



SECRETARIAT WORKING PARTY

TASK-FORCE  
ON THE  
" INTERGOVERNMENTAL CONFERENCE "

WORKING PARTY SECRETARIAT

JF/bo/276/97

Luxembourg, 17 March 1997

**No 7**  
**BRIEFING**  
**ON**  
**THE HIERARCHY OF COMMUNITY ACTS**

(third update)

PE 166.675  
Or. FR

2523 EN

These briefings have been drafted by the Parliament Secretariat Task Force on the Intergovernmental Conference. Their purpose is to gather together, in an organized, summary form, the proposals and suggestions which the authorities in the Member States, the Union's institutions and specialist commentators have put forward on the issues likely to be on the IGC/96 agenda. Briefings will be updated as negotiations proceed.

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**BRIEFING  
ON  
THE HIERARCHY OF COMMUNITY ACTS**

**1. Subject - legislative acts**

Article 189 of the EC Treaty provides that 'the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions'. The article then goes on to give a brief description of each of those acts.

Moreover, Declaration No 16 to the EU Treaty, on the hierarchy of Community acts, stipulates that 'the Intergovernmental Conference to be convened in 1996 will examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of act'.

This briefing sets out, in particular, the positions adopted by the various institutions, at the request of the Corfu European Council, on the operation of the Treaty on European Union.

**2. European Parliament resolutions**

The EP's resolution of 17 May 1995 states (in paragraph 32(i)) that 'the volume of draft legislation submitted to the European Parliament and the Council should be limited by introducing a certain hierarchy of acts. This could be achieved by introducing a new category of implementing acts, responsibility for which would lie with the Commission where so empowered by the legislative authority. Under no circumstances would this new category of acts limit the legislative and political control function exercised by the European Parliament'.

In its resolution of 13 March 1996, adopted after the Reflection Group's report, Parliament says (paragraph 21.6, final indent) that 'legal sources should be clarified by a hierarchy of acts'.

Parliament's resolution of 14 November 1996 on the scope of the codecision procedure takes the position (recital C) that the problem of extending codecision to all legislative acts might be resolved by the establishment of a hierarchy of Community legal acts, in so far as the question of defining a legislative act is tackled.

As for 'pre-Maastricht' documents, mention should be made of the Resolution of 18 April 1991 on the nature of Community acts, which proposes that the Treaties should classify Community acts according to whether they are legislative (framework laws and laws) or regulatory.

Article 34 (Definition of laws) of the draft Treaty establishing the European Union, adopted by Parliament on 14 February 1984, provided that 'laws shall lay down the rules governing common action. As far as possible, they shall restrict themselves to determining the fundamental principles governing common action and entrust the responsible authorities in the Union or the Member States with setting out in detail the procedures for their implementation'. From the point of view of the hierarchy of acts, there is a clash between Article 34 and Article 40, which provides that 'the Commission shall determine the regulations and decisions required for the implementation of laws in accordance with the procedures laid down by those laws'.

### **3. Commission: report of 10 May 1995**

In paragraph 56 of this report, the Commission states that the legislative processes need to be radically simplified 'with reference to the concept of a hierarchy of acts, a matter which the Treaty has placed on the agenda of the Intergovernmental Conference'.

The report makes no further reference to this subject, even though the Commission tried unsuccessfully to have it discussed during the Maastricht negotiations; in fact the Commission's contributions to the relevant conferences devote an entire chapter to the 'hierarchy of norms', and it was even proposed (Supplement 2/91 of the Commission Bulletin) that the wording of Article 189 of the EC Treaty be revised to provide that the institutions of the Union 'adopt laws and regulations, take decisions, make recommendations or deliver opinions'.

### **4. Council: report of 20 April 1995**

Paragraph 16 of this report ('Democracy and efficiency') merely states that 'it is believed in some quarters that the lack of a real hierarchy of laws (footnote referring to the above-mentioned Declaration No 16) is affecting the decision-making process'.

### **5. Court of Justice: report of May 1995**

This report 'on certain aspects of the application of the Treaty on European Union' points out in paragraph 19 that 'the Court is aware that the Intergovernmental Conference is called upon to examine problems of a constitutional nature, such as changes in the nomenclature of acts and the introduction of a hierarchy of norms ...'. In this regard, paragraph 21 of the report states that, in doing so, 'it would be essential to take account of the consequences which such changes would have for the system of remedies, in particular the right of individuals to bring actions for the annulment of such acts'.

The contribution of 17 May 1995 of the Court of First Instance makes no mention of the subject under discussion.

### **6. The position of the Member States**

So far, no Member State has adopted a genuine substantive position on this matter. However, the following references should be noted:

(a) France: in an article published in Le Figaro on 29 November 1994, Alain Lamassoure, the then Minister with special responsibility for European Affairs, put forward new ideas on the institutional reform to be considered by the 1996 IGC. One of the ideas was the establishment of a hierarchy of legal acts which would distinguish between general principles, a law, implementing decisions and regulations.

(b) Italy: mention should be made of the memorandum of 12 October 1994 of the Minister for Foreign Affairs, Antonio Martino, calling for acts with constitutional force, which are currently scattered through various treaties, to be collected in a single text, for the definition of legal acts to be improved and their legislative hierarchy defined.

In addition, the Italian Government's Communication of 23 February 1995 on the guidelines for its foreign policy stated that the IGC should strengthen democratic participation in the context of the Union decision-making process and, to that end, it proposed that a genuine hierarchy of acts should be established, which would improve the operation of the codecision procedure.

Finally, the Italian Government's Communication on the 1996 Conference, presented to the Chamber of Deputies on 23 May 1995, refers to Italy's position during the Maastricht Conference, when it advocated the established of three tiers of Union act: constitutional acts (requiring unanimity or a qualified majority in Council as well as ratification by the national parliaments), legislative acts (requiring a majority in the Council and codecision with the EP) and regulatory or executive acts (Council, Commission or Member State competence).

Italy also believes that it is necessary to put Parliament and the Council on an equal footing and to establish a hierarchy of acts which links the procedure for adopting acts with their ranking and reduces existing legislative procedures to no more than three.

(c) Spain: the Spanish document of March 1995 entitled '1996 Intergovernmental Conference: bases for discussion' states that discussion will focus on (among other things) matters relating to the hierarchy of acts, but does not put forward any specific proposal.

(d) Austria: in its guidelines on the issues which will probably be raised at the 1996 IGC, published at the end of June 1995, the Austrian Government states that it is 'interested' in the establishment of a hierarchy of acts. It adds, however, that the Union's institutional balance must be taken into account.

However, Austria has since come to the view that the problems created by a hierarchy of acts would outweigh the potential benefits.

(e) Netherlands: in the fourth memorandum of 12 July 1995, presented by the Netherlands Government to the national parliament, the former merely states that effectiveness and democracy dictate that a hierarchy of Community acts should be introduced in the European Union.

(f) Portugal: is of the opinion that the Conference might usefully examine this issue, particularly with regard to how legislation might be better coordinated at both institutional level and in terms of the Union's relations with national legislators.

## **7. The Reflection Group**

A hierarchy of Community acts is dealt with in point 126 of the Reflection Group's report of 5 December 1995, which refers to Declaration No 16 annexed to the Treaty and identifies two positions.

Those who favour establishing a hierarchy of Community acts based on the level of their origin source (constitutional acts, legislative acts and implementing acts) point out that this classification would render simpler and more transparent the application of subsidiarity. The functions of each institution would be clarified by such a system of Community law hierarchy: treaties would be adopted by unanimous decision of the Council followed by ratification by national parliaments, laws would be adopted on a Commission proposal by co-decision of the Council and Parliament and the Commission or the Member States would be responsible for implementing provisions, the former under Council and Parliament supervision.

Those who are opposed to this system do not deny its clarity, but refute its logic, which is based on the idea of separation of powers within a State, since this approach would transform the Council into a second legislative chamber and the Commission into the European executive. Their view is that the Union has its own particular nature which is suited to a characteristic classification of acts: Regulations, Directives, Decisions and Recommendations. They feel, however, that within this characteristic system it is possible to clarify the functions of each of the institutions while maintaining the balance between them. In this context, they recommend a return to the original spirit of the Treaty through greater attention to the quality of each act and a use of the Directive which is more in line with its genuine purpose. It was also pointed out that the introduction of the co-decision procedure has meant that the debate on the hierarchy of acts has lost its previous importance.

Among those in favour of a hierarchy of acts, some stress that directives should be retained as the best means of complying with the principle of subsidiarity.

### **8. Other views**

With regard to the most recent learned articles, in 'The 1996 Intergovernmental Conference' (European Law Review No 3, 1993), 'Justus Lipsius' asks whether it would be feasible to institute a legal hierarchy between the different Community forms of legislation. He points out that, in spite of Italy's endeavours, no agreement was reached on this subject at Maastricht, which gave rise to the above-mentioned Declaration No 16. He goes on to say, however, that finding a solution will be as difficult in 1996 as it was in 1991 because it is not easy to distinguish clearly where the border is between 'principles' (laws) and their 'implementing norms' (regulations). He proposes that certain important subjects should be reserved to the highest degree of norms, as is the case in the 1958 French Constitution. Such a division would make it possible to reserve the heaviest procedure (codecision) for the adoption of these last norms.

With a view to the 1996 Intergovernmental Conference, the International European Movement has set up an action committee chaired by Professor Jean-Victor Louis. Mr Dastoli, the Movement's Secretary-General, said (on 5 July 1995) that the hierarchy of acts was one of the main outstanding issues and that it had to be cleared up.

In an article entitled 'Hierarchy of norms in European law' published in Common Market Law Review 33, pages 907-930, R. Bieber and I. Salomé say that the hierarchy is not an aim in itself but provides a useful tool which should be employed in conjunction with other instruments to promote autonomy and cooperation between the institutions.

P.Y. Monjal in 'The 1996 Intergovernmental Conference and the hierarchy of Community acts' published in the quarterly European Law Review No. 4, 1996 (October-December) states that opting for a hierarchy of norms involving greater precedence for Community law would have the advantage of posing the question of the future of the Communities in constitutional terms; despite the fact that monetary competences are to be transferred to European level there still appears to be a reluctance to accept concepts such as a European law or constitution although these would undoubtedly offer advantages in institutional terms.

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