



Legal Service

Opinion of the Legal Service

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LEGAL OPINION

Subject: Modalities of submission of the Bischoff report to the plenary

I. Introduction

1. By letter dated 1 December 2020, received by the Legal Service on the same day, Mr Antonio TAJANI, Chair of the Committee on Constitutional Affairs (hereinafter: 'AFCO Committee') requested a legal opinion.
2. The referral from the Chair of the AFCO Committee was prepared "[f]ollowing a request of the AFCO Working Group" on the Rules of Procedure (hereinafter: "RoP"). The request inquires about the "modalities of submission to the plenary of the Bischoff report on amendments to the [RoP] in order to ensure the functioning of Parliament in extraordinary circumstances (2020/2098(REG)) (A9-0194/2020), adopted by [the AFCO] Committee on 12 October 2020" (hereinafter: 'Bischoff report').
3. In particular, the referral seeks the opinion of the Legal Service on the following issues:

"whether the following procedures would be legally safe and sound enough to successfully face a possible Court case, and in case they are, which one of them is the most promising:

- a vote by 'written procedure', meaning that the Members would vote on the amendments in accordance with the same procedure applied during the past 8 months (vote by email), but that the final vote on the Rules' changes would be cast on a ballot paper that is to be dropped in voting boxes in the plenary chamber and in the European Parliament Liaison Offices (EPLOs), in order to ensure that 'Members [...] cast their votes individually and in person' (Rule 186). In such case, the vote should be declared open over several days in order to allow for all

Members to be able to cast their votes. The final text would of course be adopted only if it would secure the votes of a majority of the component Members of Parliament;

- same procedure as above, but also allowing for a postal vote;

- a timely limited change to the [RoP] for a duration of, for example 6 or 12 months (sunset clause);

- adoption of the [RoP] changes by means of the current provisional remote voting scheme (also implying to amend [p]aragraph 6 of the draft Decision, indicating that the adoption of the changes could deviate from standard procedures)”.

4. In addition, the referral asks the Legal Service to analyse “possible other options as to how Parliament could proceed in the current circumstances linked to the COVID-19 pandemic with a view to amend its [RoP].”

II. Legal analysis

5. The referral contains, in substance, four separate questions that will be examined separately. To the extent that the interpretation of the provisions of Parliament’s Rules of Procedure (hereinafter ‘RoP’) is concerned by the present legal opinion, the Legal Service must emphasise that its legal conclusions are without prejudice to a possible subsequent interpretation of the relevant Rules by the competent parliamentary committee, pursuant to Rule 236(3) RoP.

A. First question: legal assessment of alternative voting modalities

6. Under its first and second indent, the referral seeks, in substance, advice as to whether the various voting modalities for the adoption, by plenary, of the Bischoff report that are put forward in the referral would be more predisposed to successfully face a hypothetical legal challenge in front of the Court of Justice than the current modality under which plenary has adopted acts since the beginning of the pandemic.
7. In this context, the referral proposes, as possible alternative voting methods, a vote by ‘written procedure’ consisting of a combination of a vote by email and a use of a ballot paper vote to be exercised in parallel in the hemicycle and in the European Parliament’s Liaison Offices (EPOs). Moreover, the referral proposes, in addition to the foregoing, a postal vote.
8. The Legal Service points out, in the first place, that the Treaties leave a considerable margin for Parliament to organise its own proceedings.¹ Indeed, according to established case law of the Court of Justice, “the Parliament is authorized, under that power of internal organization, to take appropriate measures to ensure the proper functioning and conduct of its proceedings”.² The purpose of granting a power of internal organisation to Parliament is to enable it to fulfil its functions defined, notably, under Article 14(1) TEU.³

¹ Article 232, first paragraph, TFEU.

² Judgment of 1 October 1997, *French Republic v European Parliament*, C-345/95, EU:C:1997:450, paragraph 31.

³ “The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission”.

9. Within this margin of its institutional discretion, Parliament has laid down its internal procedures, including the admissible voting procedures, under its RoP. As regards these voting procedures, Rule 187(1) RoP provides for two voting modalities in Parliament: the show of hands or the use of an electronic voting system. In addition, Rule 191 RoP lays down the voting modalities for voting by secret ballot in the case of appointments, which may be conducted by the use of a ballot paper. The RoP do not provide for any other voting modalities for plenary.
10. As regards the use of an electronic voting system, the Legal Service recalls that the Bureau has adopted implementing measures, pursuant to Rule 192(1) RoP, on the technical arrangements for using the electronic voting system⁴. On this same legal basis, the Bureau adopted, on 20 March 2020⁵, the so-called “alternative electronic voting system” which is currently applied in the context of the ongoing pandemic and which allows for electronic remote voting as a specific modality of “electronic voting” within the meaning of Rule 187(1) RoP.
11. The Legal Service considers that the modalities proposed by the referral in its first and second indent would exceed the scope of the voting modalities currently provided for under Rules 187 and 191 RoP.
12. Indeed, neither do Rules 187 and 191 RoP provide for the possibility of a ‘postal vote’, nor does it provide for a ‘hybrid’ vote consisting of an electronic vote by email, combined with a ballot paper conducted either in the hemicycle or in one of Parliament’s EPLOs. The proposed voting modalities therefore go beyond the scope of Rules 187 and 191 RoP laying down the voting modalities currently provided for under the RoP.
13. For this reason, the Legal Service comes to the conclusion that the use of the modalities proposed by the referral in its first and second indent would require a prior amendment of the RoP, and notably of its Rule 187.

B. Second question: inclusion of a “sunset clause” in a future amendment of the RoP

14. Second, the referral asks, in substance, whether the inclusion, in the Bischoff report, of a ‘sunset clause’ limited for 6 or 12 months would make it more prone to withstand a hypothetical legal challenge. According to such a clause, the new emergency regime under the Bischoff report, if incorporated into the RoP, would automatically expire at a given moment. Such an approach would thus allow Parliament to adopt, after the end of the pandemic and under its regular procedures, the same or similar rules relating to an emergency regime for future situations of crisis.

⁴ Bureau decision of 3 May 2004 consolidating existing rules, as amended by the Bureau decision of 16 June 2014 and supplemented by the Bureau decision of 20 March 2020 as amended by the Bureau decision of 6 July 2020, 14 September 2020 and 23 November 2020.

⁵ Decision of the Bureau of the European Parliament of 20 March 2020 supplementing its Decision of 3 May 2004 on rules governing voting.

15. The Legal Service observes, first, that there are precedents whereby provisions are included in the RoP that allow that a certain part of the RoP shall cease to have effect after a specific date, unless further steps are taken to extend its temporal effect⁶. The use of a ‘sunset clause’ is therefore legally unproblematic.
16. It is therefore a political choice for Parliament to consider that such an approach would be more appropriate, given the long lasting effects of the new rules on an emergency regime. The incorporation of a “sunset clause” would indeed grant Parliament the possibility to “oblige itself” to reassess the new emergency regime after the end of the current Coronavirus (COVID-19) pandemic and to possibly adjust it.
17. Second, the use of a ‘sunset clause’ would not affect, in principle, the question of the ‘legal soundness’ of a possible amendment of the RoP in accordance with the Bischoff report, since it only concerns the temporal effects of the relevant provisions. In case of a challenge, the Court evaluates the validity of a Union act on the basis of the criteria set out in Article 263 TFEU, second paragraph, namely “*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*”. Whether a given Union act has a shorter or a longer temporary effect does not influence, in principle, the application of the above-mentioned grounds of legal review by the Court.
18. In conclusion, the use of a ‘sunset clause’ is a matter of political choice which could be appropriate if the legislator prefers, for political reasons, the adoption of merely provisional rules during the remaining months of the current pandemic, and to reserve itself the possibility to enact under the regular procedure, after the end of the pandemic, a final and long-lasting emergency regime for the future.
19. The same applies to the question of the entry into force of a newly adopted emergency regime. Parliament would be free to determine the exact date of the entry into force in accordance with practical requirements following from the need, after a possible adoption of the Bischoff report, to adjust Parliament’s current working conditions to this new legal setting. Paragraph 7 of the draft Decision would then have to be adjusted accordingly.

C. Third question: application of the ‘alternative electronic voting system’

20. Third, the referral asks the Legal Service to assess the use of the “alternative electronic voting system” currently applied under the conditions of the pandemic, for the vote on the Bischoff report.
21. In this respect, it has to be underlined that the RoP do not necessitate any specific voting modalities as regards votes on their amendment, compared to the procedural modalities used by Parliament for the vote on any other type of act.
22. Indeed, when it comes to the adoption of amendments to the RoP, the Treaties do not impose on Parliament any specific procedural rule, as compared to the vote on other types of acts, such as legislative acts or own initiative reports. The only specificity the Treaties define for the adoption or the amendment of the RoP — in Article 232, first paragraph, TFEU — is that

⁶ Such is the case, for example, of Rule 168(1) which defines the temporal effect of transitional arrangements concerning the linguistic regime under Rule 167. Those transitional arrangements will lapse at the end of the ninth parliamentary term, unless extended by Parliament.

Parliament shall act by a '*majority of its Members*'. Apart from that requirement, Parliament may act, in principle, within the same margin of discretion, based on its power of internal organisation, as it does in case of the vote on any other type of act. Therefore, primary law does not require Parliament to use any different procedure or modalities for the adoption of the RoP than it requires in the case of the adoption of any other act.

23. In conclusion, the Legal Service finds no legal obstacles in the use of the current 'alternative electronic voting system' for the conduct of the vote on the Bischoff report. Under such a scenario, it would then indeed be necessary to adjust Paragraph 6 of the draft Decision accordingly.

D. Fourth question: potential additional modalities

24. Fourth, the referral asks the Legal Service to conceive possible other modalities as regards the conduct of the vote on the Bischoff report in plenary.
25. In this regard, and as already elaborated above⁷, it has to be recalled that the Treaties leave a considerable margin for Parliament to organise its own proceedings. These internal procedures, however, are defined under the current RoP and the applicable implementing Decisions of the Bureau, as outlined above.
26. Any possible new or additional alternative voting modality would thus require a prior amendment of the RoP. In accordance with the above conclusions⁸, however, there is no reason to assume that any alternative voting modality, other than the standard procedures, would be 'legally safer or sounder', as expounded in the referral.
27. If such amendment of the RoP is not envisaged, the vote on the Bischoff report would have to be conducted either under the currently applicable 'alternative electronic voting system' or, if circumstances so allow, under Parliament's regular procedures.

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⁷ See above, paragraphs 8 and 9.

⁸ See above, paragraph 23.

III. Conclusions

28. The Legal Service reaches the following conclusions:

- a) The use of the modalities proposed by the referral in its first and second indent would require a prior amendment of the RoP, and notably of its Rule 187.
- b) The use of a 'sunset clause' is a matter of political choice which could be appropriate if the legislator prefers, for political reasons, the adoption of merely provisional rules during the remaining months of the current pandemic, and to reserve itself the possibility to enact under the regular procedure, after the end of the pandemic, a final and long-lasting emergency regime for the future.
- c) The Legal Service sees no legal obstacles for the use of the 'alternative electronic voting system' when it comes to the vote on the Bischoff report. Under such a scenario, it would be necessary to adjust Paragraph 6 of the draft Decision accordingly.
- d) Any possible alternative voting modality would require a prior amendment of the RoP. If such an amendment of the RoP is not envisaged, the vote on the Bischoff report would have to be conducted either under the currently applicable 'alternative electronic voting system' or, if circumstances so allow, under Parliament's regular procedures.

 Freddy DREXLER

Annex: Request for a legal opinion of 1 December 2020