Is the European Legislator after Lisbon a real Legislature?

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In his wonderful book *Colossus* Niall Ferguson¹ tries to fathom the character of the European Union. What is it? A proto-federation that will vie with the United States in due course or a megalomaniacal and hopelessly divided US protectorate, which is apparently unable to unite itself and for that reason – but also due to a lack of military ambition – does not succeed in creating the institutional conditions necessary for growing into an economic superpower? I will not give away the answer to his original question here; anyone can read Chapter 7 – “Impire”: Europe between Brussels and Byzantium – of that book for themselves. What is interesting in this context is that Ferguson regards the existence of a European legislature as an important indication and hallmark of the quasi-federal character of the European Union. In his eyes, such institutions are decisive for economic stability and, in due course, economic superpower. In his words:

“(…) the EU already has a quasi-federal character. This is most obvious in the legal sphere. EU legislation now accounts for around half of all new legislation in Europe.”²

“Europe’s, in short, is a curious kind of union, a confederation that fantasizes about being a federation without ever quite becoming one. It has an executive, a legislature, an upper house, a supreme court, a central bank, a common currency, a flag and an anthem. But it has only a tiny common budget and the barest bones of a common army.”

But is the legislator of the European Union in fact a real legislature? This question is interesting given the fact that the Treaty of Lisbon creates some order out of the chaos of legislative procedures and legislative instruments from the EC and EU treaties. It creates a uniform “ordinary legislative procedure” (Article 294 of the Treaty on the Functioning of the European Union, hereinafter referred to as “the TFEU”) and a well-organized system of legal acts, which comprise legislative acts and non-legislative acts. The treaty even provides for a uniform framework for delegation.

Like those made by the earlier constitutional treaty, the amendments to the legislative procedure introduced by the Treaty of Lisbon have received hardly any attention in the run-up to approval of the treaty in the Netherlands, even though these are quite substantial. The amendments received the same lukewarm attention in other EU Member States, we deduce from the reports of the approval proceedings in these countries.

The amendments deserved more notice, because they establish a European legislature and change the character and nature of the former legislative procedures. According to the uniform legislative procedure in the TFEU, the European Parliament will be a genuine co-legislator in nearly all cases in the future, and it will also have a much tighter grip on implementation legislation enacted on the European Commission’s initiative. As a result of this parliamentary involvement and the check that can be carried out on delegated legislation, the European legislator more than ever resembles most legislators in the Member States. According to Tom Eijsbouts, we are at the “dawn of a legislator”
(read: a *real* legislature) for this reason. But is this really so? Can we really put the European legislator, i.e. the collaboration of the European Commission, the Council of Ministers and the European Parliament according to the ordinary legislative procedure, on a par with legislatures in the Member States? The first question we have to answer is: what is actually a real legislator?

2. WHAT IS A LEGISLATURE, A LEGISLATOR?

What requirements must be satisfied before we can rightfully speak of a legislature? Contrary to what one might expect, the literature does not provide a quick answer to this. Yes, you can read quite a bit about questions such as the bodies that belong or do not belong to the legislature, the procedures for adopting legislation, the function and meaning of legislation, what constitutes a law of general application etc., but only a little about what makes a legislator a *real* legislature.

A real legislature is usually associated with the *parliamentary* legislator, or at least a legislator that adopts rules that are generally binding on citizens with the cooperation or approval of an assembly of elected people’s representatives. This democratically legitimized legislator must also be superior to other legislators to prevent the rules that have been created with the cooperation of the population’s representatives from being immediately cancelled by later or lower law-making bodies or simply set aside by a court or administrative body.

Some of these elements are also found in the definition of “legislature” – a fine one, as far as I am concerned – given by the English Internet encyclopaedia Wikipedia:

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7 Even the books that address this issue in greater depth fail to answer this question. See G.J. Veerman (2008), *Over wetgeving* (On Legislation). Sdu Uitgevers; The Hague. Elzinga and De Lange do consider this problem in the adaptation of Van der Pot’s handbook on Dutch constitutional law, but they approach this question in the light of the powers of the European legislator and the norms to which it is bound (including, for example, the principle of legality – if any – in the EU). See C.W. van der Pot (2006), Pot’s *Handboek van het Nederlandse staatsrecht* (Handbook of Dutch Constitutional Law), adapted by D.J. Elzinga, R. de Lange, with the cooperation of H.G. Hoogers. Fourteenth edition. Kluwer; Deventer.

“A Legislature is a type of representative deliberative assembly with the power to create, amend and ratify laws. The law created by a legislature is called legislation or statutory law.”

It is this very people’s representation aspect that distinguishes a real legislator from other rule-makers that have – dependent or independent – regulatory powers.

Popelier has also dealt with the exact meaning of the term “legislature”. She relies on the meaning of this concept in the First Protocol to the European Convention on Human Rights. In this document, “legislature” means the body that has its own primary regulatory power and must therefore be constituted on the basis of elections. For this reason, the principal distinction between “primary legislation” (i.e. “Acts of Parliament”) (the product of the legislature) and “secondary” or “subordinate legislation” (i.e. generally binding laws of inferior rank) lies in the democratic legitimacy of primary legislation.

“Primary legislation restricts, underlies and justifies other government actions, which must always be based on legislation (or the Constitution). (…) In other words, the primary legislator requires no authorization other than the constitutional provisions that confer general legislative power on it, whereas other law-making bodies have only a conferred power in principle.”

Knowing the difference between primary legislation and secondary legislation and between primary legislators and secondary legislators is one thing, but this is not all there is to it. What are the characteristic features of a real legislator? Let me try to list a few characteristics of real legislators. I can think of the following:

1. Competence: a power conferred by a constitution or another constitutional document to adopt legislation in the sense of generally binding rules.
2. Parliamentary involvement in adopting generally binding rules taking the form of “co-determination” (such as the right of legislative initiative, the right of amendment, etc.).

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9 See http://en.wikipedia.org/wiki/Legislature last visited 30 August 2008. By the way, this Wikipedia page includes a nice list of the names of all parliamentary legislators in the world.
10 Patricia Popelier (2004), De wet juridisch bekeken (Legislation taken from a legal perspective). Die Keure; Brugge, p. 13 et seq.
3. **Binding power**: the power to bind citizens and bodies (for example, administrative bodies, courts, etc.) through general legal rules.

4. Power of conferral of legislative power, meaning the power to create law and delegate this power to other bodies.

5. **Power of ratification**: the power to approve or disapprove treaties and the like.

6. **Primacy**: the power to exercise the highest law-making authority – within the framework of a constitution – to which other bodies are subordinate.¹²

Lists are easy to draw up and never finished, but let us examine on the basis of these provisional characteristics whether the new European legislator as it emerges from the Treaty of Lisbon in fact qualifies as a real legislature.

### 3. THE EUROPEAN LEGISLATOR AFTER LISBON

On 9 July 2008, the Dutch Senate agreed to the Act approving the Treaty of Lisbon, which marked the end of a turbulent period, which had seen a disturbing declaration (the Laeken Declaration), a European convention, a rejected proposal for a Constitution for Europe and then the Treaty of Lisbon. Most of the Member States to date have – like the Netherlands – ratified the Lisbon Treaty. Only the Czech Republic’s and Ireland’s ratification are still pending. Although the consequences of the Irish “no” are not yet known, it looks as if the Treaty of Lisbon will enter into force. Even though it was presented as a step backward compared to the too ambitious constitutional treaty, the institutional changes brought about by Lisbon are quite significant.¹³

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¹² In systems in which courts have the right of constitutional review with respect to Acts of Parliament (i.e. the products of the legislator), too, a legislator may still have primacy in law creation, because in that case, the court does not have any further law-creating task – it does not create laws itself – but it merely reviews laws and can only prevent the entry into force of proposed legislation and cannot determine the contents of legislation. This means that the court does not create new, higher law, but it merely applies it. Accordingly, the court does not have its own or surrogate law-making primacy.

¹³ The differences with the constitutional treaty are negligible to a certain extent. The Treaty of Lisbon does not include a number of things, such as the symbols (flag, anthem, public holiday) and the fundamental rights, but apart from these, there are only minor differences. The differences are small, so small even that Dutch observer Antoine Jacobs speaks of “Etikettenschwindel”. See A.T.M. Jacobs (2008), “Het Verdrag van Lissabon en de Europese Grondwet; een overtuigend onderscheid?” (The Lisbon Treaty and the European Constitution; a convincing distinction?), Nederlands Juristenblad (Dutch Lawyers Journal), no. 6, pp. 320-329.
This certainly applies to the legislative procedure and legal instruments of the Union, which have already been discussed in the introduction. Until recently, the EC Treaty and the EU Treaty did not provide for a uniform legislative procedure. These treaties regulated the competences to adopt directives, regulations and framework decisions – the Union’s most important “legislative” instruments – differently on a case-by-case basis. Sometimes the Council alone was competent to perform an act – on a proposal from the Commission – and in other cases it was necessary to seek the cooperation of the European Parliament, which could concern different types of cooperation (consultation, cooperation, assent, codecision). In some cases, the Commission was even independently competent under the treaty. In addition, there were as many as 15 legal instruments. Because of the combination of instruments and procedures, there were, even if we disregard the comitology system, about 50 procedures. It is impossible for European citizens to understand such Byzantine procedures. This point had already been made in the analysis of the White Paper on European Governance, published in 2001, and the conclusions attached thereto in the Laeken Declaration. During the European Convention – which carried out the preparatory work for a European Constitution in 2002 and 2003 – a special working group was set up to consider the possibilities of simplifying and uniformizing legislative procedures and legislative

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14 Because of the large number of procedures and instruments under the present treaties, there is not really a fixed definition of “legislation”, although the Court of Justice does have a working definition for “European legislation”, usually used to denote directives and regulations that contain generally binding rules. See also H. van Meerten (2001), “Naar een nieuw Europees wetgevingsbegrip” (Towards a new definition of European Legislation), Nederlands tijdschrift voor Europees recht (Dutch Journal for European Law), no. 6, pp. 166-169.

15 For example, Article 96 of the EC Treaty.

16 Of these instruments, 14 are specified in the treaties and one is sui generis.

17 The comitology system is intended as a check on the rules the European Commission may adopt under a delegation of powers. In adopting delegated or implementation rules (Article 202 of the EC Treaty allows the conferment of powers for this purpose), the Commission seeks the assistance of committees consisting of Member State representatives. The procedure is enshrined in the decision from 1999, as amended in 2006. See Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006) 512 EC, OJ 2006 L 200/11. By now, there are four types of committees (depending on the procedure), to wit, advisory, regulatory and management committees and – the new – committees pursuant to the regulatory procedure with scrutiny.


instruments. The working group made a number of specific recommendations, including one general legislative procedure, drastic simplification and uniformization of the legislative instruments under a new name, and a form of hierarchy between these instruments. In 2003, these recommendations were incorporated, with hardly any changes, into Part I and Part III of the Constitutional Treaty. And the Treaty of Lisbon, too, incorporates these recommendations made by the Convention’s working party with hardly any changes. Only the new names for a regulation (“European law”) and directive (“European framework law”) were not kept in the Treaty of Lisbon – because of the alleged state-like associations. In order to position the new EU legislator after Lisbon, I will briefly discuss the changes in the legislative procedure and the instruments below.

3a. The uniform legislative procedure (ordinary legislative procedure) of Article 294 of the TFEU

Preliminary Observations

The Treaty of Lisbon amends the EC Treaty (also known as the Treaty of Rome) and the EU Treaty (popularly called “the Maastricht Treaty”). For this article I was already able to use a consolidated text of the Treaty of Rome – which will from now on be called the Treaty on the functioning of the European Union (“TFEU”) – with the new numbering. This is really helpful, but it may take some getting used to for some.

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21 Working group IX of the Convention (the d’Amato Working Group on Simplification) particularly looked at the position of the “European legislator”. The aim of the group was to create order, by means of simplification, in the existing legal instruments and corresponding procedures and enhance the transparency of European decision-making as a result. The Working Group’s final report was presented on 29 November 2002, CONV 424/02, document no. 13 of the Working Group. The Working Group’s views on the solutions were relatively uniform and the debate in connection with the Convention’s proposals on the simplification of legal instruments and procedures was relatively calm as well – except for the issue of the QMV decision-making rule. The question arises, however, whether the working group chose a sound method to enhance the transparency and legitimacy of European decision-making. The working group appears to be a little naïve when one reads that it relies very much on a few technical simplification and uniformization measures designed to improve the legitimacy of the Union’s decision-making. The working group fails to address the substantive problems such as the democratic deficit, the absence of the right of legislative initiative for MEPs, and other substantive issues. See W.J.M. Voermans (2005), “Hoe verder met de Europese wetgever na het Nederlandse “no”?” (The European Legislator after the Dutch no-vote), in H.-M.T.D. ten Napel & W.J.M. Voermans (ed.), De betekenis van de Europese Grondwet voor de Nederlandse staatsinstellingen (The impact of the European Constitution on Dutch governmental institutions). Kluwer; Deventer, pp. 21-37.
One of the minor assets of the Treaty of Lisbon concerns the new arrangement of the TFEU. Where in the EC and EU treaties, the legislative procedures and instruments were scattered across the two treaties – and the constitutional treaty also dealt with procedure and instruments separately – the legislative procedure and the legislative instruments (entitled “legal acts”) are neatly grouped together in Chapter 2 “Legal Acts of the Union, Adoption Procedures and Other Provisions” of Part Six of the Treaty.22

The ordinary legislative procedure

Article 294 of the TFEU is the central article from that Chapter 2 and provides for the new “ordinary” legislative procedure. This procedure, under which the three legislative institutions of the Union – the European Commission, the Council of Ministers23 and the European Parliament – can adopt legislative and other measures together, is in fact a well-known procedure. It is the codecision procedure of Article 251 of the present EC Treaty.24 This ordinary legislative procedure begins with an initiative of the European Commission, which is exclusively competent to take this initiative. The European Parliament does not have the right to initiate “legislation”.25 However, citizens – under the Citizens Initiative Procedure26 – or the European Parliament – through the legislation resolution – may

22 A small aside for those who are interested in legislative drafting. The style of the TFEU is – it has to be said – abominable at the very least here and there. In some places, the text has become utterly unreadable as a result of the large number of additions. For example, it looks as though the text of Article 64(3) of the TFEU was drafted in Brussels at a very late hour of a night in June 2007 (it is impossible to ascertain its meaning and there is no explanatory note either). Articles 139(4) and Article 209(1) and – for some reasons – specific paragraphs of Article 238(2) and Article 244 – to mention just a few examples – are also unclear as a result of the language used. Particularly the French preference for parenthetic clauses and the overuse of the phrase “without prejudice to” (also a French quirk) disfigure the texts that are full of legalese anyway. Often these are, of course, deliberately vague and ambiguous (constructive ambiguity) to leave some scope in the future. This happens to be part and parcel of texts of this kind. It looks as if the lawyers employed by the Union disliked the style of the text, too, because they hit back hard. The structure of the lengthy TFEU is exemplary. It is clear that they have taken great pains to perfect this. The Treaty now has a logical classification of the subject matter, divided into parts, titles, chapters and sections of the Treaty. In the Netherlands we would reverse the order of the titles and chapters, but apart from that: nothing but praise.
23 Invariably called the “Upper House” or the “Bundesrat of the Union” by Ferguson (2004). That’s an interesting one to think about.
24 At some point, the Convention considered shortening the current codecision procedure by one reading, but because the codecision procedure is working well at present, it was decided not to change it.
25 This means, according to Combrez, that it is the only parliament in the world without the right of legislative initiative. We have to take his word for it, because I have not been able to check it. Christophe Combrez (2003), “The Democratic Deficit of the European Union; Much Ado about Nothing”, European Union Politics, vol. 4 (1): 101-120.
26 Article 11 (4) of the Treaty on European Union. For such a request to be admissible, at least one million citizens from a significant number of Member States should endorse an initiative.
request the Commission to pursue an initiative. In actual fact, the Commission cannot be forced to take any initiative, save a few exceptional cases based on the old third pillar\textsuperscript{27}, but it can be prevented from doing so. Cooperating national parliaments can block a proposal through the orange-card procedure.\textsuperscript{28}

The codecision procedure regulates a complicated game that resembles the French legislative procedure a little bit. It allows two bodies (Council and Parliament) to exert influence on legislative proposals and fine-tune them through several readings. The main idea behind the procedure is to allow the European Parliament to play a genuine role in the European law-making process. From the time of the Maastricht Treaty to the Treaty of Lisbon, the scope of the codecision procedure has been extended in different periods and now the “ordinary” legislative procedure is used for the adoption of nearly all European legislation.\textsuperscript{29} As an exception, the Council itself adopts legislative measures under an extraordinary legislative procedure, but in this procedure, too, the decision cannot be adopted before the European Parliament’s approval has been obtained, barring one exception: art. 92 TFEU.\textsuperscript{30}

\textsuperscript{27} See Article 76, opening lines, and under (b) of the TFEU (Rules for administrative cooperation in the context of the creation of the area of freedom, security and justice).

\textsuperscript{28} This is enshrined in Article 69 of the TFEU. This article refers to the procedure that is included in the subsidiarity and proportionality protocol to the Treaty of Lisbon.

\textsuperscript{29} Since its introduction in 1992, the codecision procedure has surpassed many pessimistic expectations. In 2002 the Convention concluded that the codecision procedure worked pretty well. About 32\% of the proposals are accepted in the first reading; in approx. 40\% of the cases, the decision can be adopted after a second reading and in 28\% of the cases, a Conciliation Committee is instituted during the negotiations on the proposal. See the Convention document "Legislative procedures (including the budgetary procedure): current situation", CONV 216/02, 24 July 2002. Even so, an interesting debate was held on the question whether the European Parliament’s influence has in fact increased as a result of the codecision procedure. The American political scientist George Tsebelis claimed – two years after its introduction – that as a result of the codecision procedure, the European Parliament’s influence had declined compared to the preceding period, in which the Parliament was usually involved in the legislative process under the cooperation procedure. In these first two years of the codecision procedure, he saw a shift in the power to set the agenda towards the Council. See George Tsebelis (1994), “The Power of the European Parliament as a Conditional Agenda Setter”, American Political Science Review 88, 1994, pp. 128-42. Later on, he has had to adjust this picture on the basis of the experiences in the period after 1996. It turns out that the Parliament has become more important in relation to the Council as a result of the codecision procedure – also when it comes to setting the agenda. See George Tsebelis and Geoffrey Garrett (2000), “Legislative Politics in the European Union”, European Union Politics 1(1), 2000, pp. 9-36. More recent studies show that the influence exerted by the European Parliament on legislation, also in relation to the Commission, has grown considerably. This is for the most part due to the right of amendment. Amie Kreppel (2002), “Moving Beyond Procedure: An Empirical Analysis of European Parliament Legislative Influence”, Comparative Political Studies 35, 2002, pp. 784-813.

\textsuperscript{30} The treaty has the following exceptions to the ordinary legislative procedure of Article 294 of the TFEU (i.e. the special legislative procedures of the TFEU). This concerns three situations:


B. The Council decides after consultation of the European Parliament: Article 21(3) (social security and
Under the ordinary legislative procedure of Article 294 of the TFEU, both the Parliament and the Council have the right of amendment (even if it is called “adopting a position” in the TFEU), and the European Parliament is expected to exercise this right frequently and intensively. The procedure provides for several readings, which means that it is possible to seek a compromise with respect to a proposal through a kind of “navette”, which may ultimately end in a third reading – after a Conciliation Committee has been instituted – even if the positions of the Council and the European Parliament are far apart after two readings.

Does the ordinary legislative procedure give rise to a “primary” legislator at EU level? This may seem a simple question, but it is in fact hard to answer it. In any case, it does not give rise to a primary legislator in the Dutch sense of the word, whereby a decision that has gone through the constitutional legislative procedure (Art. 81 et seq. of the Dutch Constitution) directly has – as an Act of Parliament – the status of “primary legislation” (called: wet in formele zin). The ordinary legislative procedure from the TFEU must be followed for quite different kinds of decisions and acts. Naturally, the Article 294 TFEU procedure is prescribed for nearly all directives and regulations, but also the decision-making with respect to other instruments quite often takes this route. Under the amended treaty, it frequently happens that the Council and the European Parliament must follow the ordinary legislative procedure for taking a measure – what the Dutch would call a decision to perform an act or a financial decision. As a general rule,
the three legislative institutions are free to determine the legal form of a measure. This may be a regulation, a directive, a recommendation, or a decision to perform an act not intended to have any legal effect. Within the limits set by the principle of proportionality, the institutions have freedom of choice in this respect. In principle, the Dutch legislator – like many kin-legislatures in the EU – does not have this freedom. In the Netherlands the constitutional procedure also determines the form of a decision to a great extent. If the route of Art. 81 et seq. of the Dutch Constitution is taken, this necessarily means that the result will be called a “statute” or (like in many other countries) an “Act of Parliament”. Another remarkable difference: the ordinary legislative procedure of Article 294 by no means always results in a “legal act”, which means a decision by which a change is effected in the status quo of existing rights and obligations. The ordinary legislative procedure may be used for adopting a number of policy measures that do not change the law at all. For example, non-binding opinions, recommendations (see section 3.b below), or policy intentions must sometimes be adopted through the procedure of Article 294 of the TFEU. In the system of the TFEU, these opinions, recommendations and policy measures are a type of legal act – even though they do not have any direct legal consequence – namely a “legislative act” (Article 289(3) of the TFEU). This is confusing for legal scholars educated in the Netherlands. This confusion is due to the fact that the TFEU uses a legal act concept that is totally different from the one used in a lot of continental law systems or in common law systems for that matter. And this brings us to the next subsection.

3.b The legislative instruments of the Union: legislative acts and non-legislative acts

To exercise the Union’s competences, the institutions may adopt regulations, directives, decisions, recommendations or opinions in accordance with Article 288 of the TFEU. Together, these five instruments constitute the “legal acts” of the Union. This will take some getting used to, of course, because in the Dutch legal literature – owing much in this respect to German and Austrian

\[34\] Article 5(4) of the EU Treaty.
doctrine –, some of these instruments would not be called *rechtshandelingen* (i.e. legal acts with legal consequence). For example, a recommendation or an opinion cannot even be binding.35 In the Netherlands, we would be more likely to call them “types of decisions”.36

The directives, regulations, opinions and recommendations pursuant to Article 288 of the TFEU are of the same nature as those in the current Article 249 of the EC Treaty. In the Dutch text of the treaty, the term *beschikking* from the old EC Treaty has been replaced by the term *besluit*, which is also binding in its entirety. This use of “besluit”, by the way, ends the problems the Germans, Austrians and the Dutch had with “beschikking” under the preceding text; it did not tie in well with their domestic administrative law and administrative law doctrine. Observers from other legal cultures will not be bothered much by these details. Both “beschikking” and “besluit” translate as *decision* in English. Most countries do not distinguish between types of decisions.

Aside from these details on the plane of the instruments there seems not to be much new under the sun so far.37

Within the category of legal acts provided for by the TFEU, a distinction is made between legislative acts and non-legislative acts. Legislative acts are decisions adopted under the ordinary or special legislative procedure (Article 289(3) of the TFEU) and non-legislative acts are decisions that are adopted pursuant to delegation or for the purpose of implementing a legislative act (Articles 290 and 291 of the TFEU).

It is important to point out that the difference between a legislative act and a non-legislative act in the TFEU is of a formal nature. A delegated or implementing regulation the Commission adopts through delegation pursuant to a legislative act may and will often contain what is known as a material act of legislation, commonly referred to as statutory instrument, subordinated or secondary legislation, or – what we call in Dutch – “wetgeving in materiële zin” (legal provisions of a generally binding nature).

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35 See Article 288 of the TFEU, last sentence.
36 Meaning that recommendations, opinions, measures, etc. are always adopted by decision, not that they are also a “besluit” (usually translated as “order” rather than “decision”, because the latter is usually used as a translation of the narrower term *beschikking*) within the meaning of the Dutch General Administrative Law Act, of course.
37 The Constitutional Treaty proposed to re-label the Regulation and Directive into “EU Law” and “EU Framework Law”. This Convention proposal was undone by the Lisbon Treaty because it might – it was felt – prompt the idea of the EU as a super, federal state.
The distinction between legislative acts and non-legislative acts is highly important in the system of the TFEU, however. Non-legislative acts – what an ugly term it is! – are subordinate to legislative acts. This hierarchy between principal decisions and decisions that are adopted in accordance with the comitology system, for example, did not exist under the EC Treaty. Article 202 of the present EC Treaty provides only that the Council may confer on the Commission powers for the implementation of the rules which the Council lays down. If the Commission made these implementation rules, these had essentially the same legal status as the basic decisions underlying the Commission’s implementation powers. Indeed: these implementation rules prevailed over the basic rules because they were more recent. This undesirable situation has now come to an end and so has the relatively unclear status of comitology and the role to be played by the European Parliament in terms of delegated and implementing decisions of the Commission: in short, the non-legislative acts.\footnote{38}

3.c Delegation and implementation under Lisbon: the future of comitology

The institutions that adopt legislative acts (the Council and European Parliament acting on a proposal from the Commission) may delegate the power to supplement or amend (!) the relevant legislation in legislative acts of general application (Article 290 of the TFEU). The primary legislator may delegate such powers to adopt further rules only for non-essential\footnote{39} elements. This norm – apparently based on German law\footnote{40} – has given rise to some kind of primacy of the legislator at European level; the Union legislator regulates the essential parts, whereas the Commission – through delegation – regulates less important subjects. Delegation possibilities are restricted by the TFEU. The primary legislator has only two options – not more\footnote{41} – to interfere with the rules adopted by the Commission pursuant to delegation, to wit:

\footnote{38} The above-mentioned Comitology decision of 1999, as amended in 2006, had already removed some of the lack of clarity as well. OJ 2006 L 200/11.
\footnote{39} In the current consolidated Dutch text, the term "niet-wezenlijke" is improperly mentioned.
\footnote{40} The doctrine of "Wesentlichkeit" as a part of the principle "Vorbehalt des Gesetzes”. Expressed in the German Constitutional Court Ruling, BVerfGE 47, 46 (48f.).
\footnote{41} "Exhaustive", as Jorna calls it. (2004), p. 25.
a) Revoking the delegation (also known as “call back”);
b) A preliminary scrutiny option, 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.\(^4^2\)

These delegation norms from the TFEU deserve support, because they provide a transparent framework, which has been absent to date, for delegating legislative powers to the Commission. This contributes to the need of efficiency and decisive action, creates clarity, and treats the principal legislative institutions on an equal footing. The question arises, however, what this will mean for the above-mentioned phenomenon of comitology. Comitology may be described as “chaperoning” the Commission with respect to its task to adopt rules through committees on which Member State representatives sit. In 2004, Jorna pointed out – and rightly so, in my opinion – that in principle, there should be the possibility of a contribution by committees consisting of Member State experts who assist the Commission in adopting further rules pursuant to a delegation, but that it is not in line with the delegation framework imposed by the TFEU that these committees should be able to dictate, block or otherwise control the contents of these rules, which is the case, more or less, at present in the management, regulatory and scrutiny committees. In various versions, expert representatives from the Member States assist the Commission in such committees in thinking about and deciding on implementation rules about which the EC Treaty says that the Commission itself must actually make these independently (Article 202 of the EC Treaty). This kind of Member State “chaperoning” of rules that the Commission may adopt pursuant to delegation is also inconsistent with the letter and spirit of the new Article 290(2) of the TFEU. It remains to be seen, however, what developments the European political nature will give rise to. Comitology was always a Member State “check reflex”\(^4^3\), which did not have any basis in the Treaty. The question is whether this nature will adjust to the new treaty. We will see what happens when the present

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\(^{4^2}\) See Article 290(2) of the TFEU.

\(^{4^3}\) The Member States themselves invented and negotiated this check on the drafting of implementation rules in conjunction with the Commission for the purpose of allowing a somewhat more flexible delegation practice.
comitology decision from 1999 (amended in 2006)\textsuperscript{44} will be amended to bring it into line with the TFEU.

Let me make a few closing remarks on the delegation procedure from Article 290 of the TFEU. It is striking that the TFEU explicitly allows the possibility that a non-legislative act adopted by the Commission pursuant to delegation may \textit{amend} the basic decision, the legislative act. A lower instrument that amends a higher instrument or may even repeal it. This is quite a shock to Dutch people, but in other EU Member States this occasionally happens. In the United Kingdom, for example, this repeal possibility is called a “Henry VIII” clause. Incidentally, the question arises whether Article 290 may also be used as a Henry VIII clause, i.e. the possibility of repealing the basic instrument by means of a delegated instrument. A second point: a non-legislative act that is adopted, pursuant to a delegation, in a regulation (a legislative act), is, in terms of its legal nature, a subordinate \textit{non-legislative act} and is called a \textit{delegated regulation}. If a directive is the basic decision (the legislative act), the decision adopted pursuant to a delegation would be called a \textit{delegated directive}.\textsuperscript{45} We cannot make it even simpler, but we can make it more complicated... Dutch people may find it hard to get used to these counterintuitive terms.

3.d Implementing acts

Article 291 of the TFEU makes provision for implementing acts. This refers to the collection of acts required for implementing European law – in the broadest sense of the term.\textsuperscript{46} This includes the legal transposition of directives; the designation of administrative bodies; removing legal obstacles that prevent the applicability of European law; in short, all legal measures (because Article 291 of the TFEU is restricted to the latter) to be taken in accordance with the duty of loyal cooperation. In principle, this is the Member States’ responsibility, but the Commission also has a role to play in this respect. In a 1989 ruling, the Court of Justice decided that “implementation” comprises both the drafting of implementing rules by the Commission (or the

\textsuperscript{44} OJ 2006 L 200/11.

\textsuperscript{45} Article 290(3) of the TFEU.

\textsuperscript{46} See P. Eijlander and W. Voermans (2000), \textit{Wetgevingsleer} (Legislative Drafting). Boom Juridische uitgevers; The Hague.
Council, in exceptional cases) and the implementation of these rules itself.\textsuperscript{47} Jorna believes that this ruling is also relevant to the provisions included in Article 291\textsuperscript{48} of the TFEU.\textsuperscript{49} By all appearances, the Commission or the Council will be able to draft implementing regulations under the vWEU as well, even though this requires the express conferral of a competence for this purpose in the basic instrument (the legislative act). This gives rise to a grey area, because conferring an implementing power of a general nature constitutes a delegation within the meaning of Article 290 of the TFEU as well. And therefore, the delegation conditions apply too in that case. Or is this not so? In any case, the Commission is not independently competent to draft implementing regulations. Like Jorna, I believe that Article 290 of the TFEU is nevertheless applicable.\textsuperscript{50} This appears to be an inevitable result of the system opted for. Another deep one: the national legal measures the Member States take are implementing acts within the meaning of Article 291 of the TFEU and, consequently, non-legislative acts subordinate to legislative acts. An interesting question that arises is the following: what will be the meaning of legislative acts – such as directives – or amendments to these for legal measures that Member States have taken. Are the latter voidable as a result of them, even within the transposition period? I believe so, even though this is a rather drastic consequence of the system.

\textit{Lamfalussy}

Article 291(2) also provides a basis for what is known as the Lamfalussy method or procedure.\textsuperscript{51} In short, this method means that the European Commission may seek the advice of experts and specialised committees not necessarily composed of Member State representatives in setting uniform implementing standards (i.e. uniform implementing conditions). As this procedure is not too democratic in nature (experts who draft rules without direct or indirect democratic legitimacy), Article 291(2) of the TFEU instructs the Council and the Parliament, acting by means of a regulation, to lay down general rules and principles relating to the mechanism of control by Member States of
the Commission’s exercise of implementing powers. This appeal for comitology-new-style seems to suggest that comitology-old-style is no longer in line with delegation under Article 290(2) of the TFEU, but that its only function is to monitor the manner in which the Commission exercises its implementing powers. Unfortunately, no clear distinction has been made between delegation and implementation. 

I would like to raise a final point: if a regulation confers implementing powers on the Commission and the latter draws up implementing regulations on the basis thereof, the product is called an implementing regulation. By analogy, a directive will become an implementing directive. This will take a little getting used to. The outline below may clarify things.

Outline of New Legislative Instruments

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<td>(Articles 288 through 292 of the TFEU)</td>
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<td>LEGAL ACTS OF THE UNION</td>
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<td>A. Legislative acts</td>
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4. THE MEMBER STATES AS CO-LEGISLATORS

The Member States constitute an integral part of the complex of bodies of the European legislator under the new Lisbon structure as well. After Lisbon, they have become a full legislative partner in two ways, as in the
old system. They contribute to the preparation and adoption of European legislation and they are responsible for perfecting European legislation once adopted, for the European regulations and directives adopted in Brussels and Strasbourg are often not finished at all: they must still be implemented (and directives must often be transposed into national law).52

These co-legislative duties are not to be taken lightly. Particularly its share in the preparation of European legislation – and especially the national Parliament’s share – gives cause for concern, for instance in the Netherlands, but in other countries as well. We have found on several occasions that Dutch parliamentarians are hardly aware of the fact that their Parliament can make an important contribution to the preparation process and they do not like the idea very much. The input the Houses may have in the preparation of European legislation requires thorough knowledge of the files, a superb sense of timing and great commitment. In short, parliamentarians have to put in a great deal of effort to achieve modest results. In the Netherlands these skills are not in big supply. There is not a big demand either. The Dutch electorate is not in the least interested in the way parliamentarians deal with proposals for European legislation. Once, I jokingly compared great investments made by parliamentarians in European files to political suicide.53 Efforts and return are – in the Netherlands, as in many other Member State – fully out of balance, certainly given the fact that the Government has an iron grip on the European agenda and has much greater expertise in this field. In addition, if you take into account that the European meeting agendas do not take the slightest notice of meeting and planning cycles in the Netherlands, or in any other Member State for that matter, this results in parliamentarians often being poorly informed about the facts. This forbidding climate of neglect, lacking information and political disinterest, poor coordination and scheduling has resulted in a an unfortunate downward spiral in the Netherlands as far as its share in the preparation of European legislation is concerned. Of course, some will say that it does not matter very much if the House of Representatives” share in the preparation of legislation is only nominal (the Dutch Senate is more active in

53 Voermans (2004), pp. 84-86.
this field). The Government conducts negotiations and reports thereon to the House of Representatives. Besides, the Senate compensates the omissions of the House of Representatives to some extent, and then there is also the European Parliament that keeps an eye on the process. In addition, the House of Representatives is involved in the implementing process. I believe that none of these arguments makes any sense. Unlike the House of Representatives, the European Parliament and the Dutch Senate cannot provide for direct national legitimacy of European decision-making. Formally, they may have this power, but not substantively. These soothing arguments are consistent with what I called “the logic of the international law approach to European management of affairs” in 2007.54 This approach is still the standard of all things in the Netherlands – the country I will stick to in this paragraph. This approach means that the Dutch Government negotiates on international matters on the basis of its own strength and presents the results achieved to the Dutch Parliament. For a long time now, EU legislation has not been comparable to other international matters, however, neither in terms of its nature nor in terms of its sheer volume. The need for more national control of European policy and European legislation, as evidenced by the Dutch “no” in 2005, requires a parliamentary approach of European management of affairs. Undoubtedly, this Dutch resistance is also related to discontent about the process of “integration by stealth”, as Majone calls this process.55 The national population feels it has hardly been involved in European decision-making, which is partly due to an outdated sovereignty concept, according to Brinkhorst.56

To prevent the European decision-making process from being even more “isolated” from the population, it is possible to involve the national Parliament to a greater extent. The recent debate on parliamentary involvement in EU matters is, I think, both illustrative and recognizable. For more than a decade commentators in the Netherlands have argued and rallied for closer parliamentary involvement into EU-dossiers in order to avoid further EU alienation.57 The influential Dutch Council of State, for one, has cherished this wish

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for a long time as well. Closer involvement may take various forms, the Council observes, for example, closer cooperation between members of the Dutch Parliament and Dutch representatives in the European Parliament. Pursuant to this line of reasoning the Dutch Council rendered a positive opinion on the participation of Euro MPs in debates in the Dutch House of Representatives: the Council did not see any obstacles to it.58 Greater involvement by the Dutch Parliament in the preparation of European legislation may also be useful, the Council and a lot of Dutch commentators feel. By now, many EU countries have given shape to this involvement through a “parliamentary scrutiny reserve”, which means that the government of a country will not discuss a legislation file in the Council of Ministers until after it has discussed this file in its own parliament.59 There is a great variety of reserves. In some countries, this is even achieved by a written negotiation mandate for the government. In the Netherlands we also had a kind of parliamentary scrutiny reserve, the “right of consent” for files in the third pillar. As the Treaty of Lisbon put an end to the pillar structure of the Union, the question arose whether this right of consent should be retained. The commission chaired by Meijers and Besselink, Curtin and Reestman advocated retaining this right of consent.60 The Dutch Parliament, however, did not seize this opportunity: only a small part of the right of consent has been retained – on the occasion of the enactment of the approval act61 – in a very restricted number of specific fields where only the European Parliament should be consulted – by way of exception to the ordinary European legislative procedure. A proposal for a parliamentary scrutiny reserve has been adopted only in a much diluted form.62 This is a bad thing if one reflects on it.


58 See the opinion by the Council dated 19 July 2007, together with the further report published in Dutch Parliamentary Papers II 2007/08, 31202, no. 4.


61 This approval act for the Treaty of Lisbon was adopted on 9 July 2008.

62 Dutch Parliamentary Papers I 2007/08, 31 384 (R 1850), A. This concerns, for example, the adoption of rules for travel documents and residence permits for Union citizens. For a survey of the various amendments, subamendments and motions that have been submitted, see Dutch Parliamentary Papers II 2007/08, 31 384 (R 1850) and for the votes therein, see Proceedings II 2007/08, 93, pp. 6619-6620.
A final way of involving the national Parliament in the process is the "orange card" procedure – a procedure that was negotiated by the Netherlands – at least is the way it is felt – in the run up to Lisbon. This procedure is the "emergency brake" successor to the yellow card procedure from the protocols to the constitutional treaty. This procedure means that if half of the national parliaments do not agree to a proposal by the Commission within an eight-week period, the European Commission must render a reasoned opinion if it wishes to maintain its proposal. If subsequently, one of the co-legislators (Council with 55% of the members or the EP with a majority of the votes cast) decides that the proposal is not consistent with the principle of subsidiarity, the proposal will no longer be taken into consideration.

The orange card procedure is an example of pure symbol politics, in my view. Statistically, I believe that the chances of this procedure being successfully used even only once over a longer period of time are negligible. This is because pulling the orange card requires no less than a joint uprising by at least 14 parliaments (including many bicameral parliaments). This is almost impossible, because these rebellious parliaments do not have regular consultation meetings, are also very diffuse, have very different cultures and very little time to pull off a thing like that. And then I have not even pinpointed the complicating factor that all these parliaments will probably undermine the position taken by their governments at an earlier stage (the Commission usually submits proposals only on request and with the consent of the Member States), which might result in domestic political fuss. No, although nothing is impossible, the orange card procedure simply cannot work.

The Netherlands, as co-legislator, is also involved in the implementation of EU legislation. Of course, the preparation and implementation of EU legislation are communicating vessels, even though it concerns stages that should be distinguished. The Treaty of Lisbon does not introduce many changes in the field of implementation of EU legislation. Some comitology aspects might or might not change following the entry into

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63 For example, research shows time and again that active involvement (particularly parliamentary involvement) in the preparation of EU directives is conducive to the speedy and successful implementation thereof. See B. Steunenberg & W. Voermans (2005), The Transposition of EC Directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States. WODC, Ministry of Justice; Leiden/The Hague.
force of the Treaty. Accordingly, I will not deal with the involvement of the Netherlands in the implementation of EU legislation any further.

5. REALLY?

It is time for the conclusion. Does Europe have a real legislature after the Treaty of Lisbon? If we assess the new legislator from the TFEU in terms of the criteria developed in section 2, the answer must be in the affirmative. The Treaty of Lisbon replaces a motley collection of procedures and instruments – which in some cases involved the Council and the European Parliament, but in other cases not – with one legislator (the Council and the Parliament cooperating in a uniform legislative procedure on the Commission’s proposal). Article 14 in conjunction with Article 16 of the EU Treaty reveals the existence of one legislator in the Union. These provisions expressly assign the legislative tasks in the Union to the Council and the European Parliament jointly, enshrining the European Parliament’s essential share in the Union legislation in the Treaty. As a result of the operation of the principle of conferral, the European legislature may not be competent to draw up rules for every subject, but even so, the Treaty does confer substantial legislative powers on the Council and the Parliament in almost every field of European policymaking. In the ordinary legislative procedure, the Council cooperates with the people’s representation and the European legislator also has the power to adopt binding legislation. Regulations are binding in their entirety and have direct effect in the Member States; directives bind Member States as to the result and decisions bind those to whom they are addressed. The European legislator has a power of conferral in the sense that it may confer legislative and other powers on bodies (for example, Article 290(2) of the TFEU). In addition, in accordance with the procedure of Article 294 of the TFEU, the ordinary EU legislator has legislative primacy with respect to “essential subjects”, because Article 290(2) of the TFEU prohibits delegation in respect of these subjects. And the ordinary EU legislator also satisfies the final characteristic of a real legislator after the Treaty of Lisbon: this legislator is competent to adopt legislation which binds the EU to treaties.64

64 This follows from Article 37 of the EU Treaty.
Accordingly, the following conclusion should be drawn: we are dealing with a real legislature. Now we should ensure that it will represent a real power in the eyes of European citizens and will receive the public support necessary for its decisions. This can be achieved only if National Parliament, like the Dutch Parliament, will utilize the possibilities of contributing to the preparation of European proposals for legislation; indeed, if National Parliaments are seen to be taking their responsibility when it comes to the deciding on the position that Member State takes in relation to proposals for directives and regulations submitted by the Commission. Scrutiny reserves can be wholesome in this respect because helps to hammer home the message that European legislation begins in the Member State itself, not in far off Brussels. It is important to know and propagate this notion. This could for example help to relieve the process of *Europa Verfremdung*65 as it is currently underway in the Netherlands and other Member States. The Treaty of Lisbon itself will not improve the legitimacy of European decisions. The institutions and politicians will have to do so. Let see if political will and stamina will bring us there.

65 I.e. the process European alienation rising from the feeling of considerable parts of the European public that they are not a part of the European Union but merely subjected to it.