



## **The legal status of an OECD act and the procedure for its adoption**

by Nicola Bonucci,

Deputy Director

OECD Directorate for Legal Affairs

This brief note has been prepared for the first drafting meeting concerning possible UNESCO/OECD guidelines on "Quality Provision in Cross-border Higher Education" to be held in Paris on April 5-6, 2004.

The note intends to present the possible form that a legal instrument could take within the OECD context and indicate the procedure to be followed.

### **A. The various legal instruments within the OECD**

While the primary purpose of the OECD is not to produce legal norms this activity is not exceptional and can take a variety of forms.

#### 1) The OECD Acts

Article 5 of the OECD Convention states that "in order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; and (b) make recommendations to Members". These are known as **Acts of the Organisation**.

**Decisions** are legally binding on all those Members countries who do not abstain when the Act is adopted. While they are not international treaties they do entail, for Member countries, the same kind of legal obligations as those subscribed to under international treaties. Members are obliged to implement Decisions and they must take the measures necessary for such implementation. Since the entry into force of the Convention establishing the OECD, the Council has adopted more than 40 Decisions.

**Recommendations** are "submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation" (Article 18 of the Rules of Procedure of the OECD). Recommendations are not legally binding, but practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation. Thus, Member countries who do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms. Since the entry into force of the Convention establishing the OECD, the Council has adopted more than 150 Recommendations.

#### 2) Other forms of legal instruments

These are the following :

**Declarations** are solemn texts setting out relatively precise policy commitments subscribed to by the governments of Member countries. They are not formal Acts of the Organisation and are not intended to be legally binding, but they are noted by the OECD Council and their application is generally monitored by the responsible OECD body.

**Arrangements and Understandings** are instruments, negotiated and adopted in the framework of the Organisation by some Member countries. They are not formal Acts of the Organisation and are not legally binding, but they are noted by the OECD Council and their implementation is monitored.

**Treaties/Conventions** while they are concluded in the framework of the Organisation, they are free standing agreements legally binding on the Parties (including possibly some non-OECD members).

For the purpose of this note it is assumed that the UNESCO/OECD guidelines on “Quality Provision in Cross-border Higher Education” would be adopted under the form of an OECD Recommendation.

#### B. The procedure for the adoption of an OECD Recommendation

OECD Recommendations are normally produced following a bottom – up approach. Thus the ground work is usually prepared at a technical level by experts with the assistance of the OECD Secretariat the substantive directorate(s) concerned and the legal directorate).

Once the product is ready on a technical level it is brought to the subsidiary body concerned (in this case the Governing Board of the Centre for Educational research and Innovation (CERI)) and then to main Committee responsible for the area in question (in this case the Education Committee). These are charged with reviewing the draft Recommendation not only from a technical point of view but also to confirm the consensus of the policy-makers. Each body is entitled to introduce amendments to the draft Recommendations as it deems appropriate and/or to send back the draft Recommendation to the experts for further work.

Finally the draft Recommendation is transmitted to the governing body of the OECD, the Council, after a last examination by the Executive Committee. The Council and its Executive Committee represent the view of the whole government and not only of the Ministry concerned.

It should be noted that the Executive Committee and the Council meet usually twice per month on a yearly basis and that therefore an OECD Recommendation can be adopted at any time.

The Council will adopt the Recommendation by consensus, i.e. in the absence of any formal objection by any OECD member.

Once adopted a Recommendation is immediately applicable on all those Members countries who did not abstain when it was adopted.