

Commission on the Loose? Delegated Lawmaking and Comitology after Lisbon

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Abstract

The Treaty of Lisbon has altered the institutional mechanism of the European Union. The introduction of formal hierarchy of legal acts has important implications for the balance of power among the EU institutions. This paper argues that the Commission is likely to enjoy some discretion in delegated lawmaking while remaining in the shadow of the legislators' activism. The Commission has also successfully positioned itself to diminish the influence of comitology committees on the adoption of implementing acts, though a new layer of complexity was added. The possible outcomes of this new institutional battle are analysed in the context of the new challenges to the Community method. Some important inferences of this institutional shift for the debate on the democratic deficit in the EU are also drawn up.

Keywords: comitology, delegated lawmaking, implementing powers, institutional balance, democratic deficit.

1. Introduction

The history of the implementing powers of the European Commission is long and contentious (Bergström 2005; Vos 2009). The Treaty of Lisbon has turned a new page in this history, and the outcome is still pending. This paper studies the possible (and probable) implications of the introduction of a hierarchy of legal acts of the European Union (EU) for the exercise of

implementing powers by the Commission. The previous experiences with the comitology procedures are used to evaluate this reform from a legal institutional perspective.

The first section provides a comprehensive account of the reform first in the Constitutional Treaty, and then in the Treaty of Lisbon. The first delegated acts adopted under the new legal framework are studied. The adopted text of the comitology regulation is also analysed in detail. The second section attempts to outline the potential issues of contention in the new legal regime of delegated and implementing acts adopted by the Commission. It then presents the implications of this reform for the overall institutional balance of the EU. Some important inferences of this institutional shift for the debate on the democratic deficit in the EU are also drawn up. The concluding section provides a summary of the findings and outlines new venues for academic research on the implementing powers of the Commission and its further politicisation.

2. The Legal Framework of Comitology and Delegated Lawmaking in the Constitutional Treaty and the Treaty of Lisbon

The legal framework for the exercise of implementing powers by the Commission has changed dramatically with the entry into force of the Treaty of Lisbon. This section studies in detail the introduction of a hierarchy of legal acts of the EU. The first case of adoption of delegated acts under Art. 290 TFEU is presented and analysed. The new comitology regime as introduced by the adopted text of the new comitology regulation is then studied.

2.1. The European Convention and the Constitutional Treaty

The Laeken declaration of the European Council¹ called in December 2001 for the summoning of a Convention on the Future of Europe. The main issues that were to be discussed in the convention included the simplification of the EU's legislative instruments, the maintenance of interinstitutional balance and an improvement to the efficacy of the decision-making procedure.

The European Convention began its work on 28 February 2002. In September 2002 it was decided that a specific working group would be responsible for providing a model for

¹ Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the future of the European Union, in *Bulletin of the European Union*. 2001, No 12, pp. 19-23.

simplification of the legislative procedures and instruments². The deliberations of the Working Group (IX) on simplification began on 19 September 2002³.

The basis for the work of the Working Group was formed by the opinions of three members of the group - Jean-Claude Piris (Director-General of the Council Legal Service), Michel Petite (Director-General of the Commission Legal Service) and Koen Lenaerts (judge of the Court of First Instance).

The most voluminous opinion was given by Jean-Claude Piris⁴. He proposed the reduction of the legal instruments from 15 to 5 by: replacing framework decisions with directives; abolishing the use of decisions in the area of Justice and Home Affairs (JHA), abolishing the four current meanings of the term "*decision*" and replacing them with a single definition as contained in the former ECSC Treaty, abolishing the "*joint action*" in the area of the Common Foreign and Security Policy (CFSP) and replacing it with the newly defined "*decision*"; abolishing the "*common positions*" (CFSP and JHA) and replacing them with the newly defined "*decision*"; removing the "*common strategies*" from the list of CFSP instruments; and discontinuing the use of the instrument of conventions between Member States in the first pillar and JHA.

Piris claims that it would be unwise to create a general, horizontal relationship between the kind of act and the kind of competence exercised. That kind of restriction would only make sense on a case-by-case basis, in the actual clause conferring competence, where it lays down specific conditions⁵. He also thinks that it would be very difficult to transpose to the Union the customary clear distinction between legislative and executive authority, i.e. between some institutions empowered only to pass laws and others merely implementing legislation or issuing regulations. He claims that the powers conferred on the institutions by the Treaties are so convoluted that such a distinction between legislative and executive authority could not be made without upsetting the existing balance⁶.

² Mandate of Working Group IX on the simplification of legislative procedures and instruments. 17/09/2002 CONV 271/02.

³ The theoretical discussion among the three legal experts in the working group - Jean-Claude Piris, Michel Petite and Koen Lenaerts is reviewed in Bergström and Rotkirch 2003, pp. 48-51.

⁴ Simplification of Legislative Procedures and Instruments, paper submitted by Jean-Claude Piris to Working Group IX on 17 October 2002 (Working Document 06).

⁵ Ibid, p. 16.

⁶ Ibid, p. 20.

In his opinion⁷ the representative of the European Commission, Michel Petite, supports the idea that a clear delineation of powers in the EU is necessary. More specifically he claims that it is the law itself which should specify if implementing measures are necessary at Union level. That would depend in particular on the degree of detail of the law, which is a matter for the legislator alone to decide. Then it would be for the Commission to adopt the implementing measures, by regulation or, in the case of individual measures, by decision. Finally the Commission should be subject to controls by the legislator, the European Parliament (EP) and the Council in the exercise of this executive responsibility⁸. Petite does not specify the character of these forms of control.

The opinion of the third expert⁹, Koen Lenaerts, is particularly original. Lenaerts firstly observes that a clear distinction between the legislative and executive acts of the Union is needed. This distinction, according to Lenaerts, should be based not on the identity of the author of the act, but on the type of procedure followed for its adoption¹⁰. In this sense the acts which include basic policy choices in the sense of the *Köster* judgement of the ECJ¹¹ should be treated as legislative acts and adopted under the co-decision procedure. On the other hand the autonomous regulations of a more technical nature would not justify a direct intervention of the legislator. These acts, which should also be identified, would correctly fall within the second category, and take the form either of “*delegated legislation*”, or of “*executive acts*” *sensu stricto*¹².

The “*delegated acts*” would include the legislation adopted by the Council or, more frequently, by the Commission on the basis of a power granted either in a precise Treaty provision or in a legislative act (first category). In these cases Lenaerts believes that it is necessary to provide for a “*heavy*” comitology procedure (intervention of a regulatory committee or of a management committee) and of a strict control by the EP, which could include a right of call back for the legislator in certain cases¹³.

The “*executive acts*” *sensu stricto* would include acts adopted, on a Community or on a national level, on the basis of a “*legislative*” provision of the Treaties, of a legislative act

⁷ Simplifying Legislative Procedures and Instruments, paper submitted by Michel Petite to Working Group IX on 17 October 2002 (Working Document 08).

⁸ Ibid, p. 7.

⁹ How to Simplify the Instruments of the Union? paper submitted by Koen Lenaerts submitted to Working Group IX on 17 October 2002 (Working Document 07).

¹⁰ Ibid, p. 2.

¹¹ Judgment of the Court of Justice of 17 December 1970, *Köster*, 25/70, ECR 1161, p. 6.

¹² How to Simplify the Instruments of the Union?, *supra* note 9, p. 4.

¹³ Ibid, p. 5.

(adopted in compliance with the co-decision procedure) or of a “*delegated act*”. Lenaerts thinks that for the executive acts thus adopted by the Commission, a “*light*” comitology would suffice (consultative committee), leaving the final word to the Commission, under the control of the EP¹⁴.

Only two months later the result was presented in a final report¹⁵. The Working Group proposed that legislative acts should be adopted in the form of “*laws*” and “*framework laws*”. More importantly, the report made a distinction between “*delegated*” and “*implementing*” non-legislative acts. The main difference, however, was not their qualitative differentiation, but rather a different means for exercising the political supervision over these acts (Bergström and Rotkirch 2003: 54). Thus the important question was about the differences in the exercise of political control over the two types of non-legislative acts.

In respect of the delegated acts a totally new system for political control was introduced. The idea of the Working Group was to encourage the legislator to pay more attention to the essential elements of the legislative act and to delegate more technical issues to the implementing body, while retaining the right to call back the delegation. Three methods of political control were introduced - a right of call-back of the delegation, a period of tacit approval – during which the Council and the EP can object to the delegated act, and a sunset clause – where the delegated act can have a limited period of duration. This setting distanced the institutional framework from the initial idea of Koen Lenaerts, and is much closer to the classical understanding of the separation of powers¹⁶, inasmuch as the three proposed mechanisms of control exclude the comitology procedures. The application of comitology procedures was retained for the executive acts *sensu stricto*.

The Praesidium of the European Convention in its drafts of Art. 23 and Art. 24 of the Constitutional Treaty¹⁷ noted the broad consensus in the European Convention regarding the introduction of a hierarchy of legal acts in the Constitutional Treaty. The distinction between legislative and non-legislative acts was accepted, as well as the distinction between delegated acts and implementing acts *sensu stricto*. The Commission is the only institution to which power may be delegated (Art. 27, para. 1 of the draft). Implementing acts can be adopted only where uniform conditions for the implementation of the Union's binding acts are needed (Art. 28, para. 1 of the draft). The rules for the introduction of control mechanisms over the

¹⁴ Ibid, pp. 5-6.

¹⁵ Final report of Working Group IX on Simplification. 29/11/2002 CONV 424/02.

¹⁶ Bergström and Rotkirch 2003, p. 54.

¹⁷ Praesidium's Draft of Articles 24 to 33 of the Constitutional Treaty (CONV 571/03)

implementing acts would be subject to the legislative procedure – co-decision by the Council and the EP (Art. 28, para. 3 of the draft).

The newly constructed hierarchy of legislative and non-legislative acts, and delegated and implementing non-legislative acts, was reproduced in Articles 33-36 of the final text of the Draft Treaty establishing a Constitution for Europe¹⁸. However, some changes were made to the Working Group proposals. The third method of control over delegated acts – the sunset clause, was removed from the text of Art. 35, para. 2 of the Draft Constitutional Treaty. More notably, the form of control over the adoption of implementing acts is specified further in Art. 36, para. 3 of the Draft Constitutional Treaty. The rules and general principles for the mechanisms for control would be introduced by European laws; but these mechanisms of control would be exercised *solely* by the Member States. This essential amendment in fact denied the EP access to and participation in the control mechanisms. The importance of this setting will be discussed further in the next two sections of this paper.

The Constitutional Treaty¹⁹ reproduced the provisions for non-legislative acts from the Draft Constitutional Treaty (Art. I-35 - Art. I-37 of the Constitutional Treaty). However, the referenda for the ratification of the Constitutional Treaty in France on 20 May and in the Netherlands on 1 June 2005 failed and the Constitutional Treaty did not enter into force.

2.2. *The Treaty of Lisbon*

After the failure of the ratification of the Constitutional Treaty, the Berlin Declaration²⁰ set a goal for a new reform of the Treaties before the EP elections in 2009. The Treaty of Lisbon²¹ entered into force on 1 December 2009. To a large extent the Treaty of Lisbon replicated the texts in the Constitutional Treaty, but merged those into the TEU and EC (now called Treaty on the Functioning of the European Union, TFEU).

The rules about the typology and hierarchy of legal acts of the EU were put in Articles 288-292 TFEU. The terminology of “*laws*” and “*framework laws*” was abolished. A four-level hierarchy of legal acts was established. The treaty provisions formed the first level. The second level – legislative acts, was formed by acts adopted under the co-decision procedure, and special legislative procedures where provided for (Article 289 TFEU). The third level was

¹⁸ Draft Treaty establishing a Constitution for Europe, OJ C 169-2003.

¹⁹ Treaty establishing a Constitution for Europe. OJ C 310-2004.

²⁰ Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome. Informal Meeting of the Heads of State and Government. Berlin, 24-25 March 2007.

²¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJ C 306-2007.

delegated acts (Article 290 TFEU). The fourth level was for implementing acts (Article 291 TFEU).

Delegated acts were subject to revocation or *ex ante* control. More importantly, the implementing acts could be made subject to comitology procedures, but the rules governing these procedures should be adopted by the ordinary legislative procedure, that is – co-decision by the EP and the Council (Article 291, para. 3 TFEU).

2.3. Post-Lisbon developments

2.3.1. Delegated Acts

In December 2009 the Commission issued a communication on the application of Art. 290 TFEU²². In the communication the Commission attempted to outline the scope of Art. 290 TFEU. The communication notes that purely in terms of the wording, the definition of delegated acts in Article 290, para. 1 TFEU is very similar to that of acts which, under Decision 1999/468/EC (*"the comitology Decision"*), are subject to the regulatory procedure with scrutiny introduced by Decision 2006/512/EC. According to the Commission in both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument. However, the Commission warns that in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny²³. The Commission then focuses its attention on the interpretation of the verbs "*amend*" and "*supplement*" in Art. 290 TFEU. The Commission believes that by using the verb "*amend*" the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument, irrespective of whether the annex contains purely technical measures. As for the verb "*supplement*", the Commission believes that the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission²⁴.

In respect of the opportunity to set a preclusive deadline of the delegation, the Commission does not believe that this requirement sanctions the practice of sunset clauses which automatically set a time limit on the powers conferred on the Commission. The Commission believes that it is preferable not to increase the institutions' workload by introducing a binding

²² Implementation of Article 290 of the Treaty on the Functioning of the European Union. Brussels, 9.12.2009 COM(2009) 673 final.

²³ Ibid, p. 2.1.

²⁴ Ibid, p. 2.3.

system of short-term delegations. That is why it suggests that the delegations of power should in principle be of indefinite duration. In the cases that the delegation is, after all, restricted in time, the Commission advocates for a mechanism of tacit renewal²⁵.

The Commission further reiterates its autonomy in the process of adoption of delegated acts. The Commission notes that it intends to “*systematically*” consult experts from the national authorities of all the Member States. However, the Commission underlines that that these experts will have a “*consultative rather than an institutional role*” in the decision-making procedure²⁶. No reference is made to any further institutionalisation of the consultation process.

As far as the mechanisms of political control by the Council and the EP are concerned, the Commission considers the right of call-back (revocation) of the delegation as a more exceptional measure, prompted for example by the occurrence of factors that undermine the very basis of the delegation of power. The Commission further notes that the right of revocation gives one of the two branches of the legislature the unilateral power to render inoperative a provision that was adopted jointly. The right of tacit approval (opposition) is considered by the Commission to be the normal, regular means of control by the legislative bodies. A period of two months is proposed for the right of tacit approval since, according to the Commission, experience with the regulatory procedure with scrutiny shows that the EP and the Council are often able to establish more quickly whether the act in question is likely to pose problems. The Annex to the communication also contains models of standard wording for the Articles of a basic instrument in which the legislator defines the limits of the delegation of power and lays down the conditions to which the delegation is subject.

It is quite obvious that the Commission aims at a rather broad interpretation of Art. 290 TFEU that allows it maximum operating space with minimum constraints in the adoption of delegated acts.

The first delegated acts under Art. 290 TFEU were adopted by the Commission in September 2010 and published in the Official Journal in November 2010²⁷. The four delegated

²⁵ Ibid, p. 3.2.

²⁶ Ibid, p. 4.2.

²⁷ Commission Delegated Regulation (EU) No 1059/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household dishwashers; Commission Delegated Regulation (EU) No 1060/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household refrigerating appliances; Commission Delegated Regulation (EU) No 1061/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household washing machines; Commission Delegated Regulation (EU) No 1062/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of televisions; OJ L 314-2010.

regulations supplement Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products²⁸. Directive 2010/30/EU stipulates that the Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU in respect of labelling and standard product information of the consumption of energy and other essential resources by energy-related products during use. The directive also notes that “*it is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level*”²⁹. Art. 10 of Directive 2010/30/EU contains a number of binding instructions for the Commission for the adoption of the delegated acts. Art. 11 of the directive provides a 5-year preclusive term for the delegation with an automatic renewal for another 5 years. Art. 12 provides for the potential use of the revocation control mechanism. Art. 13 provides for the right of objection to the delegated acts by the EP or the Council within a period of two months from the date of notification. Art. 13 also stipulates that the delegated act may be published in the Official Journal and enter into force before the expiry of that period, if the EP and the Council have both informed the Commission of their intention not to raise objections.

Thus the first use of delegated acts represents a mixed picture. It appears that the Council and the EP chose to use all the procedural opportunities for restraining the discretion of the Commission in delegated lawmaking by using a sunset clause for the delegation, both revocation and tacit approval as control mechanisms, as well as significant material restrictions in the form of binding instructions for the Commission. On the other hand the preclusive term of the delegation can be automatically renewed, and the time limit for opposition is two months.

2.3.2. Implementing Acts

In March 2010 the Commission proposed a draft regulation on the mechanisms for control by Member States of the Commission’s exercise of implementing powers³⁰. The Commission outlined two major principles for the new regulation of the comitology procedures: – that the Member States are unilaterally responsible for controlling the Commission's exercise of

²⁸ OJ L 153-2010.

²⁹ Ibid, recital 19.

³⁰ Proposal for a Regulation of the EP 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. Brussels, 9.3.2010, COM(2010) 83 final.

implementing powers, and that the procedural requirements should be proportionate to the nature of implementing acts³¹.

The proposal provided for two committee procedures - the advisory procedure, mirroring the existing advisory procedure (Art. 3 of Decision 1999/468/EC), and a new “*examination procedure*”, which would replace the existing management and regulatory procedures. The Commission proposed that the criteria for the choice of the examination procedure should be binding (Art. 2, para. 2 of the proposal). The main criterion is the adoption of implementing measures “*of general scope*”. Additionally, the examination procedure is applied to implementing acts in the areas of the common agricultural and common fisheries policies, the environment, the security, safety and protection of the health or safety of humans, animals or plants, and the common commercial policy. The advisory procedure should be used for all other measures

The examination procedure (Art. 5 of the proposal) has two phases. First the examination committee reviews the measure in question and delivers its opinion by a qualified majority as provided for in Art. 16(4) and (5) TEU. If the draft measures are in accordance with the opinion of the committee, the Commission adopts these measures. If the committee rejects the draft with qualified majority, the chairperson of the committee (always a representative of the Commission) may resubmit the draft measures for further deliberation or submit an amended version of the draft measures. However, the Commission may adopt draft measures which are not in accordance with the opinion of the committee where their non-adoption within an imperative deadline would create a significant disruption of the markets or a risk for the security or safety of humans or for the financial interests of the Union. A more interesting hypothesis is where the committee has failed to deliver an opinion in the prescribed period. In this case the Commission is authorized to adopt the draft measures if it so wishes. There is no role whatsoever for the Council or for the EP in the examination procedure. Both institutions hold the right to be informed (Art. 8, para. 2 of the proposal).

The Commission also wanted to abolish altogether the old comitology procedures for implementing acts in force, with the exception of acts under Art. 5a of Decision 1999/468/EC (the regulatory procedure with scrutiny).

The EP started its work on the proposed regulation soon after the initial Commission proposal. This was happening in parallel with energetic discussions in the Council on the use

³¹ Ibid, p. 2.1.

of comitology committees for trade measures. Reportedly, a coalition led by Germany, the UK and Scandinavian countries had been lobbying hard to remove trade policy from the comitology review³². The compromise solution was to include a simple majority veto in the examination procedure. Some considerations of the EP were also included in the text.

The legislative resolution adopted by the EP at first reading³³ included a number of amendments of the initial Commission proposal. The adopted text included new areas where the examination procedure should apply - programmes with substantial implications and taxation (Art. 2, para. 2 (b) of the adopted text). The adopted text included in Art. 3, para. 7 a new body – the so-called “*appeal committee*”.

The examination procedure itself was substantially reorganized. The lack of decision taken with qualified majority by the examination committee authorizes the Commission to adopt the draft measures unless they related to taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures (Art. 5, para 4 of the adopted text). Additionally, the basic act can also restrict the right of the Commission to unilaterally adopt the draft measures. A simple majority of the committee members can block the adoption of the draft measures by the Commission. In any of these three hypotheses the Chair of the committee may either submit the draft acts within one month to the appeal committee for further deliberation or submit to the committee within two months an amended version of the draft acts.

In relation to anti-dumping measures a specific variant is included in the case when the committee did not reach a decision with qualified majority (Art. 5, para. 5 of the adopted text). The Commission should first conduct consultations with the Member States. Within one month of the committee meeting the Commission should inform the committee members of the results of those consultations and submit a draft act to the appeal committee. The appeal committee should then meet within one month at the latest after the submission of the draft act.

The appeal committee procedure is regulated in Art. 6 of the adopted text. It serves as a second-level decision-making body in the cases of rejection of the draft measures by the examination committee with qualified majority or the hypotheses of Art. 5, para. 4 and 5

³² “UK, Germany resist attempted EU power grab on trade”. Euractiv. Published: 05 November 2010 ; updated: 08 November 2010. <http://www.euractiv.com/en/future-eu/uk-germany-resist-attempted-eu-power-grab-trade-news-499463> Accessed online on 14.2.2011.

³³ EP legislative resolution of 16 December 2010 on the proposal for a regulation of the EP 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 (COM(2010)0083 – C7-0073/2010 – 2010/0051(COD))

reviewed above. In these cases any member of the appeal committee may suggest amendments to the draft acts. The Chair should endeavour to find solutions with the widest possible support. The draft measures are adopted if the appeal committee has given a positive opinion with qualified majority or has failed to give an opinion within the prescribed period. However, in the case of definitive multilateral safeguard measures the Commission cannot adopt the draft measures unless they receive a positive opinion from the appeal committee. For a period of 18 months after the entry into force of the regulation the appeal committee will deliver its opinion on definitive draft anti-dumping or countervailing measures by a simple majority of its component members.

A very important addition was made regarding the transfer of committee documents. The Commission is obliged to transfer the agendas of committee meetings, the draft acts on which the committees are asked to deliver an opinion, and the final draft acts following the opinion of the committees to the Council and the EP at the same time as they are sent to the committee members (Art. 10, para. 4 of the adopted text).

The adopted text also introduced a specific right of scrutiny in Art. 11. According to Art. 11 the EP or the Council can at any time indicate to the Commission that they consider a draft implementing act to exceed the implementing powers provided for in the basic act. The Commission should then review the draft measure in question, taking account of the positions expressed, and should inform the EP and the Council.

Regarding the application of the new comitology regulation to the old legislative acts, the adopted text retained the principle that the old comitology procedures for implementing acts in force should be abolished, with the exception of acts under Art. 5a of Decision 1999/468/EC (the regulatory procedure with scrutiny). The Commission is obliged to present a report on the implementation of the regulation within five years of its entry into force (Art. 15 of the adopted text). This report should not be mistaken with the annual report on the work of the committees (Art. 10. para. 2 of the adopted text).

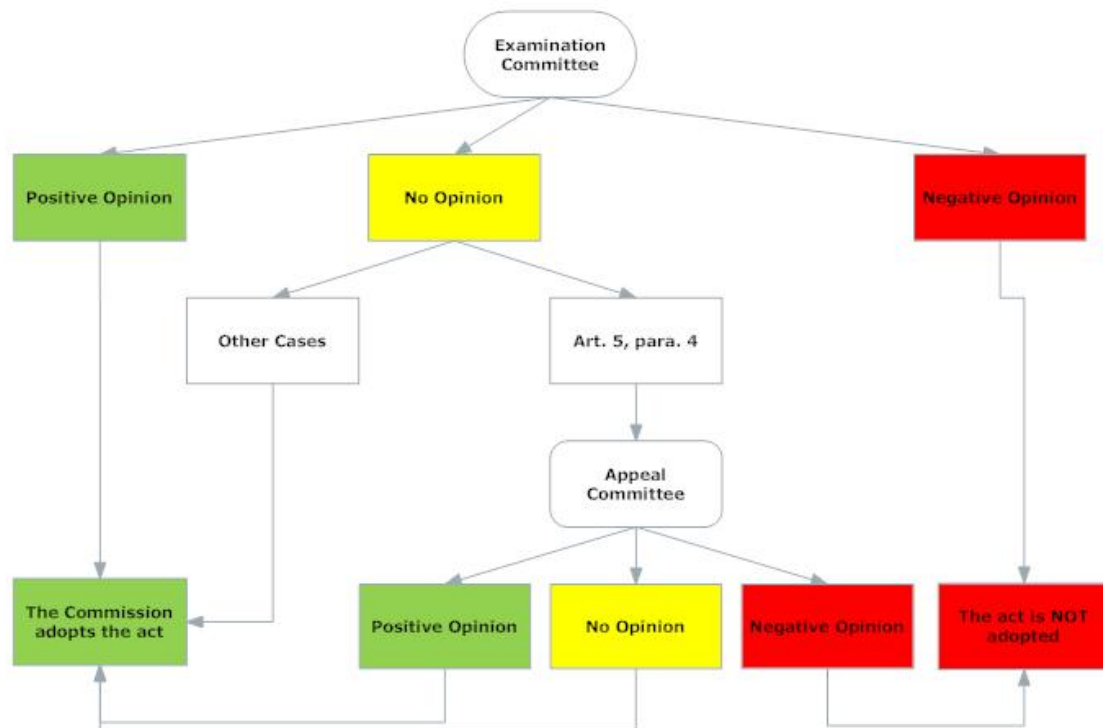


Figure 1. The examination and appeal procedures in the new comitology regime.

In the end the examination procedure was substantially burdened with new complexity. A whole new level of *ex ante* control over the implementing powers of the Commission was introduced. The implications of the new institutional setting of the comitology procedures will be discussed in the next section.

3. Legal and Institutional Implications of the New Institutional Setting

This section will examine the probable development of delegated lawmaking and comitology procedures based on the existing legal framework. An attempt will be made to outline potential issues of contention. The wider implications for the institutional balance of the EU will be discussed. Some important inferences of this institutional shift for the debate on the democratic deficit in the EU will also be drawn up.

3.1. What Has Really Changed? Mapping Contentious Issues

The introduction of a formal hierarchy of the legal acts of the EU is a significant institutional innovation with wide-ranging consequences. However, here only the reform of the regulation of implementing acts will be summarized from the previous section.

The first level of reform is the Treaty of Lisbon itself. There are three main parameters of institutional change in the Treaty of Lisbon. First, the European Commission becomes the principal executive body; only in “*duly justified specific cases*” the Council may adopt implementing acts (Art. 291, para. 2 TFEU), but not delegated acts. Second, a whole category of implementing acts – called “*delegated acts*” is unconditionally exempt from comitology control (Art. 290 TFEU). Third, the new instrument regulating the comitology procedures for implementing acts must be adopted by the ordinary legislative procedure (Art. 291, para. 3 TFEU).

The second level of reform is represented by the regulation in the corresponding EU legislative acts. However, the first important distinction can be seen here – there is no horizontal regulation of the delegation of legislative powers (Art. 290 TFEU)³⁴. Two procedures can be used to restrict the adoption of a delegated act – the right of call back or the right of tacit approval. The right of objection (or veto) is not bound by any substantive criteria. However, it will be much harder for the EP to exercise its right of control given the requirement of absolute majority (as opposed to simple majority for the adoption of the legislative act containing the delegation during the codecision procedure)³⁵. In both cases the Council votes with qualified majority and is better positioned to impose its will on the Commission. What the EP can do is to include either prescriptive, binding instructions in the legislative act that further restrict the scope of delegation, or include a sunset clause that imposes a time limit on the delegation. As was shown in the previous section, both mechanisms were used in the case of Directive 2010/30/EU.

Another important issue appears to be the existence of a grey area between delegated and implementing acts (Bergström and Rotkirch 2003: 21; Lenaerts and Desomer 2005:764, Dougan 2008: 649; Hofmann 2009: 494-499, Kaeding and Hardacre 2010: 7; see *a contrario* Best 2003: 173). The only definitive guide here is the communication of the Commission which, as was shown in the previous section, rests on a quite wide interpretation of Art. 290 TFEU. This debate will be settled on case-by-case basis during the legislative procedure, where the EP has equal influence on the outcome.

The new comitology regime provides a number of potential contentious issues. The new examination procedure in its current form³⁶ is laden with complications. The scope of the

³⁴ See also Kaeding and Hardacre 2010, p. 5.

³⁵ See Lenaerts and Desormer 2005, p. 755.

³⁶ Before final approval by the Council.

restrictions in the second subparagraph of Art. 5, para. 4 of the adopted text³⁷ may lead to some difficulties in its interpretation, especially in relation to the “*protection of the health or safety of humans, animals or plants*”. The composition of the appeal committee (Art. 6 of the adopted text) is not regulated in the new comitology regulation. This may well be the same committee that served as an examination committee, or may include representatives of the Member States at a higher administrative level. This uncertainty may probably be resolved through the standard rules of procedure (Art. 9 of the adopted text). However, a comparison with the second stage of the regulatory committee and management committee procedures (Hardacre and Kaeding 2011: 15) is not accurate. The Council’s work has always been supported by the various working formats, including COREPER1 and COREPER2 (Beyers and Dierickx 1998, Bostock 2002). Now the appeal committee will be the only venue for discussion of the rejected or unapproved implementing measures. The importance of this fact will be discussed in the subsection on the democratic deficit below.

The implementing measures based on existing legislative acts that refer to Art. 4 of Decision 1999/468/EC (the management committee procedure) will be redirected to the examination procedure, but in these cases the second and third paragraph of Art. 5, para. 4 of the adopted text will not apply. This means that in the case when the committee does not reach a decision with qualified majority, the Commission could adopt the measures. In case the existing legislative act refers to Art. 5 of Decision 1999/468/EC (the regulatory committee procedure), it is presumed that the legislative act has referred to the second hypothesis of the second subparagraph of Art. 5, para. 4 of the adopted text. Thus when the examination committee has not reached a decision with qualified majority the Commission must either submit the draft acts within one month to the appeal committee for further deliberation or submit an amended version of the draft acts to the committee within two months.

3.2. The Implications for the Institutional Balance

The new legal regime for the implementing powers of the Commission clearly modifies the institutional balance (Hoffmann 2009:483). The direction of change is difficult to calculate. Here an attempt will be made for a vector analysis of this shift.

Looking at the institutional shift from a pragmatic procedural perspective and in the light of recent developments it is quite obvious that the Commission has strengthened its hold on the execution of implementing powers (Craig 2004:32). It has become the default executive body

³⁷ See *supra* note 33.

at the supranational level; the Council can adopt implementing acts in “*duly justified specific cases*” but it cannot adopt delegated acts (Art. 291, para. 2 TFEU). In historic perspective that is a fundamental shift from the initial setting in the Treaty of Rome where the Council was the subject of implementing powers at the supranational level, and the Commission had only a supplementary *duty* to exercise the implementing powers conferred on it by the Council (Art. 155 TEEC in its 1957 version). Thus the Treaty of Lisbon completes the cycle of transfer of implementing powers from the Council to the Commission³⁸. The importance of this shift cannot be underestimated.

Additionally, the Commission has been relieved from the control of comitology committees over the adoption of delegated acts. The hierarchical subordination of implementing acts under delegated regulations should further enhance the importance of the Commission as an executive organ vis-à-vis the Council (Schütze 2005: 18). But the conclusion that the Commission would be the winner if there is extensive use of delegated acts (Hoffmann 2009: 504) is somewhat premature. As was shown in the example of Directive 2010/30/EU, the EP and the Council not only used all statutorily available instruments to limit the discretion of the Commission, but also included in the legislative act a number of binding instructions for the Commission for the adoption of the delegated acts. If this practice is continued, the Commission will only enjoy limited discretion in the adoption of delegated acts, staying in the shadow of the legislators’ activism. The disparity of voting procedures for codecision and Art. 290 TFEU for the EP (simple vs. absolute majority) and the Council (qualified majority in both cases) may indeed result in some additional advantage for the Council. This may further stimulate the EP to seek maximum restriction of the discretion of the Commission and may also lead to more lobbying activity in the EP during the codecision procedure (Hardacre and Kaeding 2011: 14).

The new organization of the comitology procedures for implementing acts presents completely different challenges to the institutional balance. Here the EP is practically excluded from the procedure with the exception of the right of information (Art. 10, para. 4 of the adopted text) and the right of scrutiny (Art. 11 of the adopted text). The Council itself has also been excluded from the procedure. The examination committee procedure improves the standing of the Commission in the case of measures previously reviewed by the regulatory committee procedure under Decision 1999/468/EC, since the Commission can adopt the

³⁸ Bergström 2005, pp. 178-184 provides a comprehensive study of the reform of supranational implementing powers in the Single European Act

measures without having obtained the approval of the examination committee. Even in the cases of the second subparagraph of Art. 5, para. 4 of the adopted text of the comitology regulation, the Commission has substantial flexibility – it can either modify the measure, or submit it to the appeal committee. The lack of rejection with qualified majority in the appeal committee allows the Commission to adopt the draft measures (see Figure 1.). These procedural arrangements will substantially increase the discretion of the Commission in adopting implementing acts *sensu stricto* compared to delegated acts (Türk 2005: 1568).

There is obvious concentration of executive power in the Commission that might have been easily diluted, for example, by creating conditions for truly independent executive agencies at EU level. It is true that the subsidiarity principle, the new powers of the European Council, and the involvement of national parliaments (Art. 69 TFEU) may further limit the discretion of the Commission. However, from a legal institutional perspective it is evident that the Commission has obtained significant relief from the control of Member States. This relief of control can be explained by the existence of a weak interaction between the notion of parliamentarisation of the EU and the gradual moderation of the control exercised by Member States through the comitology procedures (Georgiev 2011).

The Commission has earned the position of *de facto* executive, but it is not the *political* executive of the EU (Kreppel 2009: 11). This internal contradiction is often overlooked, since the main focus of attention has usually been set on the agenda-setting powers of the Commission and the European Council, respectively. It may be argued that after the Treaty of Lisbon the Commission has lost some ground to the European Council and Member States (Jacque 2004:390; Bribosia 2008:65; Devuyt 2008), but it has also strengthened its hold on the substance of the implementing acts at the supranational level. The Commission is both strengthened and weakened as an executive. This new twist in the institutional balance is probably not premeditated (Jacque 2004:387).

The weakening of the agenda-setting powers of the Commission deserves further study and consideration, especially in the light of the recent Franco-German proposals for a dramatic overhaul of the procedures for economic governance coordination³⁹. This is particularly important given the fact that the state dimension of power is instrumental in the deliberations of the European Council (Tallberg 2008), thus allowing the hijacking of the EU's agenda by the more powerful Member States (France, Germany and the UK). The new rules for qualified

³⁹ Poland supports Barroso's fight for 'Community method'. Euractiv. Published: 14 February 2011, Updated: 15 February 2011. Accessed online on 16.02.2011. <http://www.euractiv.com/en/future-eu/poland-supports-barrosos-fight-community-method-news-502128>

majority voting in the Council also eliminate the protection for the smaller Member States (Devyust 2008).

The strengthening of the Commission as a *de facto* executive cannot compensate its relative loss of initiative. In fact, the Commission may well refrain from pushing forward implementing measures that are opposed by a number of Member States even if the comitology procedure formally allows it to adopt the measures. It is also possible that the Commission will attempt to align its position with larger, more powerful Member States when there is no clear majority in the examination committee.

One potential corrective to the discrepancies of the new legal regime could be the European Court of Justice (ECJ). Its intervention will be particularly important in interpreting the criteria for the adoption of delegated acts (Kaeding and Hardacre 2010: 7). However, the ECJ is usually reluctant to review legislative discretion against an alternative interpretation of the substantive criteria (Hoffmann 2009: 489). More generally, the ECJ has been unwilling to reduce the room for political negotiations in respect to the implementing powers of the Commission, and has been able to adapt quickly to the result of those negotiations (Bergström 2005: 319). That is why it is unlikely that the ECJ will interfere in a significant way in order to reduce the uncertainties.

The shift of the institutional balance in terms of the implementing powers of the Commission has been categorical and significant. But this shift, although within the logic of parliamentarisation of the EU (Georgiev 2011), portends new challenges to the institutional balance. The implications for the democratic deficit of the EU will be discussed in the next subsection.

3.3. *A Contribution to the Democratic Deficit?*

A substantial scientific literature has considered the different implications of the so-called “*democratic deficit*” in the EU and the relevance of the national legal and political traditions to the tasks of a supranational community⁴⁰. Here a more focused approach will be used that will discuss the implications of the new regime of implementing powers for all vectors of input and output legitimacy of the EU (Lord and Magnette 2004). This framework of analysis is based on the concept of four vectors of legitimacy: indirect (derived from the legitimacy of the Member States); parliamentary (dual legitimation by a Council of governments and a directly elected Parliament); technocratic (derived through the ability of supranational

⁴⁰ See for example Lindseth 1999, Moravcsik 2002, Follesdal 2004, Follesdal and Hix 2006, Ladeur 2008, Hix 2008, Somek 2008. For an overview of the debates see Jensen 2009.

institutions to offer ‘Pareto-improving’ solutions) and procedural (legitimation by observing principles such as transparency, balance of interests, proportionality, legal certainty and consultation of stakeholders)⁴¹.

The new legal regime of implementing powers of the Commission has different implications for the two types of non-legislative acts. That is why delegated and implementing acts *sensu stricto* must be reviewed separately.

The regulation of delegated acts in Art. 290 TFEU is to a large extent reminiscent of the existing political controls of the legislators in Western democracies over the adoption of delegated acts by the executive. In these cases the legislature assumes political responsibility for the executive rule beyond the original empowerment by means of subsequent approval (Pünder 2009: 367). The model of Art. 290 TFEU is closer to the German model of control of the legislative delegation⁴². The EU model, however, does not provide for an *ex ante* control mechanism where the approval of the legislature is a *condition sine qua non*⁴³. It may therefore be argued that the adoption of delegated acts is to a large extent legitimate based on the indirect and parliamentary vectors of legitimacy. The technocratic vector of legitimacy may also be considered “covered” to certain extent. It may be assumed that the Commission has sufficient administrative resources to manage the drafting of delegated acts, and that its expertise is relevant to the substance of the delegated acts. However, this is only an assumption, since studies of the Commission typically do not focus on its institutional capacity *per se*⁴⁴. The effectiveness of the procedure for adoption of delegated acts is a stronger point for the technocratic vector of legitimacy, since here the Commission is not constrained by any additional procedure apart from the right of tacit approval that will usually delay the promulgation of the delegated act with two months.

The procedural vector of legitimacy poses important questions for the adoption of delegated acts. The main problem here is the lack of institutionalization of the consultation process in the period of drafting of the delegated acts. First, it is not clear whether the Commission will use existing working groups. Second, the extent of participation of third party representatives of various stakeholders and the methods of selection are not regulated in detail. This is a long-standing issue (Bignami 1999). The lack of transparent procedures for collecting input from stakeholders is a serious impediment to the social legitimacy of the delegated acts (but see the

⁴¹ See for more details Lord and Magnette 2004, pp. 185-188.

⁴² Compare with Pünder 2009, pp. 364-365.

⁴³ As is the case with *Zustimmungsverordnungen* in Germany, Pünder 2009, p. 364.

⁴⁴ Compare the findings of Metcalfe 2000, Hooghe 2001, and Christiansen 2006.

arguments in Smismans 2006). One additional question here is the possible involvement of the EP in the drafting process (Kaeding and Hardacre 2010: 7).

The review of the reformed comitology procedures for the adoption of implementing acts reveals much more significant deviations from the vectors of legitimacy. First, in terms of the indirect vector of legitimacy the Member States will actually lose ground to the Commission in two directions. First, the approval of the examination committee is not an absolute procedural requirement for the entry into force of the implementing measures (see Figure 1) as opposed to the regulatory procedure under Decision 1999/468/EC. Second, as was discussed in subsection 3.1. above, the referral to an appeal committee is not equivalent to the referral to the Council under Decision 1999/468/EC. These two aspects of the new comitology regime must be considered in the light of the empirical findings of Brandsma 2010, who shows that in almost 70 per cent of the cases the superiors in the public administrations of Denmark and the Netherlands are either relatively little informed, or they hardly discuss input in the comitology committees with their employees, or both (Brandsma 2010:193). This problem of accountability *within* the public administrations of smaller Member States and especially Member States from Eastern Europe is probably much greater (Panke 2010, Georgiev 2010).

The parliamentary vector of legitimacy is practically non-existent in the new comitology regime due to the lack of participation of both the EP and the Council. The technocratic vector of legitimacy is to some extent accounted for by the comitology procedures inasmuch as they do produce Pareto-optimal solutions (Papadopoulos 2003). However, many EU regulations are not Pareto improvements (Follesdal 2009, Follesdal 2011). In fact in cases where the comitology system has been used to find solutions to politically salient problems with the characteristics of zero-sum games, the outcome has been sometimes quite negative. Such was the case with the approval of GMOs (Tiberghien 2009, Christiansen and Polak 2009) and the measures against bovine spongiform encephalopathy (Harlow 2002:69, Krapohl and Zurek 2006). In the new comitology regime the Commission will have the opportunity to overtake the Member States and decide the issues in question once the examination or appeal committee has failed to deliver an opinion with qualified majority. Thus it is not self-evident that the comitology committees will represent a form of "*mixed administration*", representing the *direct* decisional input by the Member States into the Union administration (Schütze 2010: 1423). The hypothesis that the formation and use of expert knowledge in the implementation of European policies creates gaps in Member State control (Böhling 2009), and the criticism

of the comitology committees as epistemic communities (Kuo 2009:224-234) should also be kept in mind.

The procedural vector of legitimacy of the new comitology regime suffers from the same shortcomings as discussed above about the adoption of delegated acts. However, given the fact that the EP is practically excluded from the comitology procedures altogether and keeping in mind the traditions of the comitology committees to this moment, it seems that there will be even less opportunities for the stakeholders to participate in the decision-making process. The only viable opportunity will be to participate in the working groups of the Commission during the drafting process.

The overview of the new institutional setting of the implementing powers of the Commission after the Treaty of Lisbon has revealed a worrying picture. It appears that the new comitology regime in particular is contributing to, rather than helping to reduce, the democratic deficit of the EU. This observation is in line with some recent academic thinking on the accountability and legitimacy of the new modes of governance (NMG)⁴⁵. The new comitology regime is obviously deviating from the three strands of democratic control proposed by Héritier and Lehmkuhl 2011: democratic accountability of governing actors to the constituency, a functional mode of representation of stakeholders, and the media-based critical public debate (Héritier and Lehmkuhl 2011:137-138). The findings of the present paper also support the claim that the alleged benefits of NMG are open to severe doubts, unless embedded within institutions that provide democratic and legal accountability (Follesdal 2011:100). While some may argue that the hierarchical assumptions about accountability may not be appropriate in the case of the EU (Harlow and Rawlings 2007), there is little evidence that the comitology committees act as an accountability network.

Three practical measures can be proposed *de lege ferenda* to counterbalance this negative trend: the institutionalization of the consultation process in the drafting phase by the Commission⁴⁶, the use of COREPER1 or even COREPER2 as an appeal committee in the new comitology regime, and the more widespread use of sunset clauses in the legislative acts⁴⁷. While these measures will not be sufficient to address all concerns about the legitimacy of the implementing powers of the Commission, they may well contribute to a more balanced and deliberative exercise of those powers.

⁴⁵ See Scott 2009, Bovens, Curtin & Hart 2010, Héritier and Lehmkuhl 2011, Bellamy and Castiglione 2011, Follesdal 2011.

⁴⁶ See more on the justification of this recommendation in Bellamy and Castiglione 2011.

⁴⁷ On the importance of sunset clauses for overcoming the democratic deficit see also Lord 2008, p. 20.

On a more general level it is worth exploring the hypothesis that a further politicization of the Commission may be necessary (Follesdal and Hix 2006, Hix 2008), while keeping in mind the perils of such a transformation (Jacque 2004, Kreppel 2009).

4. Conclusions

This paper has studied the new legal regime for the exercise of implementing powers by the Commission at the supranational level. The introduction of a hierarchy of legal acts of the EU is a significant reform that has led to a new institutional setting. The outcomes for the adoption of delegated and implementing acts by the Commission appear quite different. If the initial practice can be a relevant guide, the Commission will only enjoy limited discretion in the adoption of delegated acts, staying in the shadow of the legislators' activism. The new comitology regime has excluded the Council and has added a new layer of complexity to the examination procedure. As a whole the Commission has strengthened its hold on the substance of the implementing acts *sensu stricto* at the supranational level. In terms of the overall institutional balance of the EU there is obvious concentration of executive power in the Commission after the Treaty of Lisbon. However, the strengthening of the Commission as a *de facto* executive cannot compensate its relative loss of initiative.

The overview of the new institutional setting of the implementing powers of the Commission after the Treaty of Lisbon has revealed a worrying picture for the democratic deficit of the EU. It appears that the new comitology regime in particular contributes to the democratic deficit, rather than alleviating it. Three practical measures can be proposed to limit this negative result: the institutionalisation of the consultation process in the drafting phase by the Commission, the use of COREPER as an appeal committee in the new comitology regime, and the more widespread use of sunset clauses in the legislative acts.

Future studies should focus on the dichotomy of the Commission's position in the exercise of implementing powers, and its agenda-setting powers in the light of a holistic assessment of the Community method. The perils of further politicization of the Commission should be weighed against the prospect of an unaccountable, *de facto* executive.

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