PRELIMINARY OPINION ON THE CASE RELATED TO THE COUNCIL NEGOTIATION OF THE DRAFT DIRECTIVE ON PATENTABILITY OF COMPUTER IMPLEMENTED INVENTIONS

Coordinator:

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Abogado

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La Laguna (Tenerife) – Madrid, 2nd June, 2004.

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SUBMITTED QUESTION:

Question submitted by the Foundation for a Free Information Infrastructure, the 28th May 2004:

Is the decision taken last 18th May by the Council Competitiveness of the EU on Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions the final Council position related to the EP First Reading?

If not, can a State Member change its previous position and vote in the 18th May meeting? In that case, how can it be done?

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

RESEARCH INFORMATION:

Due to the limitations of time to elaborate this opinion, and because of the high specialisation required to solve it, the question has been submitted to two collaborators specialized in european procedural law. they have worked separately, as a way to assure objectivity on the submitted subject, and to increase the available alternative procedures for the member states affected by the 18th may agreement.

At Fajardo López we have selected the following experts:
Prof. Dr. Antonio Estella
Prof. for Administrative Law at the Universidad Carlos III de Madrid
Expert in EU Law;

Dr. Ángeles Mazuelos
Associated Professor at the Universidad Autónoma de Madrid.
Expert in Public International Law.
Doctor of Law of the European University Institute (Florence).

Our academic colaborators are coordinated by the law office principal,

Dr. Luis Fajardo López.
Expert in law of new technologies.
Professor of Civil Law (case studies) at the Universidad Nacional de Educación a Distancia (Centro Asociado de Tenerife).

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

PRELIMINARY CONCLUSIONS:

Taken into account both opinions, and the different contacts and conversations maintained by this Coordinator, we can resume the following preliminary conclusions:

There will not be a definitive Council decision until the formal common position is adopted.

The decision adopted on May the 18th is only an internal Council agreement, so-called 'political agreement on common position'. It is not legally binding, due to the fact that its not a council common position.

Member states may decide to take the following acts no matter what their vote and position was on the may the 18th meeting:

a) To Ask the Presidency to withdraw an item from the agenda in the circumstances provided in the Council Rules of Procedure;

b) To Require the Presidency to open a new voting procedure;

Until the formal adoption of the Council common position takes place, national delegations have the right to modify their opinions on the matters concerned, even if these have been the object of a political agreement by the Council. However, practice shows that informal agreements are in fact confirmed afterwards. One may suggest that there are political implications in departing from a previously agreed matter.

Even if it were a formal common position, the meeting record (minutes) has to be approved by the Council 15 days after the meeting. If a Member States

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

considers that the Presidency has misunderstand his position or vote, has the opportunity to vote against approval of the record.

There is no possibility to act before the European Court of Justice until the Directive is finally adopted. If it were the case, the misunderstanding voting by the Presidency could be enough reason for an action for annulment, according to Article 230 EC.

The questions seems to be a political matter, not a legal one. There are legal ways to change the position adopted on May the 18th meeting. In other words, at this procedural moment there is no legal obstacles to reversing the political agreement on common position, neither to adopt a new probably more balanced political compromise.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

OPINION OF DR. A. MAZUELOS

On 20th February 2002 the Commission presented a *Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions* (the Proposal).[1] The Directive would have article 95 of the Treaty of the European Community (EC) as its legal basis since the object of the directive is the harmonisation of national laws. Accordingly, the Directive would be decided by co-decision procedure, after consulting the Economic and Social Committee.[2]

The co-decision procedure[3] entails that measures are adopted with the approval of both the European Parliament (EP) and the Council of the European Union (the Council).[4] It can become a very complex procedure. The procedure starts when the Commission adopts a proposal (in our case on 20th February 2002), which is then sent to the EP and the Council. The EP renders its opinion (at First reading, in our case on 24th September 2003) which is then submitted to the Council. If, as it is the case at stake, the EP proposes amendments which the Council does/can not accept, it adopts a "common position" which is communicated to the EP, together with information of the reasons that led it to adopt its common position. The Commission shall inform the EP fully of its position. Then EP then proceeds to a Second reading where, depending on the circumstances, the act can be deemed adopted, or be deemed not adopted or proceed to a Second reading at the Council (when the EP adopts amendments to the common position by absolute majority of its members). If the Council does not approve all of EP amendments within 3 moths, a Conciliation Committee is convened by agreement between the Parliament and the Council. Conciliation may be successful or not.

It must be noted that the Council meets in different formations according to the

1 COM(2002) 92 final.

2 In the case at stake the Opinion was delivered on 19 September 2002, EESC/2002/1031.

3 Article 251 EC.

4 The Council is acting in its legislative capacity.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

subject-matters dealt with. One formation is Council "Competitiveness" (Internal Market, Industry and Research).[5]

A Note delivered on 18 December 2003 gave notice of the co-decision files under the Irish Presidency.[6] The Proposal under examination was listed among files that expected the First Reading at the Council. It was scheduled that the Council "Competitiveness" would discuss the EP First Reading on 17-18 May 2004.

Decision-making at Council must take into account the role of the COREPER (Committee of Permanent Representatives). It prepares Council work and carry out any other task assigned to it by the Council. There are two formations of this Committee: Coreper I which is composed of deputy permanent representatives and Coreper II which consists of permanent representatives who are of ambassadorial rank and which is in charge of sensitive matters.

As a general rule, before the Council itself deals with an issue, it has been discussed by Coreper and/or by Working Groups. However, it is the Council that has the power to decide. Formal decisions on substantive issues are only adopted by the Council as such. At present, the Coreper is authorised by the Treaty[7] and the Council Rules of Procedure[8] to adopt certain *procedural* decisions.

Council meetings have a provisional agenda which is divided into items "A" or "B". The former are those for which approval by the Council is possible without discussion[9], which, in turn, are normally those which reached complete

5 Annex I Council Rules of Procedure, March 2004.

6 *NOTE A L'ATTENTION DES MEMBRES DU COREPER I ET II ET DES PORTE-PAROLES AU CSA*, Conseil de l'Unión Européenne, Secrétariat Général, Service juridique Procédures législatives en codécision.

7 Article 207 EC.

8 Article 19.7 Council Rules of Procedure.

9 Article 3.6 Council Rules of Procedure.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

agreement at Coreper.[10] However, the fact that an item has been placed as an "A" item does not exclude the possibility of any member of the Council or of the Commission expressing an opinion at the time of the approval of these items and having statements included in the minutes.[11] Minutes of Council meetings are drawn up by the General Secretariat within 15 days and are submitted to the Council or Coreper for approval. Prior to approval "any member of the Council, or the Commission, may request that more details are inserted in the minutes regarding any item on the agenda. These requests may be made in Coreper."[12] Once approved, they are signed by the Secretary General or the Deputy Secretary-General; power to sign can be delegated.[13]

The provisional agenda is adopted by the Council at the beginning of each meeting. At this stage, an item that was not included in the provisional agenda can be included (unanimity in the Council is required)[14]; likewise an "A" item shall be withdrawn from the agenda, unless the Council decides otherwise, if a position on an "A" item might lead to further discussion thereof or if a member of the Council or the Commission so requests.[15] Practice shows that at times "A" items are, withdrawn.[16]

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10 M. Westlake, *The Council of the European Union*, Cartermill Publishing, 1995, p.113; Hartley notes that "If unanimous agreement is reached in COREPER, the item will be listed under Part A of the Council Agenda;", T. C. Hartley, *The Foundations of European Community Law*, 5th ed., OUP, 2003, p.20.

11 Art.3.6 Council Rules of Procedure.

12 Article 13.3 Council Rules of Procedure.

13 Minutes are regulated by Article 13 Council Rules of Procedure.

14 Article 3.7 Council Rules of Procedure.

15 Art. 3.8 Council Rules of Procedure.

16 Draft minutes of 2432nd meeting of the Council (Economic and Financial Questions), indicate that item 4 of "A" items listed in 9412/02 PTS A 27 was withdrawn (9603/02); or Draft minutes of 2535th meeting of the Council of the European Union (EMPLOYMENT, SOCIAL POLICY, HEALTH AND CONSUMER AFFAIRS), record that "The Council approved the list of "A" items contained in 1368/03 PTS A 52, except item 1 which was withdrawn." (13838/03) However, it must be noted that none of these correspond to a formal "common position".

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

The Presidency "shall ensure that the provisions of Annex IV concerning the working methods for an enlarged Council are complied with".[17] Annex IV states that "The Presidency shall give as much focus as possible to discussions, in particular by requesting delegations to react to compromise texts or specific proposals."[18] Or that "Unless indicated otherwise by the Presidency, delegations shall refrain from taking the floor when in agreement with a particular proposal; in this case silence will be taken as agreement in principle."[19]

It has been noted that "When representatives of a Member State, at whatever level (Council, COREPER or working party), places a reserve on something, it means that his Member State cannot agree to it."[20] Some reserves are less problematic than others given that it is likely that they would be removed. Thus, waiting reserves (for instance because the representative wants to examine a point further, or wants to consult with the delegation...) or "scrutiny reserves" which may have their origin at domestic compromises between the executives and parliaments. In contrast, "A formal reserve is the sternest and most inflexible variety. It means that a Member State cannot accept a provision on substantial rather than procedural grounds, and that a political solution must be found. Formal reserves issued in working parties generally boil up to COREPER and from there to the Council."

We shall in the following exclusively focus on the legislative procedure of the *Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions*.

Under the co-decision procedure the Council must decide following the European Parliament's opinion at first reading. However, pending this opinion the Council may discuss a matter as it happened in our case.[21] The provisional

[17] Article 20.1 Council Rules of Procedure.

[18] Point 11 Annex IV Council Rules of Procedure.

[19] Point 16, Annex IV Council Rules of Procedure.

[20] For this paragraph, M. Westlake, *The Council of the European Union*, Cartermill Publishing, 1995, p.118.

[21] This was also the case of the *Proposal for a Directive of the European Parliament and of the Council*

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

agenda (14 November 2002) for the 2462nd meeting of the Council that was to be hold on 14-15 November 2002 included as item 9 "Proposal for a Directive on the patentability of computer-implemented inventions" (Common approach).[22] The draft minutes corresponding to this meeting[23] indicates that concerning item 9 "Proposal for a Directice on the patentability of computer-implemented inventions" (Common approach), the Council reached **broad agreement on the common approach** as set out in Annex to 14017/02. However, the Council noted a reservation by the Commission, a general scrutiny reservation by the French delegation and a Parliamentary scrutiny reservation by the Spanish delegation. In addition the Council took note of statements by the French and Belgian delegations recorded in the minutes[24], and noted that the Italian delegation associated itself with the contents of the statements by the Belgian delegation.

On 24th September 2003 the European Parliament rendered its Opinion at First Reading, endorsing the Proposal subject to certain amendments.[25]

It was then for the Council to decide on the EP Opinion at First Reading. Let us follow the steps of the procedure at the Council.

COREPER. The provisional agenda for 2051st meeting of the Permanent

concerning the processing of personal data and the protection of privacy in the electronic communications sector. The Council discussed the matter in June 2001 whereas the EP adopted its Opinion on First Reading in November 2001.

22 13914/1/02 REV 1(nl, en). Also Doc 13914/92 (12 November 2002) states as item 9 "Proposal for a Directive on computer-implemented inventions" (General approach). The Report submitted (8 November 2002) by the Permanent Representatives Committee to the Council (Competitiveness) already gave notice of the scrutiny reservations placed by certain delegations (the Belgian and F delegation are mentioned, together with the fact that "a number of delegations" requested the addition of Article 5(2) and the fact that the Commission maintained a reservation on the inclusion of this provision [...])",14017/02.

23 14288/02 (6 December 2002). Doc 14288/02 COR 2 (2 April 2003) indicates that 2462nd meeting was held on 14 November 2002 only. There is still a document ADD1, COR 1 has been requested to the Council, still awaiting reception.

24 Reproduced in Annex of Draft minutes, Doc 14288/02.

25 *Bull EU* 9-2003, 1.3.29.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

Representatives Committee (Part 1) of 5 May 2004 scheduled under Roman II Points the preparation of Council meeting (Competitiveness) on 17-18 May (item 8) , which included a "political agreement" on the Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions.[26]

WORKING PARTY. It results from the documentation that also a Working Party on Intellectual Property (Patents) discussed the matter.

PRESIDENCY. On 10th May 2004 the Presidency addressed to the Council "Competitiveness" a Report[27] and an Addedum to the Report[28] concerning the *Proposal for a Directive on the patentability of computer-implemented inventions* (Political agreement on the Council's common position). It is affirmed that the text submitted was an "overall compromise package" which received "strong support from a clear majority of delegations, including the Commission". However, there were recalled at the same time, "remaining reservations" on the Presidency compromise package, both general ones (*inter alia* by Denmark) and on certain recitals and articles. It must be noted that the Report is not wholly public, since some words have been DELETED (they seem to correspond to the names of certain delegations). It was indicated that the Presidency proposal for the Council's common position followed preparatory work in the Permanent Representatives Committee (Part 1). To summarise, at this date, the Council was invited to "confirm the existence of a political agreement on the text [submitted...] with a view to its formal adoption at a subsequent Council session, following finalisation by the Legal/Linguistic experts, as the Council's common position".

COUNCIL "COMPETITIVENESS". The provisional agenda[29] (14 May 2004) for **2583rd meeting of the Council "Competitiveness"** scheduled the discussion

[26] 9078/04.

[27] 9277/04.

[28] 9277/04 ADD 1.

[29] 9458/04.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

of the Proposal for a Directive on the patentability of computer-implemented inventions (political agreement-public deliberation) for **Tuesday 18 May** 2004 (item 12) and it was indicated that it was an item on which a vote may be requested. The meeting took place, but there are so far not draft minutes available. However the Provisional version of the Press Release[30] concerning the meeting indicates that the Council reached a **political agreement on a common position** concerning the proposal for the Directive. It is indicated that the agreement was reached by qualified majority, with the Austrian, Italian and Belgian delegations abstaining and Spain voting against. It is indicated that the text has to be formally adopted by the Council[31] and only then will it be forwarded to the European Parliament for second reading; the formal common position must also be published in the Official Journal.[32]

As a general rule, and as the Report of the Presidency referred recalled, the political agreement on common position will be sent to the legal/linguistic experts. Once the text is ready, it will be submitted to the Council for its formal approval. Also the Council statement of reasons are asked to be approved, so that both can be forwarded to the European Parliament for its second reading. Practice shows that it takes *at least* one month since a political agreement on common position is adopted before the formal common position is adopted.

[30] 9081/04 (Press 140).

[31] Same in IP/04/659.

[32] Article 17.1 Council Rules of Procedure.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

1. With the documentation available, and cited above it cannot be concluded that a formal common position has been adopted so far. All indicates that a political agreement on a common position was reached at the Council.

2. If this is so, the adoption of a formal common position will be included in the provisional agenda of a forthcoming Council meeting. Given that the political agreement on the common position was reached ("B" item), it seems reasonable to presume that the formal common position will be adopted as an "A" item.

It appears that there are legal arguments to support that until the formal adoption of the Council common position takes place, national delegations have the right to modify their opinions on matters, even if these have been the object of a political agreement by the Council. However, practice shows that informal agreements are in fact confirmed afterwards. One may suggest that there are political implications in departing from a previously agreed matter.

3. Concerning the agenda of the Council, the legal rule is that "A" items can be withdrawn from the agenda in the circumstances provided in the Council Rules of Procedure: an "A" item can be withdrawn "unless the Council decides otherwise" if a position might lead to further discussion or if a Member of the Council or the Commission so requests.

4. The Council shall vote on the initiative of its President.

Furthermore, the President shall be required to open a voting procedure on the initiative of a member of the Council or of the Commission, "provided that a majority of the Council's members so decide".[33]

In any case, in order for the Council to adopt a decision, the majority required by the rules governing the act must be respected. The necessary majority must exist, otherwise the act would entail a violation of the law. Council's common

[33] Article 11.1 Council Rules of Procedure.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

positions are adopted by qualified majority, as a general rule. It remains the delegations' right of having statements recorded in minutes.

5. Concerning the legal status of minutes of Council meetings, in *Antonissen* the European Court of Justice enunciated what has become the rule concerning the use of declarations recorded in minutes of Council meetings for interpretative purposes. It was ruled that, "such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance".[34] The Court has subsequently applied *Antonissen*. In *Denkavit*,[35] *FAO*[36], *Bautiaa*[37] or *Vag Sverige.*[38] Although it could be argued that in *Generics*[39] the Court departed in practice from *Antonissen* the Court confirmed the rule set in *Antonissen*.

Likewise, in *Commission v. Italy* the defendant claimed the validity of a reservation that it had expressed in the discussions on the adoption of a Council decision.[40] The European Court of Justice argued that "the scope and effect of the [acceleration] decision must be assessed in the light of its terms and therefore cannot be restricted by reservations or statements which might have been made in the course of drawing up the measure concerned".[41] Similarly,

[34] Case C-292/89, *The Queen v. The Immigration Appeal Tribunal, ex parte Antonissen* (Re: Antonissen) [1991] ECR I-745, at 18.

[35] Joined cases C-283/94, C-291/94 and C-292/94, *Denkavit* [1996] ECR I-5063.

[36] Case C-25/94, *Commission v. Council* (Re: FAO) [1996] ECR I-1497, at 38.

[37] Joined cases C-197/94 and C-252/94*, Bautiaa and Société Française Maritime v. Directeur des Services Fiscaux* [1996] ECR I-505, at 51.

[38] Case C-329/95, *Vag Sverige* [1997] ECR I-2675, at 23.

[39] Case C-368/96, The Queen v The Licensing Authority, ex parte Generics (Re: Generics) [1998] ECR I-7963.

[40] Case 38/69, *Commission* v. *Italy* [1970] ECR 47.

[41] At 12.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

when Denmark sought to rely on a unilateral declaration included in the minutes of the Council minutes to avoid the obligations deriving from Directive 75/117, the Court denied such possibility arguing that "such unilateral declarations cannot be relied upon for the interpretation of Community measures, since the objective scope of the rules laid down by the Common institutions cannot be modified by reservations or objections which Member States may have made at the time when the rules were being formulated".[42] Other cases in the same line may be cited.[43]

6. With regard to the challengeability of Community acts before the European Court of Justice, it was stated in *IBM*[44] that "[i]n the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision".

Consequently, if a Council act is adopted without respecting the necessary majority by Community law it would be possible to challenge such act before the European Court of Justice, Article 230 EC provides grounds in this sense.

In fact, where preparatory acts entail legal consequences of their own, they are actionable. This may happen in the field of state aids.[45]

[42] Case 143/83, *Commission* v. *Denmark* [1985] ECR 427, at 13. It is noticed that this case is cited by the Court of Justice as evidence that declarations of the Member States may not be used for the purposes of interpretation, that is, as part of *Antonissen* rule (see Chapter 7, section 1.2). This was for instance the case in Case C-233/97, *KappAhl Oy* [1997] ECR 8069, at 23.

[43] Case 39/72, *Commission v. Italy* [1973] ECR 101, at 22; Case 237/84, *Commission v. Belgium* [1986] ECR 1247, at 16-17. We may also include here Case C-375/95, *Commission* v. *Hellenic Republic* [1997] ECR I-5981, at 45.

[44] Case 60/81, *IBM* v. *Commission* [1981] ECR 2639. See also Case T-64/89 *Automec v Commission* [1990] ECR II-367, at 42, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, *Cimenteries CBR et al. v. Commission* [1992], at 28, Case T-37/92, *BEUC and NCC v. Commission* [1994] ECR II-285, at 27; Case T-186/94, *Guérin Automobiles v. Commission* [1995] ECR II-1753, at 39; Case C-147/96, *Netherlands v. Commission* [2000] ECR I-4720, at 26.

[45] Case C-312/90, *Spain v. Commission* [1992] I-4117. See further Case C-47/91, *Italy v. Commission* (Re:

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

Italgrani) [1992] ECR I-4145.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

OPONION OF PROF. DR. A. ESTELLA:

1) Factual background

On May 18, 2004, the so-called “competitiveness Council of Ministers” had a meeting in which the draft proposal of the directive on the patentability of computer implemented inventions was discussed. The Commission proposal had been launched in the previous year under the co-decision procedure. As article 251 of the ECT states, the Commission proposal has to be discussed in the first place by the European parliament, which has to take a decision, either amending or approving the Commission proposal. In the case at hand, the European parliament made substantial modifications to the Commission text.

The Council of Ministers discussed then the Commission proposal, as amended by the European parliament. As article 251 establishes, in these cases, the Council may either approve the text or amend it. If the Council amends the text, then it adopts a “common position”

and sends it back to the European parliament for a second reading. In the case at hand, the issue under examination arose in the negotiation of the Council’s common position.

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

During this negotiation, a number of Member States abstained. However, these Member States are afraid that their position on the issue was misunderstood by the Irish Presidency. In particular, they are afraid that their abstentions were counted as “yes” votes.

If this were the case, these Member States would like to know how they would have to proceed in order that the minutes of the meeting were modified so that their respective abstentions were correctly reflected in the minutes.

2) Legal opinion

The following is a preliminary legal opinion on the issue under consideration based on the law and practice of the European Communities. One remark is important before resuming. This is that this legal consultant has only been able to read a very partial extract of the minutes. Needless to say, the full consultation of the minutes (and related documents) of the meeting *is a must* in order to have a complete view of the subject. Accordingly, some of the points made in this preliminary note could suffer future qualifications if the full consultation of the minutes offered new or different information.

In order to give an answer to the previous question, it would be important to

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

differentiate between two moments: before the record of the minutes is published, and after.

a) Before publication of the record.

Article 9 of the internal regulation of the Council of Ministers states that when the Council acts in its capacity of Community legislator (or co-legislator), the record containing the votes cast in the Council and the Member States explanations of their votes have to be published. It also establishes that both the votes and the Member States explanations of common positions under the co-decision procedure have to be published. Therefore this article applies to the matter under examination.

The record which article 9 refers to has not been published so far in the case at hand. According to the information that this legal consultant has obtained, publication will take place along the current week. Therefore the question at this point is how to proceed BEFORE the record is published. It is clear that the record cannot be taken as a definitive record before publication.

In this scenario, there are two possibilities. One is political or diplomatic and the other one is legal. The political/diplomatic alternative is to have contacts

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

with the Irish presidency in order that the Member States affected by this case have fresh information about whether the record will reflect their positions as “yes” votes or as abstentions. If the former were the case, these countries would have to urge the Irish presidency to clarify the misunderstanding. It would be enough for these countries to show the transcriptions of the minutes of the meeting in question in order to prove that there was a manifest error and therefore a misunderstanding. Further, it has to be noted that according to article 13 of the Council internal regulation, the record has to be approved by the Council 15 days after the meeting. The Member States affected by this case could vote against approval of the record if their votes were not counted as abstentions.

The second alternative is legal. In the case that the first alternative failed, and assuming that the record included their positions on the issue as yes votes, then it would be possible to bring an action (of an administrative nature) before the Irish presidency. In this action the applicants would claim that the record be changed and would argue that there was a manifest error (the transcription of the minutes could be adduced here as proofs). This action could eventually lead to an annulment action before the ECJ on the same grounds.

It is important to say at this point that the preferred strategy, according to the

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

view of this legal consultant, would be the first (political/diplomatic) one. It is clear that misunderstandings of this kind often happen at the Council level and that informal or diplomatic solutions apply in these cases.

Regarding the legal alternative, additional analyses would be needed in order to further fine-tune the scope of the action, the eventual arguments and the possible answer of the ECJ. More in particular, a very careful analysis of the ECJ case-law on this topic would be needed in order to give a more complete advice about this alternative.

b) After publication of the record

Once the record is published, then the only solution would be a legal solution. The Member States affected by this case could bring an administrative action before the Presidency, and eventually, an annulment action before the ECJ. This is so because in principle one would expect that other Member States would protest in the case of an informal and voluntary solution. The points made *supra*, at point a), in this regard, apply here as well.

This notwithstanding, it is important to remember that the co-decision

C./ Deán Palahí, 16. La Laguna 38201 – E (Tenerife). Tel.: 922260100. Fax.: 922250596

procedure is a complex and long legislative procedure. This means that it is very probable that the proposal will come back again to the Council after the EP second reading. If this were the case, then the Member States would have another opportunity to clarify their positions. It is important to mention that in a Council negotiation, Member States are not legally bound by the positions they defended in previous rounds of the negotiation. On the contrary, one could even argue that it is in the very essence of the co-decision procedure to change positions and votes. Taking this into account, a wise solution would be to wait until the proposal comes back again to the Council of Ministers after the EP second reading.

3) Concluding remarks

Three concluding remarks. First, political or diplomatic solutions are a first choice in the case under examination. Legal solutions (i.e., annulment actions) have to be considered only as second-best alternatives. This is because legal solutions are costly and time consuming. Further, they are uncertain. This legal consultant's perception is that legal cases of the kind do not abound –precisely because political solutions apply here. In second place, a thorough legal analysis of the ECJ case law on this topic would be needed in order to give a more complete advice on the question that has been posed to this legal consultant. Third and last, one of the options that the affected Member States

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would have to consider is the “wait and see” option. This legal adviser recommends the affected Member States to prospect what the position of the EP will be in the second reading. In the case that the EP was considering to make amendments to the Council’s common position, this legal consultant would advice the affected Member States to wait until the proposal comes back again to the Council. Once the proposal was back again in the Council, the affected Member States would have another chance to make their position clear.

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INDEX OF CONTENT

SUBMITTED QUESTION:.....2

RESEARCH INFORMATION:.....3

PRELIMINARY CONCLUSIONS:.....4

OPINION OF PROF. MS. ÁNGELES MAZUELOS.....6

OPONION OF PROF. MR. ESTELLA:.....15

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