18 Problems in the law-making process

Steiner, J., Woods, L. and Twigg-Flesner, C. (2003) *Textbook on EC Law*, Oxford, Oxford University Press, pp. 57–62.

Prior to the 1996 IGC [Intergovernmental conference] leading to the ToA [Treaty of Amsterdam], a reflection group was established to consider the issues that needed addressing. Its reports revealed that the central issues which the IGC had to tackle were democracy, transparency and … efficiency. We will look mainly at the first two of these issues identifying the problem as presented at the IGC and then assessing not only what the ToA has done to improve the position, but also the impact of the Nice Treaty.

Democracy

The EC decision-making process has often been criticised for its lack of democratic legitimacy. This is frequently referred to as the 'democratic deficit'. One of the main concerns is the lack of democratic accountability of the institutions. The Commission is not elected at all, the Commissioners being political appointments.

Although the Council of Ministers is usually constituted of members of the national parliaments, those members tend not to have been elected for the purpose of serving as a member of the Council of Ministers. Any control is therefore indirect and only over the individual members rather than the Council as a body. The Belgian people will only have control over the Belgian ministers but not, for example, the Danish ministers. Ministers can avoid taking responsibility for a decision by passing it on to ministers of the other Member States. The quality of democratic control will rest with each of the national parliaments, so its standard may well vary throughout the Union.

Another concern is the use of non-elected bodies in the decision-making process. There are many of these, for example, ECOSOC [the Economic and Social Council] and the Committee of the Regions. These fulfil an advisory role only. Of more concern here is COREPER [Comité des représentants permanents – the Committee of Permanent Representatives in the European Union], which plays an important role in filtering out the non-contentious issues. It has been argued that in so doing, although technically the final decision is the Council's, in effect COREPER is functioning as a decision-making body. In deciding whether issues are contentious or not, COREPER frames the terms of the debate in Council, potentially having the effect of discouraging debate on certain issues.

The only directly elected body, the Parliament, has traditionally been the weakest of the institutions involved in the decision-making process. Admittedly, the TEU [Treaty of the European Union] improved the position by increasing the control of parliament over the Commission, introducing the Ombudsman and introducing the co-decision procedure. This latter, however, operated only in limited areas. We have seen that the ToA and Nice increased the areas in which co-decision is used and that the ToA amended the procedure so as to limit further the Council's power under this procedure. Both of these moves can be seen as

improving the democratic legitimacy of the Community, though, of course, problems have been noted regarding the operation of the conciliation committee. Further increases in powers relate to the appointment of the Commission.

Although the Parliament's powers in the second and third pillars remain limited, the transfer of the powers formerly contained in the TEU or the Schengen Agreement to the Community also brings issues which were dealt with in an intergovernmental and therefore undemocratic manner within the comparatively democratic system of the EC. The incorporation of Schengen brings its own problems however. The protocol incorporating the Schengen *acquis* [Agreement] gives the force of law to decisions made under Schengen. Not only does the protocol not identify a full list of such texts, but also some of these decisions were made, following the old Schengen procedures, in secret by unelected bureaucrats rather than by politicians. This gives rise to concerns about the democratic accountability of the people who made these decisions; it also raises questions about respect for the rule of law within the Union. Comitology [the name given to the EU committee system] [...] continues to give rise to similar concerns. Similarly, the changes to the articles relating to COREPER confirm that it may make procedural decisions, although it remains unaccountable. The ECJ [European Court of Justice] has no jurisdiction to review acts of COREPER. Furthermore, its jurisdiction in relation to the new free movement of persons provision is limited and is subject to an exception in the interests of 'national security'.

One might suggest that the national parliaments could compensate for some of the European Parliament's weaknesses. There are difficulties with this suggestion. The main problem is that, at the level of individual pieces of legislation, national parliaments became involved in the process too late to have any real impact on the outcome, and the level of control exercised by the individual national parliaments may vary significantly between Member States. The problems in this context were apparent even at the time of the TEU: a declaration (no. 13) which was attached to that treaty emphasised the importance of giving a greater role to the national parliaments. The ToA took this point up with a Protocol, which provided that draft legislation must be circulated to each national parliament at least six weeks before it can be considered by the Council. The position is still clearly unsatisfactory and the role of the national parliaments continues to be a subject of debate in the Convention on the Future of Europe, which is preparing the ground for the 2004 IGC.

Transparency

The complexity of the legislative procedures means that decision-making is not transparent. Consequently, it is difficult for individuals to become involved in the process and to hold the decision-makers accountable. The suggestion was to simplify these procedures, without altering the institutional balance. Similarly, improvements could be made in the way documents are drafted and made available. A Council

resolution on plain language was passed in 1993 (OJ C166, 1993), but the position did not improve much. ECOSOC subsequently made an own-initiative resolution on plain language, requesting that the Commission make attempts actually to comply with the 1993 Council resolution on the same subject, arguably to as little effect. The Commission has also been aware of the concern, producing annual reports on 'Better Lawmaking' together with various initiatives on simplifying legislation in specific areas. In this context, subsidiarity and proportionality may also have a role to play in determining the scope and style of legislation.

The need to take action was re-emphasised by the *White Paper on Governance* (COM (2001) 428 final) and it remains an issue to be discussed by the Convention on the Future of Europe [CFI].

The availability of documents is another part of the overall problem revolving round the way the decision-making process, particularly at Council level, operates. The complaint is that, because the Council operates behind closed doors, it is not possible for the citizen to identify who is agreeing to which proposals or the basis on which this is done. The counter-argument that has always been raised is that if Council meetings were completely open to the public gaze, it would make it difficult for the Ministers to reach decisions as many of the compromises made are politically sensitive. In 1993, a Code of Conduct regarding public access to Council and Commission documents was published (93/730/EC; see also Council Decision 93/731/EC, OJ L340, 1993).

The significance of this was emphasised by *Carvel v Council* (case T-194/94). This case relied on the Code of Practice to seek the annulment of a Council decision refusing to reveal Council meeting minutes to the applicant. The CFI held that although the Code might permit the withholding of documents when certain specified interests would be threatened by their disclosure, this is not automatic. The rights of citizens to see documents must be balanced against the other interests. In this case the Council had *automatically* refused to reveal the minutes on the basis that all minutes are confidential. Since there was no attempt to take the claims of the applicant into account, the Council was therefore held to be in breach of the Code. Although this did not mean that citizens have an automatic right to see all documents, it was a step forward in that the Council has to consider whether it is proper to refuse access, arguably changing the attitude of ministers towards the release of non-controversial information. In addition, the Council agreed, amongst other points, that the outcome of votes on legislative acts should be made public; that debates on issues of public significance will be broadcast; and that access to the minutes of meetings will be facilitated (Bull 5–1995, 1.9.5). Subsequent case law has made it clear that exceptions to the rights are to be construed narrowly, a point made expressly in *WWF* (Case T-105/95), and clarified certain points not covered by Council Decision 93/731 and Commission Decision 94/90. For example, in *Rothmans* (Case T-188/97), the CFI held that comitology committees were covered by the right of access to documents.

Again, there has been some progress in attempting to ensure transparency of following the ToA, but equally, some difficulties arise. Looking at the progress first, the streamlining of the co-decision procedure and the virtual removal of the cooperation procedure (this remains in monetary policy areas only) makes the legislative process simpler and, as a consequence, more transparent. A declaration annexed to the Amsterdam Treaty re-emphasises the points made in the Council resolution on plain language referred to above. It goes on to state that the institutions ought to establish by common accord guidelines for improving the drafting of Community legislation. Whether such guidelines will have much impact in practice is another question, although the declaration also obliges the institutions to take the internal organisational measures necessary to make sure the guidelines are properly carried out. Clarifying and codifying Community legislation will, it is hoped, improve transparency.

A new Article 255 EC provides that 'any citizen, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents'. Thus, all the institutions must amend their own rules of procedure to allow access to documents. Access to Council documents is particularly important. New Article 207 EC provides that, within the limits set down by the needs of efficient decision-making, documents involved in the legislative process should be accessible to the public and that, in any event, the results of the vote, explanations of the vote together with any statements in the minutes, shall be made public. Although it does not clarify what the needs of 'efficient decision-making' are, it is still to be hoped that this provision will increase the accountability of the Ministers in the Council to their national parliaments, as individuals will be able to identify how the individual representatives of the Member States voted. The right to access documents is, however, subject to limitation in the public or private interest (Article 255(2) EC).

Article 255(2) EC specified that a legal instrument was to be enacted under the co-decision procedure to give effect to the principle in Article 255(1). Regulation 1049/2001 on Access to Information was finally adopted on 30 May 2001 after a troubled negotiation period, which included the proposal by the Commission of a draft regulation without any public consultation and the amendment of the Council's earlier decision on access to documents by the introduction of further categories of mandatory public interest exception.

Nonetheless, agreement on a form of regulation has been reached, even if there is some dissent on an assessment of its usefulness. Article 2(3) of the regulation provides that public access will apply to all documents *held* by an institution and not just those which it drafted. This principle applies not just to the EC, but also to the other two pillars. Article 11 obliged the institutions to draw up a public register of documents by 3 June 2002. Article 4 contains a list of exceptions, comprising nine different categories divided into three groups.

The first group consists of public security; defence and military matters; international relations; financial, economic or monetary policy of the Community or a Member State; privacy and integrity of an individual (especially regarding personal data). Article 4(1) specifies that the appropriate test for determining whether access should be allowed to documents in any of theses categories is whether public access would undermine the protection of the public interest. Article 9 provides for extra protection of the public interest in relation to 'sensitive documents' dealing with issues falling in Article 4(1)(a).

The second group of concerns comprises the commercial interests of private persons, court proceedings and legal advice; and inspections, investigations and audits. The test here is whether public access would undermine the protection of one of these interests themselves.

Finally, Article 4(3) provides that documents relating to a matter on which a decision has not yet been taken 'shall be refused if the disclosure of the document would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure'. It is still too early to tell what impact this Regulation will have in practice.

Efficiency

The institutions have also been criticised for being inefficient, especially as regards the time-consuming need to reach unanimity. This problem can only get worse with enlargement of the Community. Qualified majority voting was extended to new policy areas by both ToA and Nice. Notwithstanding this development, difficulties remain. Notably, the Community law-making processes remain extremely complex, inevitably taking considerable time to reach agreement. This is compounded by the need to work in all 11 official languages. The number of languages will rise with enlargement and, although it is likely that not all documents will be translated into all languages, all legally binding documents of general application, as the situation currently stands, will be. In addition to problems relating to efficiency, the need to translate into all official languages increases the risk of small differences in meaning of key terms between the different language versions.

Conclusions

The Community has the competence to make law in a broad range of areas, albeit constrained by a procedural framework. It is perhaps this breadth of scope that has led to concern about the law-making procedures. As a result of this, successive treaty revisions have amended the law-making procedures which has affected the institutional balance. Over the years, the role of the European Parliament has increased arguably increasing the Community's democratic credentials as a result.

Nonetheless, problems with the efficiency, democratic accountability and transparency of the procedures remain, as a glance at the issues being discussed in preparation for the next round of treaty revisions illustrates. The Convention on the Future of Europe has set up working groups to discuss issues such as the role of national parliaments and the simplification of Community law. There are, however, other concerns: in particular, the vexed question of the proper scope of Community competence. There are two main aspects to this issue. The first is the identification of exclusive and concurrent competence, particularly important in the context of subsidiarity. The second is the question of how 'complementary competence' – those additional areas of Community competence in which the Community's role is to support the activities of Member States – should be dealt with. One IGC is unlikely to solve all these difficulties that have dogged the Community for some period, especially given the fact that the Community legal order has changed and continues to change over time. It is to be hoped, however, that some of these problems will be ameliorated.