instruments for some purposes. For example, if a Community law is likely to be fully enforceable only if criminal sanctions are applied, which are outside the scope of the Community's powers, the Commission may legitimately make a recommendation to the Member States that this course should be pursued. As for opinions, these have sometimes been used to indicate how the Commission proposes to interpret Community law; and, while they do not have binding effect, they do put everyone concerned on fair notice of the legal and policy actions which the Commission intends to pursue.[13]

The three procedures for the adoption of a legislative act

22-9 Apart from measures adopted by the Commission and the European Central Bank, by virtue of the powers directly conferred on them under the Treaty, there are three procedures for the adoption of secondary legislation. Which of the procedures has to be followed in any given case is determined by the provisions of the Treaty governing the subject of the legislative act in question.[14] The terms used to describe them, though not referred to as such in the Treaty itself, are convenient and widely recognised. They are:

- the consultation procedure[15],
- the cooperation procedure[16] and
- the co-decision procedure.[17]

The three procedures regulate the relationship between the Council and the European Parliament and, to a lesser extent, the Commission. The consultation procedure requires only that the Council should consult the Parliament. The cooperation procedure requires the Council to cooperate with the European Parliament both by means of consultation and, where necessary, by the adoption of a "common position", explained in more detail below, before adopting secondary legislation. The co-decision procedure goes further and provides not only for recourse, where necessary, to a Conciliation Committee but also for the secondary legislation adopted under this procedure to be in the form of a joint act of the European Parliament and the Council.

22-10 When secondary legislation goes through the consultation procedure, there are essentially three phases:

- the Commission submits a formal proposal to the Council,
- the Council consults the European Parliament and
- in the light of the European Parliament's opinion, the Council decides whether to adopt or to reject the proposal.[18]

Amendments to the Commission's proposals have traditionally been reserved to the Commission

itself, with the European Parliament suggesting amendments in its opinion to the Council and the Council suggesting, behind closed doors, that the Commission may wish to amend its proposals if it wishes to see its proposal adopted. Even now, the Council may not amend a Commission proposal except on the basis of a unanimous decision.[19] The Commission, on the other hand, may alter its proposal at any time during the procedures leading to the sdoption of a Community act.[20]

22-11 When secondary legislation goes through the cooperation procedure, it is subject to a more complex treatment. However, five stages may be identified as follows:

- the Commission submits a formal proposal to the Council,
- the Council consults the European Parliament,
- the Council adopts a "common position" and communicates it to the European Parliament,
- the European Parliament
    - accepts the common position,
    - makes no decision on the common position,
    - seeks amendments to the common position or
    - rejects, the common position and, depending on which of these options it exercises,
- the Council adopts the proposal, with or without amendments.

The details of the procedure are set out in the next paragraphs.

22-12 First, the Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, adopts a common position. This is similar to what is known in business circles as a position paper and is intended to provide a basis, bearing in mind the European Parliament's opinion, for the adoption of the Commission's proposal. The Council's common position is communicated to the European Parliament; and the Council and the Commission inform the European Parliament fully of the reasons which led the Council to adopt its common position and also of the Commission's position. If, within three months of such communication, the European Parliament approves this common position or has not taken a decision within that period, the Council "definitively" adopts the act in question in accordance with the common position.[21]

22-13 However, the European Parliament may, within that period of three months by an absolute majority of its component Members, propose amendments to the Council's common position. The European Parliament may also, by the same majority, reject the Council's common position. The result of the proceedings are then transmitted to the Council and the Commission. If the European Parliament has rejected the Council's common position, unanimity is required for the Council to act.[22]

22-14 Next, within a period of one month, the Commission re-examines the proposal on the basis of which the Council adopted its common position, by taking into account the amendments proposed by the European Parliament. The Commission forwards to the Council, at the same time as its re-examined proposal, the amendments of the European Parliament which it has not accepted, and expresses its opinion on them. The Council may adopt these amendments unanimously. The Council, acting by a qualified majority, adopts the proposal as re-examined by the Commission; but, following the general principle referred to in connection with the consultation procedure, unanimity

is required for the Council to amend the proposal as re-examined by the Commission.[23]

22-15 There are some strict time-limits for the cooperation procedure. Where the European Parliament rejects the common position or proposes amendments to it, the Council is required to act within a period of three months; and, if no decision is taken within this period, the Commission proposal is deemed not to have been adopted.[24] The period within which the European Parliament may examine the common position and the period within which the Council must act on a rejection or amendment may be extended by a maximum of one month by common accord between the Council and the European Parliament.[25]

22-16 When secondary legislation goes through the co-decision procedure, it is subject to an even more complex treatment. However, seven stages may be identified as follows:

- the Commission submits a formal proposal to the European Parliament and the Council;
- the Council consults the European Parliament;
- the Council
    - adopts the proposal if
        - it approves all the amendments proposed by the European Parliament, or
        - the European Parliament does not propose any amendments, or
    - adopts a common position and communicates it to the European Parliament;
- the European Parliament
    - approves the common position (in which case the proposal is adopted) or
    - seeks amendments to the common position or
    - rejects the common position (in which case the proposal falls);
- the Council
    - approves the amendments (in which case the proposal is adopted) or
    - does not approve the amendments (in which case the Conciliation Committee meets);
- the Conciliation Committee seeks agreement on a joint text
- the Council and the European Parliament vote on the joint text.

If the votes are in favour of the joint text, the proposal is adopted. If either the Council or the European Parliament rejects the joint text, or if the Conciliation Committee is unable to reach agreement on a joint text, the proposal falls. The details of the procedure are set out in the next paragraphs.

22-17 First, the Commission submits a proposal to the European Parliament and the Council.[26] The Council then seeks the opinion of the European Parliament. When it receives this opinion, the Council has the following three courses of action, to be taken by a qualified majority:

- if it approves all the amendments contained in the European Parliament's opinion, it may adopt the proposed act so amended;
- if the European Parliament does not propose any amendments, it may adopt the proposed act;
- otherwise, it must adopt a common position and communicate it to the European Parliament.

The Council is required to inform the European Parliament fully of the reasons which led it to adopt its common position; and the Commission is required to inform the European Parliament fully of its own position.[27]

22-18 If, within three months of these communications, the European Parliament approves the common position or has not taken a decision, the act in question is deemed to have been adopted in accordance with that common position. If it rejects, by an absolute majority of its component members, the common position, the proposed act is deemed not to have been adopted. If it proposes amendments to the common position by an absolute majority of its component members, the amended text is forwarded to the Council and to the Commission, which must deliver an opinion on those amendments.[28]

22-19 If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question is deemed to have been adopted in the form of the common position so amended. However, the Council has to act unanimously on any amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, must within six weeks convene a meeting of the Conciliation Committee.[29] This is a Committee composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament. Its task is to reach agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission takes part in the Conciliation Committee's proceedings and is under a duty to seek to reconcile the positions of the European Parliament and the Council. In carrying out its task, the Conciliation Committee addresses the common position on the basis of the amendments proposed by the European Parliament.[30] Where the Conciliation Committee does not approve a joint text, the proposed act is deemed not to have been adopted.[31]

22-20 If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it is deemed not to have been adopted.[32]

22-21 Extensions to the periods of three months and six weeks referred to above are allowed up to one month and two weeks respectively on the initiative of the European Parliament or the Council.[33]

The procedure for adopting a Commission act

22-22 Since the Commission has powers, both under the Treaty[34] and by delegation[35], to adopt legislative acts, the problem of reconciling differences between the European Parliament and the Council does not arise. A draft measure prepared by the services of the Commission is considered by the Members of the Commission and, if approved, is adopted by the Commission itself without further reference to other Institutions. The Commission may consult the European Parliament as a matter of courtesy; but it is under no obligation to do so. The absence of this obligation was much criticised in a leading case on the exercise of the Commission's legislative powers: the Commission had exceeded its powers in adopting a far-reaching directive in the telecommunications sector. However, while some provisions of the Commission's directive were ruled *ultra vires* by the Court,

there was nothing unlawful in the Commission's failure to consult the European Parliament.[36]

The requirements on justification and publication of secondary legislation

22-23 Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, are required to state the reasons on which they are based and to refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.[37] According to settled case-law, the question whether the statement of the grounds for a decision meets the requirements of this provision must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question. In competition cases, for example, while the Commission, in the statement of reasons for a decision, is not required to discuss all the issues of fact and law raised by interested parties during the administrative procedure[38], it must none the less take account of all the circumstances and all the relevant factors of the case[39] so as to enable the Court to review its lawfulness and make clear to the Member States and the persons concerned the circumstances in which the Commission has applied the Treaty. These principles apply *mutatis mutandis* to other forms of legislation and to other secondary legislators.

22-24 As a result of the application of the requirement to state the reasons on which the measures concerned are based, the measures are generally divided into two parts: the preamble and the executory provisions. The individual sentences or paragraphs of the preamble are recitals[40]; the executory provisions are Articles. Sometimes, particularly in competition cases, there may be a hundred recitals and only five Articles. Sometimes, particularly in harmonisation directives, the recitals are a little perfunctory and the Articles more numerous.

22-25 To meet the requirement that measures should refer to any proposals or opinions which were required to be obtained, the preamble usually has words along the following lines:

> Having regard to the proposal from the Commission,
> Having regard to the opinion of the the European Parliament,
> Having regard to the opinion of the Economic and Social Committee, ...

In addition, there is a reference to the legal basis of the measure:

> Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof, ...

It is on the selection of the legal basis that the legality of a measure may be challenged in the Court of Justice.[41]

22-26 As to the publication of secondary legislation, the following rules apply. Regulations, directives and decisions adopted in accordance with the co-decision procedure are signed by the President of the European Parliament and by the President of the Council and published in the *Official Journal of the European Communities*; and they come into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.[42] Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, are published in the *Official Journal of the European Communities*; and they come into force on the date specified in them or, in the absence thereof, on

the twentieth day following that of their publication.[43] Other directives and decisions are notified to those to whom they are addressed and take effect upon such notification.[44]

22-27 In connection with the rules on the publication of legislation, the Treaty contains provisions on access to legislative and other documents. Under these provisions, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents, subject to the the following principles and conditions. General principles and limits on grounds of public or private interest governing this right of access to documents are determined by the Council, acting in accordance with the co-decision procedure by 1 May, 2001. Each institution referred to above has a duty to elaborate in its own Rules of Procedure specific provisions regarding access to its documents.[45]

The enforcement of decisions imposing a pecuniary obligation on persons

22-28 Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, are enforceable. Enforcement is governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement is appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State designates for this purpose and makes known to the Commission and to the Court of Justice. When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority. Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the country concerned have jurisdiction over complaints that enforcement is being carried out in an irregular manner.[46]

1. Article 249 (formerly 189), first paragraph, EC Treaty.

2. Article 110(1) (formerly 108a(1)), EC Treaty.

3. With the exception of the European Central Bank. See paragraph 22-3 above.

4. Article 249 (formerly 189), first paragraph, EC Treaty. Those who appreciate legal niceties will note the specific use of the verbs: regulations are *made*, directives are *issued*; and so on. They will also note that there is no collective term for these measures or instruments. "Acts" are a wider term: they include, for example, the "establishment of guidelines", under Article 155(1) (formerly 129c(1)), EC Treaty, which is an act within the meaning of Article 251 (formerly 189b), EC Treaty, by virtue of Article 156 (formerly 129d), first paragraph, EC Treaty. Acts under the EC Treaty must be distinguished from "joint positions" and "joint actions" under the EU Treaty.

5. Ibid. The tasks of the Institutions concerned are set out in Articles 189, 202 and 211 (formerly 137, 145 and 155) respectively, EC Treaty. See chapters 16, 17 and 18.

6. Article 249 (formerly 189), second paragraph, EC Treaty.

7. Council Regulation EC/40/94.

8. Article 249 (formerly 189), third paragraph, EC Treaty.

9. Article 95 (formerly 100a), EC Treaty.

10. Article 249 (formerly 189), fourth paragraph, EC Treaty.

11. There is a large body of "case-law" in the competition field, based on the twenty to thirty formal decisions taken each year by the Commission. See, for example, the XXVIIth Report on Competition Policy.

12. Article 249 (formerly 189), fifth paragraph, EC Treaty.

13. Opinions of this sort were delivered by the Commission on the occasion of the first draft of the proposed Convention on a Community Patent, warning Member States that certain provisions were, in the Commission's view, contrary to Community law; and again on the occasion of the Court's judgment in the landmark Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein*, (Cassis de Dijon).

14. For example: the consultation procedure is prescribed, for certain matters affecting citizenship of the European Union, under Article 19 (formerly 8b), EC Treaty; the cooperation procedure is prescribed, for certain questions of economic policy, under Article 99(5) (formerly 103(5)), EC Treaty; and the co-decision procedure is prescribed, for certain matters affecting

public health, under Article 152(4) (formerly 129(4)), EC Treaty. Articles 251(1) and 252(1), EC Treaty, say: "Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply".

15. There is no separate description of the consultation procedure, which varies according to the substantive matter. The example given under the previous footnote may be compared with the procedure envisaged under Article 308 (formerly 235), EC Treaty.

16. Under Article 252 (formerly 189c), EC Treaty.

17. Under Article 251 (formerly 189b), EC Treaty.

18. Article 94 (formerly 100), EC Treaty; seldom used but still in force; also Article 308 (formerly 235), EC Treaty, quite often used but more frequently nowadays with the addition of another legal basis, which may call for the use of the cooperation or co-decision procedure.

19. Article 250(1) (formerly 189a(1)), EC Treaty. This rule also applies to the cooperation procedure, but not to the co-decision procedure, in which special rules apply to amendments.

20. Article 250(2) (formerly 189a(2)), EC Treaty.

21. Article 252(a) and (b) (formerly 189c(a) and (b)), EC Treaty.

22. Article 252(c) (formerly 189c(c)), EC Treaty. The text of the Treaty adds the words, "on a second reading.". This means in effect that the Council may go ahead with the same process for examining the wording of the draft as in the original preparation of the common position. The process takes place within the working groups of the Council, as well as the Committee of Permanent Representatives, before the Council itself acts. See chapter 17.

23. Article 252(d) and (e) (formerly 189c(d) and (e)), EC Treaty.

24. Article 252(f) (formerly 189c(f)), EC Treaty.

25. Article 252(g) (formerly 189c(g)), EC Treaty.

26. Article 251(2), first paragraph, EC Treaty. As this Article (originally Article 189b) was completely recast by the Treaty amending the Treaty on European Union, it is pointless to give any antecedents to the current provisions. The effect of the amending Treaty has been to simplify the procedure slightly.

27. Ibid, second paragraph.

28. Ibid, third paragraph.

29. Article 251(3), EC Treaty.

30. Article 251(4), EC Treaty.

31. Article 251(6), EC Treaty.

32. Article 251(5), EC Treaty.

33. Article 251(7), EC Treaty.

34. For example, under Article 90(3), EC Treaty.

35. For example, under Article 24 of Council Regulation 17/62, "the Commission shall have power to adopt implementing provisions ..."

36. Case C-202/88, *France v Commission of the European Communities.*

37. Article 253 (formerly 190), EC Treaty.

38. Case C-360/92P, *Publishers Association v Commission of the European Communities*, paragraph 39.

39. Case 329/93, *Germany v Commission of the European Communities*, paragraph 32 (the *Bremer Vulkan* judgment).

40. Sometimes, after the French model, known informally as the "whereas clauses". But the old, legalistic style of opening each of the recitals with the word "whereas" is not always used.

41. See, generally, chapter 19 and particularly paragraph 19-16.

42. Article 254(1) (formerly 191(1)), EC Treaty.

43. Article 254(2) (formerly 191(2)), EC Treaty.

44. Article 254(3) (formerly 191(3)), EC Treaty.

45. Article 255 (formerly 191a), EC Treaty.

46. Article 256 (formerly 192), EC Treaty.