

DEALING WITH A ZOMBIE IN EU LAW

The Regulatory Comitology Procedure with Scrutiny

Joined Cases T-261/13 and T-86/14 *Netherlands v. Commission*, EU:T:2015:671

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§1. INTRODUCTION

While the case *Netherlands v. Commission* deals with a controversy in the specific area of statistical cooperation, it is relevant for almost every area of EU law because the dispute actually revolved around the limits to the Commission's power when it implements or supplements legislative acts. Although the case was ruled some six years after the entry into force of the Lisbon Treaty, it still dealt with a pre-Lisbon comitology procedure. As will be shown, the case neatly illustrates the difficulties in putting into effect the Lisbon Treaty's reform in the area of executive decision-making and specifically the issue which Craig dubbed as the 'transitional classification problem'.¹

§2. PRELIMINARY REMARKS ON COMITOLGY

In order to properly understand the legal issues posed by *Netherlands v. Commission* it is necessary to briefly present the comitology system, pre- and post-Lisbon.² Pre-Lisbon, the comitology system found its legal basis in ex Article 202 EC, whereby the legislator (actually the Council) could confer implementing powers on the Commission. When

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¹ P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', 36 *European Law Review* (2011), p. 675–677. In relation to this issue, however, Craig stressed that the scope of Article 290 TFEU encompassed, but was also broader than that of the PRAC (see footnote 37 below). However, the case presently discussed suggests that the scope of the PRAC would not be restricted to Article 290 TFEU either, the latter not completely encompassing the PRAC.

² For an earlier discussion of this topic in this Journal, see Z. Xhafferri, 'Delegated Acts, Implementing Acts, and Institutional Balance Implications Post-Lisbon', 20 *Maastricht Journal of European and Comparative Law* (2013), p. 558–561.

exercising these powers, the Commission was assisted by committees composed of national experts (hence comitology) and the notion of ‘implementation’ was given a broad meaning, encompassing both implementation in the strict sense as well as amending formal legislation. The precise procedure to be followed by the Commission was laid down in the (second) comitology decision, which contained a number of different procedures. The weightiest of those was the regulatory procedure with scrutiny (PRAC), which allowed both the Council and the Parliament to veto a draft decision of the Commission (even if the committee had expressed a positive opinion on the draft). However, the PRAC only applied when a legislative act adopted pursuant to the co-decision procedure was amended on its non-essential elements through a measure of general scope, where amending could mean ‘deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements.’³

The Treaty of Lisbon reformed the comitology system by making a distinction between implementation in the strict sense through implementing acts (Article 291 TFEU) and the amendment or supplementation of legislative acts through delegated acts (Article 290 TFEU). The procedures of the (second) comitology decision were then also replaced by new ones through the comitology regulation adopted on the basis of Article 291(3) TFEU. The exception here was the PRAC, since in most cases the references (in legislative acts) to the PRAC should not be replaced with a reference to a comitology procedure (of the new comitology regulation), but with a reference to the delegated act under Article 290 TFEU, for which there is no horizontal instrument.⁴ Updating these legislative acts to the new legal reality of the Lisbon Treaty would thus require an amendment of every single one of these legislative acts, a process which the Commission had wanted to conclude before the end of the 7th parliamentary term in 2014 (compare with the below). However, through the Council, Member States have obstructed that process as the PRAC allows them a much greater say in the decision-making procedure than that foreseen in the procedure to adopt delegated acts. In a way, the PRAC therefore lives on as a zombie in EU law: dead but not quite.

§3. FACTS OF THE CASE AND PLEAS

The facts leading to the controversy in *Netherlands v. Commission* are rather straightforward. To ensure that consumer price indices (calculated by the Member

³ See Article 2(2) of Council Decision (EC) 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision (EC) 2006/512 amending Decision 1999/468/EC, [2006] OJ L 200/11.

⁴ See B. Daiber, ‘EU-Durchführungsrechtssetzung nach Inkrafttreten der neuen Komitologie-Verordnung’, 47 *Europarecht* (2012), p. 241; D. Bianchi, ‘La comitologie est morte! vive la comitologie! – Premières réflexions sur l’exécution du droit de l’Union après le Traité de Lisbonne – L’exemple de la Politique agricole commune’, 48 *Revue trimestrielle de droit européen* (2012), p. 96.

State authorities and then forwarded to the Commission) are comparable, the Council adopted Regulation 2494/95 in 1995.⁵ Following the entry into force of the Amsterdam Treaty, Regulation 2494/95 was amended by a legislative act adopted pursuant to the co-decision procedure.⁶ Finally, in 2009 the Regulation was amended again to allow further measures to be adopted pursuant to the PRAC,⁷ the procedure created by the 2006 amendment to the (second) comitology decision.⁸

Through the PRAC, the Commission adopted two regulations in 2013, one amending an earlier Commission measure and one directly implementing (in the pre-Lisbon sense) Regulation 2494/95.⁹ As these two Commission regulations were adopted following the PRAC, rather than one of the procedures provided for under the comitology regulation, they were not adopted as ‘implementing’ acts as prescribed by Article 291(4) TFEU. These two acts empowered the Commission (more specifically Eurostat) to adopt guidelines and manuals constituting the methodological frameworks to be used by the Member States’ authorities to calculate (in a harmonized way) inflation indices. However, the two Commission regulations simply empowered Eurostat to adopt these guidelines and manuals without prescribing a clear procedure for their adoption. The Netherlands took issue with this, arguing (i) that only the Commission (but not Eurostat) could be empowered; (ii) that the guidelines, which it found to be binding legal acts, should be adopted in the form of decisions, directives or regulations (as foreseen in Article 288 TFEU); (iii) that the Commission should have prescribed the PRAC to adopt the guidelines and manuals since that is the procedure prescribed by the basic legislative act or alternatively (iv) that one of the procedures of the comitology regulation ought to have been prescribed.¹⁰

§4. JUDGMENT

The General Court focused exclusively on the third of these pleas,¹¹ and rephrased the controversy before it as follows:

⁵ Council Regulation (EC) 2494/95 concerning harmonized indices of consumer prices, [1995] OJ L 257/1.

⁶ Regulation (EC) 1882/2003 of the European Parliament and of the Council adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, [2004] OJ L 284/1.

⁷ Regulation (EC) 596/2009 of the European Parliament and of the Council adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny, [2009] OJ L 188/14.

⁸ See Council Decision (EC) 1999/468.

⁹ Commission Regulation (EU) 119/2013 amending Regulation (EC) No 2214/96 concerning harmonised indices of consumer prices (HICP), [2013] OJ L 41/1; Commission Regulation (EU) 93/2013 laying down detailed rules for the implementation of Council Regulation (EC) No 2494/95, [2013] OJ L 33/14.

¹⁰ See Joined Cases T-261/13 and T-86/14 *Netherlands v. Commission*, EU:T:2015:671, para. 32.

¹¹ *Ibid.*, para. 35.

The pleas relied on by the Kingdom of the Netherlands concerning the absence of recourse to the regulatory procedure with scrutiny therefore raise the question of whether Regulation No 2494/95 has been correctly implemented by the Commission where, in the contested provisions, the Commission has entrusted Eurostat with the task of establishing and updating the methodological frameworks for calculating price indices without providing for the application of the regulatory procedure with scrutiny.¹²

Surprisingly however, instead of first testing the contested provisions in the light of the second comitology decision which defines the PRAC's field of application, the Court found it expedient to refer to Article 291 TFEU. It also referred to the Court of Justice of the European Union's (CJEU) finding in *Biocides*¹³ that an implementing act under Article 291 TFEU should be used when the Commission is called upon 'to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States'.¹⁴ In addition, following the CJEU's decision in *Eures network*,¹⁵ the Commission is entitled to adopt all measures which are necessary or appropriate for the implementation of a legislative act in so far as these measures comply with the legislative act's essential general aims.¹⁶ Applying this post-Lisbon case law on Article 291 TFEU to the guidelines and manuals which Eurostat was called upon to adopt, the General Court concluded that they indeed constitute measures implementing the legislative regulation.¹⁷ As a result, it found that the guidelines and manuals should be adopted following the PRAC, just like the contested Commission regulations themselves.¹⁸ In the remainder of its judgment, the Court refuted the Commission's arguments to the contrary.

§5. COMMENT

The present case is a perfect illustration of the Lisbon Treaty's unfulfilled promise of simplification and enhanced transparency, *in casu* in executive rule-making. While the introduction of a distinction between implementing and delegated acts was theoretically sound and therefore to be welcomed,¹⁹ the Treaty's reform has not been followed up in practice. Of course, commentators had already noted early on that applying the distinction

¹² Ibid., para. 41.

¹³ Case C-427/12 *Commission v. Parliament and Council*, EU:C:2014:170.

¹⁴ Joined Cases T-261/13 and T-86/14 *Netherlands v. Commission*, para. 43.

¹⁵ Case C-65/13 *Parliament v. Commission*, EU:C:2014:2289.

¹⁶ Joined Cases T-261/13 and T-86/14 *Netherlands v. Commission*, para. 45.

¹⁷ Ibid., para. 48.

¹⁸ Ibid., para. 50.

¹⁹ See inter alia D. Bianchi, 48 *Revue trimestrielle de droit européen* (2012), p. 83. For an argument in favour of the Lisbon Treaty's distinction in constitutional terms, see R. Schütze, *European constitutional law* (Cambridge University Press, 2012), p. 238–240.

between Articles 290 and 291 TFEU in practice might not be an easy undertaking.²⁰ A delegated act supplementing a legislative act, or an implementing act implementing a legislative act might, after all, be difficult to distinguish because in both cases something is ‘added’ to the (basic) legislative act.²¹ This basic difficulty posed itself in the present case and it was further complicated by the aggravating factor that the Court had to deal with the PRAC, a procedure which finds its origins under Article 202 EC but which still lives on post-Lisbon as long as the many references to the PRAC in secondary legislation have not been updated in the light of Articles 290 and 291 TFEU (compare above).

The Court in its judgment then seems driven by a concern to uphold the Lisbon Treaty’s reform of Articles 290 and 291 TFEU, oblivious of the fact that the PRAC does not come under either of both Articles. Indeed, the question *in casu* was whether the PRAC ought to be used to adopt the guidelines and manuals. To answer this question, one first ought to look at the PRAC’s field of application as defined by the second comitology decision. According to the latter, the measures which may be adopted through the PRAC should be measures of general application which delete certain non-essential elements of a legislative act (not relevant *in casu*) or which supplement the legislative act by adding new non-essential elements.

Had the Court taken this approach, it would have had to address the question of whether the guidelines and manuals (which clearly would not delete non-essential elements of the basic legislative act) would supplement the legislative act. Here it is worth stressing the difference in wording between Article 2(2) of the comitology decision (defining the PRAC’s field of application) and Article 290 TFEU. Whereas the latter refers to ‘amending’ and ‘supplementing’ as two different techniques, a distinction recently stressed by the Court in the *Connecting Europe Facility* case,²² the

²⁰ Hofmann for instance noted that the two Articles give expression to the traditional idea of executive federalism (although this is really only the case for Article 291 TFEU), whereas the implementation of EU law in practice is much more complex and depends on networks and close cooperation between national and EU executive actors. The distinction would thereby simply be outdated. See H. Hofmann, ‘Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality’, 15 *European Law Journal* (2009), p. 497–499. Stelkens notes that Article 291(2) TFEU does not prevent the legislator from laying down itself the detailed provisions ensuring a uniform implementation of its legislation in the basic act and concludes from this that the legislator can also delegate this power under Article 290 TFEU. See U. Stelkens, ‘Art. 291 AEUV, das Unionsverwaltungsrecht und die Verwaltungsautonomie der Mitgliedstaaten -zugleich zur Abgrenzung der Anwendungsbereiche von Art. 290 und Art. 291 AEUV’, 47 *Europarecht* (2012), p. 542. Still differently, Craig and Bianchi stressed that both an implementing act and a (supplementing) delegated act may ‘add’ something to a basic (legislative) act. See P. Craig, 36 *European Law Review* (2011), p. 672–674; D. Bianchi, 48 *Revue trimestrielle de droit européen* (2012), p. 93.

²¹ See P. Craig, 36 *European Law Review* (2011), p. 672–674; D. Bianchi, 48 *Revue trimestrielle de droit européen* (2012), p. 93; Z. Xhaferri, 20 *Maastricht Journal of European and Comparative Law* (2013), p. 563–564.

²² Case C-286/14 *Parliament v. Commission*, EU:C:2016:183. While the Court was right to distinguish the two, it is doubtful whether the distinction is anything more than a legal nicety, since, materially, there does not seem to be anything which a supplementing delegated act could not introduce which an

comitology decision refers to amending as ‘inter alia (...) deleting some (...) elements or (...) supplementing the instrument by the addition of new (...) elements’. The awkward phrasing was the result of a disagreement among some Member States about the type of measures which ought to be adopted using the new procedure. While all Member States agreed that the PRAC should be used to adopt quasi-legislative measures,²³ some Member States preferred a minimalistic approach restricted to measures that formally change a legislative act, while others wanted to include quasi-legislative measures, in so far as they are not implementing measures, supplementing a legislative act.²⁴ With the backing of the European Parliament, the second group got the upper hand even if it was already clear at the time that distinguishing between quasi-legislative measures supplementing a legislative act and implementing measures supplementing a legislative act would sometimes be difficult.²⁵ Only the former would then come under the PRAC as was stressed by the Council Legal Service in its opinion on the 2006 amendment to the second comitology decision.²⁶

The question which the General Court then ought to have addressed was whether the guidelines and manuals to be adopted by Eurostat, supplementing Regulation 2494/95, would amount to quasi-legislative measures or instead whether the regulation would merely be implemented, that is, given practical effect.²⁷ They should only be adopted

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- amending delegated act could (the exception being the introduction of provisions which contravene provisions of the basic legislative act). The CJEU’s distinction between amending and supplementing in *Connecting Europe Facility* also sits uneasily with its broad (non-formal) definition of ‘amending’ in *Visa Reciprocity*. See Case C-88/14 *Commission v. Parliament and Council*, EU:C:2015:499, para. 42–43. For a discussion of this case, See M. Chamon, ‘The dividing line between delegated and implementing acts, part two: The Court of Justice settles the issue in *Commission v. Parliament and Council* (Visa reciprocity)’, 52 *Common Market Law Review* (2015), p. 1617–1634. These cases show that depending on how one understands ‘amending’, i.e. in a formal or a substantive sense, there may (not) be an overlap between ‘amending’ and ‘supplementing’. Only if it is understood in a substantive sense can the overlap referred to by Xhaferri exist, see Z. Xhaferri, 20 *Maastricht Journal of European and Comparative Law* (2013), p. 563.
- ²³ G. Schusterschitz and S. Kotz, ‘The Comitology Reform of 2006: Increasing the Powers of the European Parliament Without Changing the Treaties’, 3 *European Constitutional Law Review* (2007), p. 81. This of course raises the question of what should exactly be understood by the notion of quasi-legislative measures. This question is not only relevant in distinguishing Articles 290 and 291 TFEU, since the notion has also recently been relied on by Lenaerts to distinguish the executive acts which only the Commission may adopt from the acts which the decentralized agencies may adopt. See K. Lenaerts, ‘EMU and the EU’s constitutional framework’, 39 *European Law Review* (2014), p. 762.
- ²⁴ M. van der Plas, ‘Rol Europees Parlement fors toegenomen door nieuw Comitologiebesluit’, 54 *Tijdschrift voor Europees en economisch recht* (2006), p. 413. Discussing the different interpretations of ‘quasi-legislative’ measures, see M. Szapiro, ‘Comitologie: rétrospective et prospective après la réforme de 2006’, *Revue du Droit de l’Union européenne* (2006), p. 571–574.
- ²⁵ M. van der Plas, 54 *Tijdschrift voor Europees en economisch recht* (2006), p. 414.
- ²⁶ Council Legal Service, Opinion on the amended proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (9087/04), 5923/06, p. 12–13.
- ²⁷ The French notion of ‘mettre en œuvre’ better conveys this meaning than the English notion of ‘implementation’. Compare for instance para. 30 of the English and French language versions of the Council Legal Service Opinion 5923/06.

pursuant to the PRAC if they are quasi-legislative measures. In fact, the General Court addressed this question but subsequently drew the wrong conclusions. It found that Eurostat's guidelines and manuals would come under the Article 291 TFEU notion of implementation ignoring the fact that acts adopted pursuant to the PRAC, in principle, can never come under the Article 291 TFEU notion of implementation as defined by the Court in *Biocides*.

Had the General Court followed the line of reasoning suggested here, it would have been faced with a similar situation as the one which was at issue before the CJEU in *Common Market Fertilizers*.²⁸ In that case, the Commission had been empowered by the Council to adopt measures, pursuant to the regulatory comitology procedure, implementing (under ex Article 202 EC) the EC Customs Code. In one of these implementing measures, the Commission granted itself a further power to adopt individual decisions (on remission and repayment of customs duties) without having to go through the regulatory comitology procedure. *Common Market Fertilizers*, a company affected by such an individual decision, argued that the Commission had thereby acted *ultra vires* and that it should have prescribed the regulatory comitology procedure to adopt such individual decisions. The CJEU however referred back to the (second) comitology decision which prescribes that the regulatory procedure is to be used to adopt measures of *general* application.²⁹ As a result, that procedure could not be used to adopt *individual* decisions and the Commission was free to prescribe a different procedure, as the Council had been silent on this in its legislative act.³⁰ In this regard, Kollmeyer rightly argues that the Court should still have found a problem in the Council's legislative regulation in so far as it allowed the Commission to adopt these individual implementing measures without formal recourse to one of the other procedures of the comitology decision (the management or advisory procedure), the comitology decision being an act of *infra-constitutional* (organic) law.³¹

By analogy then, the legislator *in casu* had prescribed the PRAC, but since that procedure can only be used to adopt measures which *supplement* the legislative act, while Eurostat's guidelines and manuals are *implementing* (in the strict sense) measures, it could not be applicable. Instead, because Eurostat's measures are necessary to uniformly implement the rules on consumer price indices (contained in the binding legislative regulation and in the Commission's regulations), Article 291 TFEU applies and one of the procedures foreseen in the comitology regulation (adopted pursuant to Article 291(3) TFEU) ought to have been prescribed. This way, the Netherlands' third plea should have

²⁸ See Case C-443/05 P *Common Market Fertilizers SA v. Commission*, EU:C:2007:511.

²⁹ See Article 2(1)(b) of Decision 468/1999.

³⁰ Case C-443/05 P *Common Market Fertilizers SA v. Commission*, para. 125, 134.

³¹ See D. Kollmeyer, *Delegierte Rechtssetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV* (Nomos, 2015), p. 317–318. In addition, Kollmeyer notes that the Court might not have taken issue with this because the procedure which the Commission had laid down *de facto* came down to the comitology advisory procedure (without being formally indicated as such).

been rejected but its fourth plea would have been upheld and the General Court would have properly upheld the Lisbon Treaty's reform in the area of executive decision-making.

A. THE PRAC POST-LISBON

Although no new references to the PRAC have been introduced in the body of (formal) EU legislation since the entry into force of the Lisbon Treaty over six years ago, the legislation currently in force still contains ample references to the procedure. As noted above, the Commission had initially planned to have updated the *acquis* to the new reality of Articles 290 and 291 TFEU by the end of the 7th parliamentary term in 2014.³² However, because of Member States' resistance in the Council, that proved to be more difficult than foreseen. The three proposals which the Commission made in 2013 to align the remaining legislative acts (roughly 220) referring to the PRAC³³ remained in limbo in the Council and, following the adoption of its 2015 work programme, the new Commission decided to withdraw these proposals, indicating that the issue would be addressed in the new inter-institutional agreement on Better Regulation.³⁴ That inter-institutional agreement of December 2015 provides that the Commission will propose a new alignment by the end of 2016.³⁵ In the meantime, the PRAC applies in diverse areas – some 165 PRAC measures were still adopted in 2014, mainly in the areas of 'Health and Food Safety', 'Mobility and Transport' and 'Internal Market, Industry, Entrepreneurship and SMEs'.³⁶

The refusal to align the pre-Lisbon legislation to Articles 290 and 291 TFEU stands in stark contrast with the institutions' commitment to 'Better regulation' and it remains to be seen whether any alignment through a(n) (set of) omnibus act(s) will ever be achieved. After all, it should be stressed again that the power which the Member States in Council wield pursuant to the PRAC far surpasses their power when delegated acts (or implementing acts) are adopted.³⁷ While a comprehensive comparison between the

³² See the statements by the Commission annexed to the comitology regulation, [2011] OJ L 55/19.

³³ See COM(2013) 451 final; COM(2013) 452 final; and COM(2013) 751 final. See also M. Chamon, 'Clarifying the divide between Delegated and Implementing Acts? Case C-427/12, European Commission v. European Parliament and Council of the European Union', 42 *Legal Issues of Economic Integration* (2015), p. 177–178.

³⁴ See Annex II to the Commission Work Programme 2015, p. 11–12.

³⁵ See para. 21a of the Provisional text of the proposed interinstitutional agreement on Better Regulation, p. 8.

³⁶ See Table IV in the Commission's report on the working of Committees in 2014, COM(2015) 418 final, p. 7.

³⁷ Comparing the PRAC to Articles 290 and 291 TFEU, one would assume that the delegated act's field of application minimally encompasses all PRAC measures (without being restricted thereto) since both are used when non-essential elements of legislative acts are amended or supplemented (see also footnote 1 above). This was also advocated by the Commission and Parliament. See European Commission, COM(2009) 673 final, p. 3; European Parliament, Resolution on the power of legislative delegation of 5 May 2010, [2011] OJ C 81E/6, para. 18. However, in one of its three 2013 proposals to align the PRAC to

PRAC and the procedures under Article 290 and 291 TFEU cannot be elaborated here,³⁸ it suffices to note that under the PRAC there is a mandatory involvement of Member State experts before an act is adopted (unlike for the delegated act)³⁹ and these experts' opinions constrain the Commission much more than the opinions adopted pursuant to the comitology procedures under the present comitology regulation. In addition, depending on the opinion of the committee, the PRAC allows the Commission to be divested of the power to adopt an act, which instead may be adopted by the Council. Again this is different under Articles 290 and 291 TFEU whereby delegated acts are always adopted by the Commission and the comitology procedures only foresee the Commission as the authority adopting implementing acts.⁴⁰

In practice, a certain discrepancy may be noted between the importance attached by the Member States to their involvement through the PRAC and the odd instances in which they actually succeed in making use of their powers. Between 2010 and 2014 some 830 measures have been adopted pursuant to the PRAC.⁴¹ By contrast, only five measures were vetoed by the Council (under the PRAC) during that period.⁴² In addition,

Articles 290 and 291 TFEU, the Commission included a list of legislative acts referencing to the PRAC which ought to be amended with reference to the comitology examination procedure foreseen in the comitology regulation. See Annex II of COM(2013) 751 final.

³⁸ For a discussion, see inter alia, C. Blumann, 'À la frontière de la fonction législative et de la fonction exécutive: les 'nouveaux' actes délégués', in G. Cohen-Jonathan et al. (eds.), *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué* (Daloz, 2010), p. 140–144.

³⁹ Note however that the 2016 Common Understanding (between the political institutions) on delegated acts has re-introduced a de facto advisory comitology procedure for the adoption of delegated acts. See point 4 of the Common Understanding, annexed to the Interinstitutional Agreement on Better Law-Making, [2016] OJ L 123/1.

⁴⁰ Obviously, Article 291(2) TFEU still allows the Council to adopt implementing acts 'in duly justified specific cases', but these acts are never subjected to the procedures laid down in the comitology regulation.

⁴¹ Own calculations based on the numbers provided in the Commission's annual comitology reports, see COM(2011) 879 final, p. 6; COM(2012) 685 final, p. 9; COM(2013) 701 final, p. 7; COM(2014) 572 final, p. 9; COM(2015) 418 final, p. 8.

⁴² *Ibid.* Even when the Council uses its veto, it does not necessarily have good political or legal reasons to do so. This is illustrated by the Council's veto to a proposed amendment of Commission Regulation 282/2008. To identify the procedure to be used to grant certain authorizations, this Regulation originally referred back to one of the articles of its own basic regulation (which referred to a procedure in the comitology decision), instead of referring directly to the comitology decision. The article of the basic regulation thereby originally referred to the regulatory comitology procedure but following an amendment in 2009 this was changed into a reference to the PRAC, which had unintended consequences for the authorization procedure under Regulation 282/2008. The Commission thus proposed to rectify this, amending Regulation 282/2008 so that it would refer to another article in the basic regulation which still referred to the regulatory comitology procedure (to be read as the examination comitology procedure following the entry into force of the comitology regulation). Regulation 282/2008 would therefore not itself have referred to the (abolished) regulatory comitology procedure, but the Council Legal Service ignored this and seemed to make no distinction between a Commission regulation referring to a basic legislative act which still refers to the abolished procedure and a Commission regulation referring directly to an abolished procedure. See Council, Doc. 14919/14. The Council followed its Legal Service and used its veto. See Council, Doc. 14975/14. The Commission later adopted an identical measure which referred directly to the new examination procedure rather than indirectly

in those cases where the Commission submitted a proposal to the Council as a result of there being no (or a negative) opinion of the Committee, the Council rarely achieves the necessary qualified majority to adopt the executive measure itself.⁴³ Most of the time the Council cannot find a qualified majority for or against the measure and the Commission is left to adopt it,⁴⁴ including in sensitive cases such as for instance the use of lactic acid in beef meat processing (a practice similar to that of chlorine chickens).⁴⁵

As noted above, the Commission will present a new proposal for an alignment of the PRAC to the Lisbon Treaty at the end of 2016. It remains to be seen whether the Commission will be able to overcome the Member States' apparent mistrust in it. If not, the PRAC will die a very slow death, only disappearing when each of the legislative acts involved is individually recast or repealed in the 'ordinary' process of the periodical updating of the EU's *acquis*.

§6. CONCLUSION

Had the implementation of the reform through the Lisbon Treaty stayed on course, the PRAC would not have been a subject of debate in 2016, save for historic treaties on comitology. As with other issues coming under Articles 290 and 291 however, the reform of the Lisbon Treaty is much less real than hoped and the pre-Lisbon regulatory comitology procedure with scrutiny seems much more tenacious than imagined.

This means that the Courts are confronted with problems which in reality should not have posed themselves, had the institutions conscientiously implemented the Lisbon Treaty's new framework of implementing and delegated acts. That said, the General Court's decision in *Netherlands v. Commission* should be criticized as well. At first sight, the General Court seems motivated by a concern to uphold Article 291 TFEU but in reality its solution of the case is legally flawed and undermines the Lisbon Treaty's reform as six years after the Treaty's entry into force new (non-legislative) acts still may be created prescribing the use of the PRAC to adopt further measures.

to the old regulatory procedure (to be read as the examination procedure). See Commission Regulation (EU) 2015/1906, [2005] OJ L 278/11.

⁴³ For the few exceptions during the reference period, see Council Directive (EU) 2015/652 on the quality of petrol and diesel fuels, [2015] OJ L 107/26; Council Directive (EU) 2011/97 on the storage of metallic mercury considered as waste, [2011] OJ L 328/49; Council Regulation (EU) No. 333/2011 on certain types of scrap metal cease to be waste, [2011] OJ L 94/2; Council Decision (EU) 2010/252 on Frontex operations, [2010] OJ L 111/20. The latter decision was annulled by the Court in Case C-355/10 *Parliament v. Council*, EU:C:2012:516.

⁴⁴ See Commission Regulation (EU) 2016/293 on persistent organic pollutants, OJ L 55/4; Commission Regulation (EU) 715/2013 on copper scrap ceases to be waste, [2013] OJ L 201/14; Commission Directive (EU) 2013/44 on powdered corn cob, [2013] OJ L 204/49; Commission Directive (EU) 2013/2 on packaging and packaging waste, [2013] OJ L 37/10; Commission Directive (EU) 2012/20 on flufenoxuron, [2012] OJ L 177/25; Commission Directive (EU) 2011/71 on creosote, [2011] OJ L 195/46.

⁴⁵ See Commission Regulation (EU) 101/2013, [2013] OJ L 34/1.

The General Court was right to rely on Article 291 TFEU but it should then also have acknowledged that the PRAC's function is fundamentally different from that of Article 291 TFEU. This would have led the Court to the conclusion that, since Article 291 TFEU applied, one of the procedures in the Comitology regulation should have been prescribed. This way the Lisbon Treaty's reform would have been genuinely upheld.