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Delegation Is a Matter of Confidence

The New EU Delegation System under the Treaty of Lisbon*

Wim VOERMANS**

This contribution discusses the new delegation system of the Treaty of Lisbon (Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU)) and the current debate between the EU institutions on the control over delegated legislation and on the future of comitology. The European Parliament (EP) opposes the strategy of the European Commission to involve the Council in some way or in some respect in delegated legislation other than via the mechanism that the Lisbon Treaty provides. Parliament wants comitology to end once and for all, or so it seems. Whether or not they are able to make the Commission and Council change course remains to be seen. By way of a preliminary conclusion, the contribution argues that – whatever the outcome of the current debate – delegation relies and needs to rely on confidence between the delegating authority and the delegate.

1. WHO IS THE BOSS IN EUROPE? FUSS ABOUT DELEGATION

This is not what you expect to read: a press release of the European Parliament's (hereinafter 'Parliament's' or EP's) Committee on Legal Affairs about the – at face value – minor detail of delegated legislation in the European Union (hereinafter 'Union' or EU). It comes with a catchy subtitle, too:

Efficient Lawmaking Balanced with the Democratic Process.

And this happened relatively recently, too – 26 March 2010.¹ What is going on here? What is the point of devoting a press release to a matter of technical detail, such as delegation? Well, this is the cloud of smoke lingering on after a fierce clash between the Commission and the EP. It will have escaped no one's notice that the present EP is increasingly vocal and is waging a power struggle with other EU institutions on various fronts. In the negotiations surrounding the reappointment of Barroso, the Parliament has recently gained the right of legislative initiative, greater accountability of the Commission, the right to

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¹ For the entire text of the report, see <www.europarl.europa.eu/news/expert/infopress_page/001-71115-081-03-13-901-20100322IPR71113-22-03-2010-2010-false/default_en.htm>, last consulted on 1 Jun. 2010.

receive more information, and more substantive involvement in the drafting of legislative proposals and impact assessments and a few other matters.² This is a major victory for the institution that is regarded as the clear winner of the Treaty of Lisbon. And it seems that the EP is willing to carry the momentum further.

1.1. THE BATTLE FOR DELEGATION CONTROL: COMITOLOGY

This is why there is also some arm wrestling over delegation of European legislation. That is a story with a history in the EU.³ Right from the early days of the European communities, the various Community legislators were entitled – within strict limits defined by the Court of Justice⁴ – to delegate powers to the European Commission, enabling the latter to work out the details of any instrument on this basis. Article 202 of the former EC Treaty – the former delegation provision – permitted them to do so. Because the Member States nevertheless wanted to contribute their ideas about (read: stay in control over) the adoption of these implementing rules, a system developed over the years under which special committees assist the Commission in exercising its implementing powers delegated to it. These participating committees are manned by government representatives (civil servants) from the Member States.⁵ This comitology system, as it is called, has assumed large proportions. To date, there are about 250 committees,⁶ comprising thousands of Member State representatives who contribute their ideas about or assist in the preparation of about 2,500–3,000 implementing rules every year.⁷ This is over 90% of the Union's total legislative output.

² See the Resolution of the European Parliament of 9 Feb. 2010 about a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term (P7_TA(2010)0009). Some media have published reports on this issue using titles like 'Comitology: The New Political Battleground'. See <<http://thenewep.com/wp-content/uploads/2009/06/b-m-comitology-insight-final-version.pdf>>, last consulted on 24 May 2010.

³ Since the entry into force of the Treaty of Lisbon (publication date: 17 Dec. 2009, OJ C 306), there have no longer been any pillars and the name 'European Community' has been dropped, too, and replaced by 'European Union'.

⁴ Under the 'Meroni doctrine', broad or unrestricted delegation is not permitted, certainly where bodies other than the Commission are concerned. In the first *Meroni* decision from 1958, the Court of Justice considered entrusting broad discretionary powers to a body other than the Commission to be violation of the Treaty, because this kind of delegation of powers would frustrate the institutional balance of power under the EC Treaty. See the CJEC judgment of 13 Jun. 1958 in Case 9/56 [1958] ECR 133 (*Meroni I*). This does not mean that powers cannot be delegated to bodies other than the Commission at all, but such delegation must concern technical details (no broad discretionary powers) and be subject to the same rules as those prescribed in the treaties in relation to the exercise of these powers by the delegating institutions themselves. This means that delegation of this kind must be defined in very precise terms, also for the purpose of allowing adequate judicial review. Apart from the relationship between the Council and the Commission, only the delegation of '*pouvoirs d'exécution nettement délimités*' is permitted. See the CJEC judgment of 13 Jun. 1958 in Case 10/56 [1958] ECR 157 (*Meroni II*).

⁵ This was done in various modalities, which I will discuss below.

⁶ According to the survey drawn up by the European Commission in 2003, there were 253 committees at that juncture, but this survey did not make it quite clear whether this really included all committees or only those committees that came within the scope of the 1999 Comitology Decision (Council Decision 1999/468/EC of 28 Jun. 1999 laying down the procedures for the exercise of implementing powers, OJ L 184, 23, as recently amended by Decision 2006/512/EC of 17 Jul. 2006, OJ 200, 11). For the figures, see also G.F. Schäfer & A. Türk, 'The Role of Implementing Committees', in *The Role of Committees in the Policy-Process of the European Union; Legislation: Implementation and Deliberation*, ed. T. Christiansen & T. Larsson (Edward Elgar, 2007): 182–200, with a note, 183.

⁷ For these figures, see M. Szapiro, 'Comitology: The Ongoing Reform', in *Legal Challenges in EU Administrative Law*, ed. H.C.H. Hofmann & A.H. Türk (Cheltenham: Edward Elgar, 2009): 89–15.

In this way, the Council effectively controls the adoption of about 90% of all EU rules. It may be true that the EP is now a full-fledged co-legislator for nearly all primary legislation, but this is by no means true of the rules that are adopted through delegation. When it comes to the adoption of the bulk of Union legislation – delegated or implementing acts – the parliament plays second fiddle. And that sticks in the throat of the institution that aspires to be the Union’s true people’s representative. With the amendment of the Comitology Decision in 1999 and again in 2006,^{8,9} a few stopgap measures were taken to give the EP somewhat more influence with respect to rules adopted through delegation – particularly through a mechanism resembling the ‘negative resolution procedure’ (*voorhangeregeling*) in the Netherlands, called regulatory procedure with scrutiny¹⁰ (popularly known as ‘PRAC’). But even so, compared to the Council, the EP kept trailing behind as a result of the foregoing – through the law of the power of the first draft.¹¹ For example, there are no members of the EP sitting on these PRAC committees and the procedure does not apply to all fields. From 1999 on, the EP bided its time, however, until the entry into force of the constitutional treaty and, later, the Treaty of Lisbon. The latter included a delegation system that granted the Parliament and the Council the same possibilities for controlling delegated legislation. ‘Exit comitology’ was the least that the EP expected from the Treaty of Lisbon. It is hardly surprising therefore that the Parliament reacted as if stung when, just before the entry into force of the Treaty of Lisbon (December 2009), the Commission indicated in a Communication¹² that it nevertheless wanted to involve Member State representatives in the preparation of delegated rules. Comitology new style! The Parliament interpreted it as a case of *Etikettenschwindel*, perhaps rightly so.¹³

1.2. STRUCTURE OF THE CONTRIBUTION

In this contribution, I will try to assess the significance of the new delegation system of the Treaty of Lisbon (Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU)).

Let me sound a note of warning here: this excursion takes us to slippery ground, because the Council, the Commission, and the Parliament hold very different views on the

⁸ That happened in 2006, after an earlier failed attempt by the Commission in 2002, in connection with an interinstitutional agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 Jun. 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC, OJ 2008 C 143, 1.

⁹ Council Decision 1999/468/EC of 28 Jun. 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 23, as amended by Decision 2006/512/EC of 17 Jul. 2006, OJ L 200, 11 (the ‘Comitology Decision’).

¹⁰ Article 5*bis* of the Comitology Decision.

¹¹ This law means that anyone who may define the first draft of any instrument holds a more important position than those who come later, for the latter will always use this first draft more or less as a point of departure. In public administration and political science, this phenomenon is known as path dependence.

¹² Communication from the Commission to the Council and the European Parliament on the implementation of Art. 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 def. of 9 Dec. 2009.

¹³ See the report by rapporteur József Szájer (Legal Affairs Committee of the EP) dated 29 Mar. 2010, ‘Szájer’ (2010–2021 (INI)) A7-0110/2010, particularly at 11 and 12.

meaning of the delegation provisions. And what makes matters worse, the treaty provisions themselves are not quite clear either. There are many open ends and much debate, and there is a great deal at stake. It will certainly take some time for the fog to clear.

For the sake of a systematic presentation, I will first discuss – briefly – the new legislative procedure and instruments under the Treaty of Lisbon (section 2), and after that, I will deal with the delegation system (Article 290 TFEU) and the current debate on it (section 3). Next, I will address the issue of the implementing acts, as they are called (Article 291 TFEU), which is closely connected with delegation (section 4). In the final section, I will draw some conclusions from the developments to date.

2. THE LEGAL INSTRUMENTS AND PROCEDURES UNDER THE TREATY OF LISBON: EUROPEAN PRIMACY OF THE LEGISLATOR?

Under the former EC and EU treaties, the provisions about legislative procedures and legislative instruments, such as directives, regulations, and framework decisions, were highly fragmented. To know the applicable procedure and the instrument prescribed, one always had to consult the individual articles governing the relevant subject. It was a motley jumble of provisions.¹⁴ The Treaty of Lisbon systematizes these instruments and procedures and makes them uniform, which is certainly a good thing. For example, the provisions about the legal instruments (called legal acts) and procedures are now neatly grouped in the first and second sections of Chapter 2 of Part Six of the TFEU.

2.1. THE LEGAL INSTRUMENTS OF THE UNION: LEGISLATIVE ACTS AND NON-LEGISLATIVE ACTS

The Treaty of Lisbon harmonizes the legal instruments of the Union in a way that will take lawyers in different Member States some getting used to. Article 288 TFEU provides that to exercise the Union's competences, the institutions may adopt regulations, directives, decisions, recommendations, or opinions. Collectively, these five instruments constitute the legal acts of the Union, as they are called. This is somewhat confusing, for instance, Dutch lawyers, because in the Dutch legal literature (as in many other jurisdictions),

¹⁴ Under the former treaties, the power to adopt directives, regulations, and framework decisions – the most important 'legislative' instruments of the Union – were regulated differently in a fragmented way for each case. Sometimes, only the Council was competent – acting on a proposal submitted by the Commission – to perform an act, and in other cases, there had to be cooperation with the European Parliament, which could take a variety of forms (opinion, cooperation, assent, co-decision). In some cases, the Commission was even independently competent under the Treaty (e.g., in the case of Art. 96 of the EC Treaty). In addition, there were no less than fifteen legal instruments (fourteen of which were mentioned in the treaties and one *sui generis* instrument). Due to the combination of instruments and procedures, there were approximately fifty options, leaving aside the comitology procedure. See M. Jorna, 'Europese wetgeving volgens de ontwerpgrondwet, of wat er verandert' ('European legislation according to the proposal for a European Constitution: what is going to change?'), in P. Koorn & L.H.M. Loeber, *De betekenis van de Europese Conventie voor de wetgevingspraktijk* (*The Meaning of the European Convention for the Practice of Legislating*) (The Hague: Sdu Publishers, 2004), 18–20.

some of these instruments from Article 288 TFEU would not be called legal acts (*rechtshandelingen*) at all. For example, EU recommendations or EU opinions cannot even have binding effect.¹⁵ Dutch lawyers – like I imagine many of their colleagues in other EU Member States – would sooner call the instruments of Article 288 TFEU types of decisions. Incidentally, the directives, regulations, opinions, and recommendations from this Article 288 are of the same nature as the instruments of the same name from ex Article 249 of the EC Treaty. Within the category of legal acts recognized by the TFEU, a distinction is made between ‘legislative acts’ and ‘non-legislative acts’.¹⁶ According to Article 289(3) TFEU, ‘legislative acts’ are instruments (‘legal acts’) that have been adopted through the ordinary legislative procedure (Article 294 TFEU – I will dwell on this procedure in more detail in the next subsection) and non-legislative acts are instruments that are adopted through delegation or for the purpose of implementing a legislative act (Articles 290 and 291 TFEU). Again, this sounds strange in the ears of lawyers within certain jurisdictions. Both legislative acts and non-legislative acts may include generally binding rules, because the difference between a legislative act and a non-legislative act under the TFEU is of a formal nature. An instrument is called a legislative act if it has been adopted through the ordinary (or occasionally a special) EU legislative procedure (Article 294 TFEU), and all other instruments are called non-legislative acts.

There are two types of non-legislative acts: first, the ‘delegated acts’ (Article 290 TFEU) and second, the ‘implementing acts’ (Article 291 TFEU). At present, this distinction and the relationship between the two are leading to confusion and discussion. The Commission and the Council, on the one hand, and the EP, on the other, hold different views on the question of which parties may participate in the adoption of these implementing acts. Below, I will deal with this point in the context of my discussion of the implementing acts.

Even though the distinction between legislative acts and non-legislative acts is of a formal nature, it is important in the new system. Non-legislative acts are hierarchically subordinate to legislative acts.¹⁷ This hierarchy between basic instruments (such as directives and regulations) and delegated or implementing acts did not yet exist under the former EC Treaty.¹⁸

¹⁵ See Art. 288 TFEU, final sentence.

¹⁶ It is and remains a horrible neologism, this ‘non-legislative act’.

¹⁷ See also A. van den Brink, ‘Primaat van de wetgever’ (‘Primacy of the Legislature’), in *De Europese Unie na het Verdrag van Lissabon (The EU after the Lisbon Treaty)*, ed. R.H. van Ooik & R.A. Wessel (Deventer: Kluwer, 2009), 76.

¹⁸ De Witte points out that under the former treaties, there were forms of hierarchy between EC and EU instruments. For example, implementing measures of the Commission adopted pursuant to a basic instrument (e.g., a directive or regulation) had to stay within the limits of the delegation. On the other hand, there were chains of instruments in some cases, where the general policies were defined in a Council regulation and which were subsequently implemented by the Council in implementing decisions, after which the Commission issued detailed implementing regulations on top of that. For De Witte, this was the ultimate proof that until then, the form of an instrument did not reveal a great deal about its substance. Bruno de Witte, ‘Legal Instruments and Law-Making in the Lisbon Treaty’, in *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, ed. Stefan Griller & Jacques Ziller (Wien/New York: Springer, 2008), 83–108, with a note, 91–92.

2.2. THE ORDINARY LEGISLATIVE PROCEDURE

Article 294 TFEU is the central article of section 2 of Chapter 2 (Procedures for the Adoption of Acts and Other Provisions). The article governs the ‘ordinary’ legislative procedure. Basically, this is the former co-decision procedure of ex Article 251 of the EC Treaty, under which the Commission, the EP, and the Council of Ministers join forces in adopting European legislation through a multi-layered procedure that – at most – may consist of two readings and a conciliation procedure. This ordinary legislative procedure begins with an initiative, that is, a legislative proposal of the European Commission. According to the letter of the treaties, the Commission has exclusive power to submit proposals. As indicated in the introduction, the EP has appropriated the de facto right to do so.¹⁹ We will have to wait and see what the Court of Justice will think about that.

Under the regime of the Treaty of Lisbon, this ‘ordinary’ legislative procedure applies to nearly all Union legislation. Its structure allows a meaningful and democratically legitimized debate on legislative proposals between the Council and the EP in various rounds of negotiation. The Commission submits a proposal. Next, the Council and the EP can reject the proposal or propose amendments to it at the first reading. Next, if it takes the view that the Parliament’s amendments resemble its own closely enough, the Council may decide to adopt a joint position and submit it as a text proposal to the Parliament at the second reading. Again, the proposal can be rejected or amended. If the Council and the Parliament have failed to reach agreement on a proposal after the second reading, a ‘conciliation procedure’ (also known as ‘conciliation committee procedure’) may be initiated. Representatives from the Council and the EP now try to agree on a compromise proposal – without the Commission’s involvement this time – which is then passed back to the EP and the Council. At this stage, it is no longer possible to submit amendments; the compromise proposal must be approved or rejected. Inspired by the French legislative procedure,²⁰ this European legislative procedure allows the parties to grow to each other in various steps that are as transparent as possible and to adopt sensible and democratically legitimized rules all the same.

2.3. TRILOGUES: EROSION OF THE ORDINARY LEGISLATIVE PROCEDURE?

Under the system of ‘trilogues’ (tripartite meetings), which have recently become popular, some stages in this procedure are deliberately left out, because presidencies of the Union are

¹⁹ Until now, the EP was only able to request the Commission for a legislative initiative in a resolution. The revised framework agreement on interinstitutional legislative cooperation, as concluded in February 2010, tightens the rules in this area. Under A, point (3) of the revised agreement, it was agreed that within three months of the date of a legislative initiative request made by the EP, the Commission had to submit a legislative initiative report in accordance with Art. 225 of the TFEU. Next, the Commission has to submit a legislative proposal within a year or it must include the proposal in its work programme for the next year; if the Commission fails to submit a proposal, it must give the European Parliament a detailed explanation of the reasons thereof. See the Resolution of the European Parliament of 9 Feb. 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term (P7_TA(2010)0009).

²⁰ Also known as *navette*, that is, a shuttle service.

eager to achieve results quickly (i.e., within six months). The purpose of the trilogues is to reach agreement at the first reading, essentially by bringing forward the conciliation procedure, and organize it at the time of the first reading. The treaties do not prohibit representatives of the Council, the Commission, and the EP holding informal meetings during the first reading for the purpose of reaching agreement on legislative proposals. By now, it has become a very popular informal procedure. This short-cut was used for 70% of the EU legislation adopted through the co-decision procedure. Of course, a few question marks are in order here, because speed is sometimes at the expense of the precision and quality of the procedure. For example, trilogues are often at the expense of the contribution of other Member States (that have failed to submit their contribution in good time), but in a more general sense, they may also affect the democratic nature of the procedure.²¹ The drafters did not introduce the three-stage procedure in the Treaty for nothing.

Let us return to Article 294 TFEU, which governs the ordinary legislative procedure. For the sake of convenience, we will assume that this is still the basic procedure. As a matter of fact, the ordinary legislative procedure applies to nearly all cases and subjects, but in very exceptional cases, the Council alone may adopt rules through the ‘special’ legislative procedure.²² This procedure appears to be an anomaly, but that is not quite the case. Where the special legislative procedure is applicable, the EP’s approval is still required before the instrument can enter into force,²³ apart from one exception.²⁴ This means that essentially, this special legislative procedure does not lack parliamentary involvement and democratic legitimacy after all. The system under the Treaty of Lisbon no longer permits *alleingang* of the Council.

²¹ A critical note was sounded by the European Union Committee of the House of Lords (2009), ‘Co-decision and National Parliamentary Scrutiny’, 17th Report of Session 2008–2009, HL Paper 125. Previously, this issue was addressed by P. Craig, ‘The Role of the European Parliament under the Lisbon Treaty’, in *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, ed. S. Griller & J. Ziller (Wien/New York: Springer, 2008), 109–134, and recently, D.M. Curtin, ‘The European Parliament and EU Democracy – A Paradox’, *Ars Aequi* (2009): 708–710.

²² According to Barents, ‘special legislative procedure’ is the wrong term. It is and remains the Council that adopts instruments. R. Barents, ‘Een Grondwet voor Europa IV: besluiten en besluitvorming’ (‘A Constitution for Europe: Decisions and Decision Making’), *Nederlands Tijdschrift voor Europees recht (Dutch Journal for Administrative Law)* (2004): 357.

²³ The treaty recognizes the following exceptions to the ordinary legislative procedure of Art. 294 TFEU (i.e., the special legislative procedures of the TFEU). This concerns three situations:

- (1) the Council may take action after obtaining the *consent* of the European Parliament: Art. 19 (combating discrimination);
- (2) the Council may adopt measures after *consulting* the European Parliament: Art. 21(3) (social security and social protection in connection with the freedom to move and reside freely within the territory of the Member States), Art. 22(2) (detailed arrangements concerning the right to vote and to stand as a candidate in elections), Art. 23 (facilitating diplomatic protection), Art. 25 (adding rights to the list of citizenship rights), Art. 64 (restrictions on the free movement of capital in connection with investments in third countries), Art. 77(3) (rules for the procedure governing controls on persons – passports, identity cards, and residence permits), Art. 118 (uniform protection of intellectual property rights by means of European intellectual property rights and language arrangements for the European intellectual property rights), Art. 153(2) (supporting working conditions in specific areas), Art. 194(3) (energy market – tax measures);
- (3) the Council may take measures *independently* without the European Parliament’s involvement: Art. 92 (granting a derogation permitting Member States to adopt provisions more favourable for their national carriers).

²⁴ Article 92 TFEU.

2.4. A 'PRIMARY' LEGISLATOR EXERCISING PRIMACY AT THE EUROPEAN LEVEL?

Does the ordinary legislative procedure of Article 294 TFEU give rise to a 'primary' legislator at EU level? This is relevant to know in answering the question whether, to what extent, and how broad the ordinary EU legislator may delegate powers and what subjects are reserved to this ordinary legislator. Does such a thing as primacy of the primary legislature – that is, prerogatives for the democratically underpinned legislature – exist? In different Member States of the EU (e.g., Germany, the Netherlands), the primary legislature is supreme in its relations to delegated legislators and some issues can exclusively be dealt with by the primary legislature.

Whether or not such a primary legislature exists in the EU is a difficult question to answer. The ordinary legislative procedure under the TFEU applies to a range of very different kinds of decisions and acts. The procedure is prescribed not only for nearly all directives and regulations but also for very different things, such as the adoption of policies. Under the Treaty of Lisbon, the Council and the EP sometimes have to follow the ordinary legislative procedure for taking a *measure*.²⁵ As a general rule, the three legislative institutions are free to select a fitting form for this measure. This could be a regulation, a directive, a recommendation, or a decision to perform an act without an intended legal effect. Within the limits defined by the principle of proportionality,²⁶ the institutions are free to choose a legal instrument.

There is another remarkable difference with the concept of primacy of the primary legislature in EU Member States: the ordinary legislative procedure of Article 294 by no means always results in a 'legal act', which means a legal instrument that effects a change in existing rights and obligations. The ordinary legislative procedure may be used for adopting a number of policy measures that do not bring about any legal changes at all. For example, non-binding opinions, recommendations (see section 2.2 below), or policy intentions sometimes have to be adopted through the procedure of Article 294 TFEU. In the system of the TFEU, these opinions, recommendations, and policy measures – even though they do not have any direct *legal* consequence – are regarded as legal acts all the same, namely as 'legislative acts' (Article 289(3) TFEU).

However, let us not split hairs. What Article 294 TFEU certainly creates is a *parliamentary legislator*, which is democratically legitimized and as a result – one could argue – also deserves the power to exercise the highest law-making authority in two respects: first, the rules originating from the parliamentary Union legislator take precedence over rules made by other institutions and bodies within the Union, and second, the adoption of specific types of rules is reserved to the parliamentary legislator.²⁷ These two

²⁵ For example, this applies to the cases governed by Arts 33, 48, 64(2), 77(2), 78(2), 79(2) and (4), 81(2), 82, 84, 87, 114, 118, 133, 157(3), 166(4), 168(5), 169(3), 172, 173(3), 175, 182(5), 189(2), 194(2), 195(2), 196(2), 197(2), 209(2), 212(2), 214(2), 325(2), and 338(1) of the TFEU.

²⁶ Article 5(4) of the former EU Treaty. Now Art. 296 TFEU.

²⁷ In the German legal literature, this is known as *Vorrang des Gesetzes* and *Vorbehalt des Gesetzes*.

elements can also be found in the delegation regime enshrined in the Treaty of Lisbon (in Article 290 TFEU).

3. DELEGATION UNDER THE TREATY OF LISBON: WILL COMITOLGY CONTINUE TO EXIST?

3.1. DELEGATION AND DELEGATED ACTS, THE LIMITS

Article 290 TFEU provides that a legislative act, as adopted by the institutions empowered to adopt such acts (the Council and the EP acting on a proposal from the Commission), may delegate the power to supplement or *amend*²⁸ this legislative act. No more than any other legislator in EU Member States, can the primary parliamentary EU legislator provide for all cases and fill in all details itself. This is self-evident. But to what lengths can the ordinary Union Legislator go in this context?

The first limit Article 290 defines is that the primary EU legislator may confer powers to adopt non-legislative acts of general application (based on delegation) only on the Commission and not on other bodies.²⁹ Article 290 TFEU contains other delegation limits. For example, the primary or basic legislator may only delegate the power to supplement or amend *non-essential elements* of the basic instrument in rules of *general application* (called non-legislative acts). The two requirements are cumulative. In fact, this standard creates a type of primacy of the legislature at European level; the Union legislator regulates essential elements and the Commission – through delegation – regulates less important subjects.³⁰

This brings us to the question on what constitutes an essential or a non-essential element. This is essentially a question to which there is only a political answer. A non-essential element is what the primary legislator considers to be a non-essential element. In my view, the Court of Justice is unlikely to render a substantive opinion on this subject; instead, it will administer the test of reasonableness at the very most. In any event, the criterion does not give much to hold on to.

²⁸ This power to supplement or amend basis instruments existed under the former treaties, too (at least in the eyes of the Commission), even if it was not explicitly laid down in the treaties. It was deemed to be part of the Commission's general power to implement EU legislation. This is a typically French view on the matter, because the French government has similar general implementation powers under the French Constitution. For this view, see J.-C. Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge: Cambridge University Press, 2006), 73. An outspoken comment is made by Paolo Ponzano, who not only assumes that the Commission has its own autonomous implementation powers but also claims – with a reference to the Italian, French, and, indirectly, Spanish systems of the government's independent implementation powers – that this structure is enshrined in the new Arts 290 and 291 TFEU. P. Ponzano, ““Executive” and “Delegated” Acts: The Situation after the Lisbon Treaty”, in *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, ed. S. Griller & J. Ziller (Wien/New York: Springer, 2008), 135–141.

²⁹ The question arises whether this will affect the old – pre-Lisbon – delegation case law of the Court of Justice. For example, the Court of Justice permitted the Council to take implementing decisions itself in special cases, provided that it gives detailed reasons for it. See the delegation judgment of the Court of Justice of 24 Oct. 1988, Case 16/88 [1989] ECR 3457. In addition, the Council was able to adopt legislative acts for the purpose of delegating powers to institutions or bodies other than the Commission, subject to strict limitations and provided that these are clearly defined (Meroni doctrine). See the judgment of the Court of Justice of 13 Jun. 1958, Case 9/56 [1958] ECR 133 (*Meroni I*) and the judgment of the Court of Justice of 13 Jun. 1958, Case 10/56 [1958] ECR 157 (*Meroni II*). What consequences the system of Art. 290 TFEU will have for this case law position cannot be predicted at this juncture.

³⁰ This point was also made by Van den Brink (2009).

According to Article 290 TFEU, the primary legislator may also attach conditions to the delegation of powers. There are two types of conditions:³¹

- (1) revocation of the delegation (known as call back); and
- (2) an option resembling the negative resolution procedure, which means that the delegated non-legislative act may enter into force only if no objection has been expressed by the Parliament or the Council within a specified period ('expressing an objection').³²

It is relevant to observe that both cases involve a measure taken in retrospect, which means that the measure is taken following the submission of a definitive proposal by the Commission. Neither condition involves any legislative participation or substantive input. Nor do the conditions apply automatically: they must be laid down expressly in the basic instrument. In its Communication of December 2009, the Commission made a proposal for model provisions relating to the revocation and the objection procedure.

On the one hand, the delegation regime of Article 290 TFEU deserves support,³³ in my opinion, because at long last, it creates a normative framework that is more practicable than Article 202 of the former EC Treaty. Besides, this framework has been geared towards the current institutional setup (particularly towards the greater role of the EP). On the other hand, there are many open ends. In particular, Article 290 fails to give a clear picture of the relationship with the implementing acts of Article 291 TFEU (which will be addressed in greater detail in the next section) and of the future of comitology.³⁴

3.2. THE FUTURE OF COMITOLOGY

In the introduction, I touched on the debate about the application of Article 290 TFEU and its relationship with the existing comitology practice. How should this practice be reconciled with the standards defined in Article 290 TFEU? Quick to recognize this problem, the Commission issued a communication on the implementation of Article 290 TFEU before its entry into force (on 9 December 2009).³⁵ Swift as lightning, the Commission apparently gave great weight to the issue. I will not discuss this communication in detail in this paper, but I will briefly explain some key points. First and foremost, the Commission advocates a coordinated and consistent approach concerning delegation. This could be called a constructive opening gambit. It wants to join forces with the Council and the EP. In addition, the Commission points out that some experience of the delegation framework of Article 290 TFEU has already been gained. The framework closely resembles the procedure that was introduced in 2006 to the Comitology Decision of 1999.³⁶

³¹ 'Exhaustive', as Jorna calls it, Jorna (2004), 25.

³² See Art. 290(2) of the TFEU.

³³ See Voermans (2008).

³⁴ See W. Voermans, 'Is de Europese wetgever na Lissabon wel een échte wetgever? (Is the European Legislator after Lisbon a Real Legislator?)', in *Europa en de toekomst van de nationale wetgever*, ed. R.A.J. van Gestel & H. Schooten (Nijmegen: Wolf Legal Publishers, 2008).

³⁵ COM(2009) 673 def.

³⁶ Council Decision 2006/512/EC.

Particularly, the regulatory procedure with scrutiny of the 1999 Comitology decision, version 2006, can still be applied in the new situation.³⁷ The second subparagraph of Article 290(1) TFEU includes provisions on the objectives, content, scope, and duration of the delegation of power. To begin with the latter aspect, the Commission warns against the misunderstanding that could arise from the assumption that delegation is, by definition, temporary. And material limits must be clearly defined, according to the Commission. A separate issue concerns the precise meaning of ‘essential’ and ‘non-essential’ elements of a legislative instrument. The Commission evades the question and (in its own words) ‘does not intend to interpret these criteria in the abstract’. The exact meaning of ‘essential’ and ‘non-essential’ should become clear in practice, particularly, political practice. Craig points out that, if we are to take the non-essence requirement seriously, the courts should be able to carry out judicial review on the basis of this requirement and define a non-delegation doctrine. He is not very confident, however, that the Court of Justice or any other court for that matter will be prepared to do so.³⁸ I took the same position above.

I will now address the checks on the way in which the Commission exercises the delegated powers. The primary legislator may attach conditions thereto, but it is not required to do so.³⁹ In the Annex to the Communication, the Commission includes some models that may be used, as stated above. This is a bit like the suspect giving the handcuffs to the police officer making the arrest, so be it. Next comes the crucial point in the Communication of December 2009: the Commission notes that Article 290 TFEU contains no provision relating to the procedure for adopting delegated acts. Consequently, the Commission is free to structure this process at its own discretion.⁴⁰ All of a sudden, the Communication adopts quite a peremptory and pedantic tone. The Commission intends systematically to consult experts from the Member States in preparing delegated rules, because it claims that this is its prerogative. And naturally, this enables the Commission to forestall and defuse the comitology crisis.

The EP reacted as if stung to these passages from the Commission’s communication. It issued a rather angry report, which raised objections of principle to the Commission’s approach.⁴¹ A passage from the tirade:

is regrettable that the Commission’s Communication appears to understand neither the extent nor the significance of the changes in the Union’s constitutional and legal framework ushered in by the Treaty of Lisbon. The Commission deals with delegated acts as though they were the descendants of the ‘Lamfalussy procedure’ and ‘comitology’ measures adopted on the basis of Article 202 EC. *The time has come to abandon this way of thinking* when dealing with the delegation of legislative power to the Commission.

³⁷ In an ECER communication entitled ‘Q & A Comitology under Lisbon’ of the Ministry of Foreign Affairs, Art. 290 TFEU is called ‘the regulatory procedure with scrutiny of Art. 5 *bis* of the Comitology Decision “new style”’. This will not go down well with the European Parliament.

³⁸ Craig (2008), 116.

³⁹ See *ibid.*, 116.

⁴⁰ See pp. 6 and 7 of the Communication.

⁴¹ Report drawn up by rapporteur József Szájer (Legal Affairs Committee of the EP) of 29 Mar. 2010 ‘On the power of legislative delegation’ (2010–2021 (INI)) A7-0110/2010.

The need to delegate the more technical aspects of legislation to the Commission also existed in the past, at a time when the Treaties did not provide for any mechanism to achieve such a result. The institutions were compelled to use the mechanism set out in Article 202 EC, which was an unsatisfactory solution for the Legislator, and particularly for Parliament. The *regulatory procedure with scrutiny* (RPS, or to use its French initialism, PRAC), added during the latest modification of Council Decision 1999/468/EC implementing Article 202 EC was created precisely to provide a temporary answer, albeit a far from perfect one, under the Treaty of Nice. The procedure laid down in Article 290 TFEU therefore fills a void.

Control of the power delegated by the Legislator should in all logic remain the preserve of the Legislator. Moreover, any other form of control by anyone but the Legislator would per se be contrary to Article 290 TFEU. In particular, Member States, and *a fortiori* committees composed of experts from the Member States, have no role to play in this area.

Naturally, the EP, which assumed that it would finally get rid of comitology, sees through the Commission's stratagem here. In the Commission's proposal, comitology would still be relevant to the preparation of delegated acts and the EP would once again play second fiddle in the exercise of control of delegated acts, as it did in the past. The Szájér report makes it clear that the EP really wants to put an end to the comitology practice, also where this relates to implementing acts. We will have to wait and see if the EP will have its way. In any case, the outcome is by no means certain, as the Commission suggested in its communication. It is not self-evident that the Commission is entirely free in preparing the adoption of delegated rules (even if the Member States and – certainly – the representatives sitting on the committees would like to consider this self-evident, as the Commission does, too).

3.3. DELEGATION TO BODIES OTHER THAN THE COMMISSION

In section 3.a, it was pointed out that the primary EU legislator may delegate the power to adopt rules of general application only to the Commission. The question arises, however, whether under the new delegation regime of the TFEU, the EP and the Council may delegate other powers, such as administrative powers, to institutions other than the Commission in directives and regulations. This is a topical issue, as administrative tasks of the EU – such as supervisory tasks – are increasingly being executed by European administrative bodies ('agencies'). These agencies often cooperate with administrative bodies/regulators in the Member States, and it would help if the Union legislator directly conferred tasks, powers, even regulatory powers, on these bodies/regulators,⁴² as this would give them a more independent status.⁴³ Some contend that the delegation of powers to institutions other than the Commission is contrary to the *Meroni* decisions of the Court of Justice. In the first *Meroni* decision from 1958, the Court of Justice considered the conferral of broad discretionary powers on a body other than the Commission to be a

⁴² At present, nearly all of them come under the authority of the European Commission, but there is an autonomisation tendency.

⁴³ See A.C.M. Meuwese, Y.E. Schuurmans & W.J.M. Voermans, *Towards a European Administrative Procedure Act. Review of European Administrative Law* 2, no. 2 (2009), 3–35.

violation of the Treaty, because this delegation of powers would frustrate the institutional balance of power under the EC Treaty.⁴⁴ This does not mean that the delegation of powers to organizations other than the Commission is absolutely impossible.⁴⁵ In the *Meroni* decisions, especially in *Meroni II* the Court of Justice held that powers may also be delegated to institutions or organizations other than the Commission, provided that it concerns technical details (no broad discretionary powers therefore) and that this delegation is subject to the same rules as those prescribed in the treaties with respect to the exercise of these powers by the delegating institutions themselves. This means that such delegation must be defined in very precise terms, also to allow adequate judicial review thereof. Apart from the Council-Commission relationship, only the delegation of *pouvoirs d'exécution nettement délimités* is permitted.⁴⁶

How should we interpret 290 TFEU? Is it a direct successor to Article 202 EC Treaty and is the delegation of powers to institutions or organizations other than the Commission still possible therefore? In view of the developments in the interinstitutional balance of power, Dehousse deems it even desirable that powers can be delegated to semi-independent European agencies.⁴⁷ Or should we embrace the alternative interpretation of Article 290 TFEU (as formulated in the report to the Commission) and consider it to be a restriction on the possibilities under the former Article 202?

4. IMPLEMENTING ACTS

Article 291 TFEU makes provision for implementing acts. This phenomenon is unknown – for instance – to the Belgian, Dutch, German, and Austrian legal systems, but it is a well-known concept in countries such as France. This country recognizes the principle that where parliamentary legislation is not completely ‘finished’, the administration (the government) intervenes to deliver the finishing touch, enabling the legal instrument to be implemented. In the Netherlands, the government has no general mandate to adopt detailed rules to enable an instrument to be implemented, since this must be preceded by a delegation of powers.

This French concept of the implementing act, which is alien to the Dutch system, underpins Article 291 TFEU. Implementing acts already existed under the EC Treaty, but they went unnoticed, because in Article 202 EC Treaty, they were closely connected with the delegation of regulatory powers.

Under the system of the Treaty of Lisbon, the umbrella term ‘implementing acts’ denotes all acts required to implement European law – in the broadest sense of the word.⁴⁸

⁴⁴ CJEC judgment of 13 June Case 9/56 [1958] ECR 133 (*Meroni I*).

⁴⁵ See also W. Voermans, *Toedeling van bevoegdheid* (Attribution of powers) (The Hague: Boom Legal Publishers, 2004).

⁴⁶ CJEC judgment of 13 June, Case 10/56 [1958] ECR 157 (*Meroni II*).

⁴⁷ See R. Dehousse, ‘EU Law and the Transformation of European Governance’, in *Good Governance in Europe's Integrated Market*, ed. C. Joerges & R. Dehousse (Oxford: Oxford University Press, 2002), 209.

⁴⁸ See P. Eijlander & W. Voermans, *Wetgevingsleer* (Legislative Method) (The Hague: Boom Legal Publishers, 2000).

This includes the legal transposition of directives, the creation of administrative bodies, removal of legal obstacles that prevent the applicability of European law – in short, all legal measures (as Article 291 TFEU is restricted to the latter) that effective implementation of EC law under the duty of loyal cooperation requires. In principle, the Member States are responsible for this, but the Commission also has a role to play. In a 1989 ruling, the Court of Justice held that ‘implementation’ comprises both the drafting of implementing rules by the Commission (or the Council, in exceptional cases) and the implementation of these rules itself.⁴⁹ Jorna believes⁵⁰ that this ruling is also relevant to the provisions now included in Article 291 TFEU.⁵¹ By all appearances, the Commission or the Council may adopt implementing regulations under the Treaty of Lisbon as well, even though this requires the express conferral of a competence in the basic instrument (the legislative act). This gives rise to a twilight zone because conferring an implementing power of a general nature also constitutes – if we interpret it properly – a delegation of powers within the meaning of Article 290 TFEU. And then the delegation conditions apply as well. Or do they not? In any case, the Commission is not independently competent under the Treaty to adopt generally binding implementing regulations, even though some writers, such as Piris and Ponzano, assume – based on the logic of the French and Italian constitutional systems – that EU law confers independent implementing powers on the Commission.⁵² Article 291(2), however, requires that the power to adopt implementing acts be *conferred* to the Commission. If this power relates to the adoption of generally binding rules (and this will usually be the case where implementing conditions are made), Article 290 applies to the foregoing by definition.⁵³ This appears to be an inevitable effect of the system opted for.

In the Communication of December 2009 on the implementation of Article 290, the Commission reduces the issue to a game of words (on purpose, I believe) by saying that an implementing act cannot be a delegated act because an act can never be classified under two headings at the same time. In the Commission’s view, implementing acts are not based on any legislative or quasi-legislative power, it is merely an executive act.⁵⁴ The Commission wants to have a free rein here and – once again – keep the Member State representatives in the comitology system in the future. This is why the Commission is anxious to avoid the ‘delegation’ element in its communication. If, however, we assume that the operation of Article 291 TFEU includes the Lamfalussy process, as did the authors of the Treaty of Lisbon, this means that there is indeed delegation for the purpose of adopting binding acts of general application. Incidentally, what does this Lamfalussy process entail? Below, I will deal with this process briefly.

⁴⁹ ‘Delegation judgment’ of the CJEC, Case 16/88 [1989] ECR, 3547.

⁵⁰ Jorna (2004), 27.

⁵¹ Jorna discussed the equivalent Art. I-37 from the constitutional treaty.

⁵² See Piris (2006) and Ponzano (2008) and n. 28 of this contribution.

⁵³ See also Jorna (2004), 27.

⁵⁴ See pp. 3 and 4 of the Communication.

4.1. LAMFALUSSY

In the EP's view,⁵⁵ Article 291(2) also codifies the Lamfalussy method or process, as it is called.⁵⁶ The crux of the Lamfalussy process is that, after having transposed directives in their own specific way, the Member States should make the relevant national legislation more uniform through a four-level system of further, coordinated implementation rules. The idea is that those responsible for implementing a directive should join forces with the Commission for the purpose of creating a harmonized regime of implementing rules based on good examples and best practices, which the Commission will subsequently lay down in an implementing instrument applicable to all of them. In this way, the Union legislator gradually learns from the implementing practice, which it then lays down in writing.

The Lamfalussy process has been developed by a committee of wise men (chaired by a baron of the same name) in the field of financial legislation. The process consists of four levels of increasing specificity, which enable implementing acts (implementing standards) to be developed in a flexible manner. In the context of this process, the European Commission seeks the advice of experts or specialized committees (not necessarily composed of Member State representatives) in adopting uniform implementation standards or conditions. Since this process is not too democratic in nature (experts who draft rules without any direct or indirect democratic legitimacy), Article 291(2) TFEU instructs the Council and the Parliament to adopt general rules and principles in a regulation relating to the mechanism of control by Member States of the Commission's exercise of implementing powers. Again, the Commission anticipates the arrival of comitology new style. And on this subject, too, the Szájer report of the EP is very outspoken. These general rules and principles cannot or should not be a repeat of the old comitology system, according to the EP.

4.2. ALIGNING COMITOLGY TO ARTICLE 291 TFEU

On 9 March of 2010, the Commission put forward a proposal that implements Article 291 TFEU by laying down rules and general principles concerning mechanism for control by Member States of the Commission's exercise of implementing powers.⁵⁷ In effect, this proposal amends the existing Comitology Decision of the Council by aligning it to the provisions of the Lisbon Treaty. The proposal basically maintains the Committee structure of the former Comitology Decision, although joining the old management and regulatory procedures into one new 'examination' procedure. The advisory procedure is the general procedure, and the examination procedure can only be used in specified circumstances.⁵⁸ In its report, the EP – now in the game because the old comitology decision is cast in the

⁵⁵ See the Szájer rapport, 1 (in the recitals).

⁵⁶ Named after the Commission of the same name. For this Commission's report, see 'Final Report of the Committee of Wise Men (Lamfalussy Report) on the Regulation of European Securities Markets', Brussels, 15 Feb. 2001.

⁵⁷ Com(2010) 83 final.

⁵⁸ See Art. 2 of the proposed Regulation (common agricultural and fisheries policies, environment, security, and safety of health of humans, animals, or plants and common commercial policy).

form of a proposal for a regulation – in general terms conferred with the principles of the proposal.⁵⁹ The issue of whether or not the conferral of an implementing power is an act of delegation is not addressed.

5. DELEGATION BUILDS ON TRUST

One of the many management aphorisms is ‘delegation means accepting that others will make mistakes in your name’. This is a silly example, but it lies at the core of a delegation relationship. Delegation of powers is a way of giving confidence. This is the only way in which an implementing legislator can adopt delegated or implementing acts in a fast and flexible manner. In most parliamentary systems, the supervision of rules adopted by the administration through delegation is mostly part of the normal control and accountability structures, occasionally supplemented by the duty to inform each other at an early stage. Distrust of delegation relationships often results in heavy control structures, which may outweigh any advantages of delegation (fast and expert solutions).

Apparently, this is exactly what is happening to the new delegation and implementing standards of the TFEU. It is a good thing that a new structure has replaced the outdated system of Article 202 EC Treaty, even though there are still some unanswered questions about the relationship between acts performed under Article 290 and those performed under Article 291 TFEU. For example, what is a sensible way of involving Member States in the process of adopting delegated rules by the Commission (comitology) or the question whether the delegation of the power to adopt implementing acts of general application also constitutes an act covered by Article 290 TFEU? These are difficult questions, and the various EU institutions hold fundamentally different views on this issue. As a result, an even greater risk is lurking in the background: differences of opinion among the EP, the Commission, and the Council about how the adoption of delegated and implementing acts should be monitored. We are facing the threat of an up-down game between the Council and the EP, which may well result in a crushing defeat for the Commission and other side effects, such as loss of legitimacy of EU legislation in the Member States and non-compliance. If, on the other hand, the Council does not succeed in suppressing the comitology reflex and the EP thinks that it recognizes the comitology ghost in all proposals made, this may paralyze the process of adopting delegated rules as well. The EP, for instance, will increasingly object to provisions allowing for delegation, thus crippling timely and effective legislative responses in some domains and complicating implementation. A re-emergence of comitology under the guise of consultation – as the Commission proposes – may also ultimately water down and undermine the democratic control of delegated legislation by the EP and add to the legitimacy problems of the EU institutions as well. There are no easy answers here, but what is apparent is that the institutions need to

⁵⁹ Committee on Legal Affairs’ Draft report on the proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers 2010/0051(COD) of 20 May 2010.

invest in ways and methods that allow for mutual trust in the long run, trust that is needed to operate the Lisbon delegation system. Maybe the EP needs to be co-consulted together with the experts from the Member States during the preparation of delegated legislation; maybe the delegation procedures need to be detailed in an interinstitutional agreement.

The EP – in a legislative resolution adopted on 5 April – rallied for the latter option. The EP resolution of April 2010 requires a new interinstitutional agreement on delegated acts that provides for consultations on equal footing in the preparation and drawing-up of delegated acts, mutual exchanges of information, in particular, in the event of a revocation, arrangements for the transmission of documents, minimum periods for objection by Parliament and the Council, computation of time periods, and the publication of acts in the Official Journal at different stages in the procedure.⁶⁰ And then there is the past to consider. The new delegation system should, in the eyes of the EP, also cover the already existing *acquis*. Parliament calls upon the Commission to present as a matter of priority the legislative proposals needed to adapt the *acquis* to the provisions of Articles 290 and 291 TFEU. This entails a retroactive eradication of all *comitology* instruments, in the eyes of Parliament. As a first priority, the Commission needs to adapt the *acquis* in policy areas that, prior to the entry into force of the Treaty of Lisbon, were not subject to the co-decision procedure. This last part will prove a tall order to meet, no doubt. One can only wait and see what the reaction of the Commission and Council will be. On the other hand, it may – as an unintended side effect – be beneficial to the Commission's rolling simplification programme, which seemed to be falling behind schedule anyway.⁶¹ What the EP's resolution does show is that the effect of distrust in delegation may result in an overly complex control procedure. Especially the co-consultation on draft delegated legislation may compromise the response time of the Commission, because it will undoubtedly result in negotiations between Parliament and Council.

6. DELEGATION IS A MATTER OF CONFIDENCE

In October 2010, a way out was found in the form of a compromise that is enshrined in the new Framework Agreement on relations between the European Parliament and the European Commission.⁶² Under its point 15, the Commission is required to provide full information and documentation on its meeting with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. One down for the Commission one could say. But point 15 continues. 'If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.' The line is phrased very carefully, and gives the Commission the discretion it is entitled to under the Article 291 TFEU-prerogative. On the other hand – seen from a more political perspective – the framework agreement opens the gate for

⁶⁰ European Parliament resolution of 5 May 2010 on the power of legislative delegation (2010/2021(INI)).

⁶¹ <http://ec.europa.eu/governance/better_regulation/simplification_en.htm#_rolling>.

⁶² OJ L 304, 48.

Parliament to build on its own comitology system. Of course this is not intended, but it will prove hard – again politically – for the Commission to adopt a restrictive policy on the admittance of Parliament’s experts in comitology procedures. Annex I to the agreement tries to keep the lid on by stating that meetings of *existing* comitology committees (i.e. the ones established prior to the Lisbon Treaty) are excluded from Parliaments overview under the Framework agreement. The Commission however commits itself to examine how pre-Lisbon acts and comitology procedures of the Union can be adapted to the new regime of delegated acts introduced by Article 290 TFEU. And there was another important step: in February 2011 a new – limited – Regulation on comitology 2011⁶³ was adopted, replacing Council decision 1999/468/EC (the original comitology decision). The 2011 regulation is limited to implementing acts (Article 291 TFEU) and does not cover delegated acts (Article 290 TFEU). The new regulation provides for an ‘advisory’ procedure (Article 4) and an ‘examination’ procedure (Article 5). When a committee delivers a negative opinion on a draft implementing measure under examination, the Commission cannot adopt it, but may amend it or refer it to an appeal committee for further deliberation (Article 6). In exceptional cases the Commission can adopt a measure which received a negative opinion but it needs to refer it to the appeal committee which needs to ratify it (Article 7). Because implementing measures with a general scope ex-Article 291 TFEU can have the same binding effects as delegated legislation the regulatory procedure with scrutiny applies (Article 11). Under this procedure the European Parliament and the Council can review draft implementing measures (or draft delegated acts for that matter) and object to them, if they feel it exceeds the implementing powers provided for in the basic act.⁶⁴ This regulatory procedure with scrutiny will be the uniform procedure for both delegated and implementing acts in the near future (point 51 of the Framework agreement).

All’s well that ends well? The new system is a complicated system, and we need to wait and see what will happen. One the one hand it is good thing a compromise was reached, on the other hand the system is complicated, cumbersome maybe and will – in itself – not stop the debate on who ultimately and politically controls the Union’s large corpus of delegated legislation and implementing measures (estimated at 90% of the total volume of EU legislation): the Commission, the Member States or Parliament? And then there is the pending debate on draft delegated legislation: will the regulatory procedure with scrutiny suffice? Taking an optimistic view one can argue that the stalemate positions of spring 2010 were overcome quite quickly with the operational truce of the framework agreement and new comitology decision. On a more pessimistic note one might be right in predicting that the fight over delegated legislation and implementing measures has not stopped with the new arrangements, but that it has only just begun.

⁶³ Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 13. This Regulation replaces the lapsed Proposal for a Regulation of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, COM(2010) 83 final of 2010.

⁶⁴ The procedure only applies when the basic act was adopted under the ordinary legislative procedure.

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