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Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts

Thomas Christiansen and Mathias Dobbels***

Abstract: *The reform of comitology and the introduction of the new instrument of delegated acts in the Lisbon Treaty were followed by protracted negotiations on the implementation of both articles. This article examines the resultant system that has emerged for both types of non-legislative instruments. In the area of implementing acts, a new regulation sets out important changes: a reduction in the number of procedures, the extension of the scope to trade defence measures and the replacement of a referral to the Council with a new appeal committee. With respect to delegated acts, the search for an overarching framework resulted in a Common Understanding. Our analysis not only demonstrates the need to go beyond the treaty provisions in understanding the nature of non-legislative rule making in the EU, but also emphasises the importance of informal procedures and non-binding agreements in fully assessing the nature of non-legislative rule making in this area.*

I Introduction

'Comitology', the system of legislative oversight of implementing powers delegated to the European Commission, has long been a mainstay of the EU's administrative system. From the early 1960s onwards, Member States accompanied the delegation of powers to the Commission with the establishment of implementing committees that would 'assist' the Commission in the execution of these powers. Effectively, these comitology committees provided a mechanism for scrutiny by national administrations over the way in which the Commission sought to implement delegation.

While this system has generally been considered effective in that it facilitated the involvement of Member State representatives in the adoption of thousands of implementing acts annually, it has also been the source of occasional, and recently increasing, tensions between the European Parliament (EP) and the other institutions. With the creation of the co-decision procedure in the Maastricht Treaty and the subsequent expansion of co-legislative powers for the EP, the Member States' monopoly over the scrutiny of implementing acts became a bone of contention

* Jean Monnet Professor of European Institutional Politics at the Department of Political Science at Maastricht University.
** PhD Fellow at the Department of Political Science at Maastricht University.

between the two legislative institutions. A series of intermediate reforms throughout the 1990s and 2000s provided the EP with limited rights to information and powers of scrutiny, but inter-institutional tensions persisted with the EP's demand for legislative equality to be matched by equality with regard to the scrutiny of the Commission's delegated powers.

The Lisbon Treaty marked a milestone in this regard for two reasons: first, it established a new legal base in the treaty for the work of comitology committees, replacing the use of the consultation procedure with the ordinary legislative procedure for the adoption of the general rules and procedures under which the Commission has to submit its draft implementing acts to the committees (Article 291, Treaty on the Functioning of the European Union (TFEU)); and second, it created an entirely new instrument of 'delegated acts' that are directly scrutinised by the legislative institutions, without any use of comitology (Article 290 TFEU). Both articles, individually and taken together, give the Council and Parliament equal status in the treaty with regard to the scrutiny over implementing and delegated acts, and thus constitute a certain *finalité* in terms of the EP's quest.

The history of inter-institutional tensions in comitology over the past 20 years demonstrates that disagreements about non-legislative rule making can capture the interests of the legislative institutions and have the potential for disrupting Union decision making. Far from being 'low politics', comitology—the procedures as well as the substantive decisions taken through its procedures—has often been politicised. This makes it important to study the implications of the new post-Lisbon system of delegated powers, and to ask what impact the above changes will have on the nature of non-legislative rule making.

In the following, we briefly review the key elements of the reforms introduced by the Lisbon Treaty and its subsequent implementation, before then examining in more detail the kind of proceduralisation with respect to the two instruments—delegated acts and implementing acts—that are now being used in the EU to delegate implementing powers to the European Commission. A final section will compare the degree of formalisation that has been developed in either case and addresses its significance in terms of the wider practice of non-legislative rule making in the EU.

II Background: The Lisbon Treaty Reform of Delegated Powers

A Articles 290 and 291 TFEU

The Lisbon Treaty establishes a new legal basis for the comitology procedures and makes the distinction between delegated and implementing acts. Article 290 of the TFEU provides for the possibility to delegate the power to adopt non-legislative delegated acts that are of 'general application', and 'supplement or amend non-essential' elements of the basic legal act to the European Commission.[1] The article also provides for *post hoc* control to be exercised by the EP and the Council, either through the right to revoke the delegation or the right to object to the adoption of a specific delegated act within a time limit set by the basic legal act. Article 291 TFEU, on the other hand, confers the right to implement legislation to the Member States.[2]

[1] European Union, *Consolidated Treaties* (Publications Office of the European Union, 2010), at 172.
[2] *ibid* at 174.

However, where there are uniform conditions for implementation, it shall in principle be conferred to the Commission—except for duly justified specific cases and matters of common foreign and security policy and defence for which the Council is responsible. In all other cases, however, neither the Council nor the EP has the right to substantially control the Commission's exercise of these implementing powers, which is the prerogative of the Member States. This is an important innovation of the Lisbon Treaty, as under the previous regime the Council still had a decision-making role in case certain thresholds were not met in the committee that exercised control on the proposed act.[3] Article 291 TFEU also requires that regulations are adopted under the ordinary legislative procedure in order to lay down the rules and general principles with mechanisms for control by Member States of the Commission's exercise of the implementing powers, whereas Article 290 TFEU stands on itself and requires no formal implementing measures. It is the first time the EP is co-legislator on such a regulation, as in the past the mechanisms for control were adopted through Council decisions.

The distinction between delegated and implementing acts may be clear at first reading, but a potential source of confusion is that—as opposed to Article 290 TFEU on delegated acts—Article 291 TFEU does not define what an implementing act is but rather refers to its trigger, namely 'uniform conditions for implementing legally binding Union acts'.[4] However, if there are 'uniform conditions' of general application to supplement or amend a legislative act, the correct instrument would be a delegated act. The focus to make the distinction, therefore, lies in the verbs 'amend', ie making formal changes to a text (deleting, replacing or adding non-essential elements), and 'supplement', ie adding new non-essential rules or norms, as opposed to 'implement', where no new rules or norms are established and the act is supposed to give effect to the rules that have been laid down in the basic legislative act.[5] In other words, the main difference is whether there is simply a need to adopt acts to give effect to the rules set by the legislator or whether it is necessary that the Commission has the power to change (amend) or add (supplement) some of the rules of the legislation that are of a non-essential nature. In its guidelines to its services, the European Commission[6] concludes that a handy way of making the distinction lies in asking the question 'what' Member States should do, which constitutes a delegated act, as opposed to 'how' Member States are to act to carry out the obligations set by a legislative act, which would constitute an implementing act. It is important to

[3] In the *management procedure*, which was mainly used for the implementation of agricultural measures and financial support programmes, the Commission could adopt the implementing measure only if there was no qualified majority against the proposal. In case this threshold was met, the matter was to be referred to the Council, who had the opportunity of adopting a different decision. Under the *regulatory procedure*, instead, measures could only be adopted by the Commission if a qualified majority of Member States was in favour. Otherwise, the act had to be forwarded to the Council, who could ultimately adopt the act. This procedure, used for all implementing measures having a 'legislative impact', especially in the field of health and safety of persons, foresaw also the possibility for the EP to exercise its right of scrutiny in case of lack of positive opinion within the Committee.

[4] See also J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', (2012) 49(3) *Common Market Law Review* 885–927.

[5] European Commission, *Implementation of the Treaty of Lisbon. Delegated Acts. Guidelines for the Services of the Commission* (Brussels, 2011), at 11–12.

[6] *ibid* at 13.

emphasise here that in both its Communication[7] and the guidelines to its services,[8] the Commission states that Articles 290 and 291 TFEU are mutually exclusive and do not overlap. The analysis on the implementation of the delegated acts article will show that this is not the case in practice and that the co-legislators often clash as to the interpretation of the legal wording.

B Implementing the New System

With Articles 290 and 291 TFEU, the EP obtained a formal treaty-based role in the control on delegated acts and is co-legislator to set the mechanisms for control in the regulations on implementing acts. In December 2010, negotiations among the EP, the Council and the Commission were successfully concluded on the new regulation on implementing acts. Regulation 182/2011 establishes two procedures for Member States to exercise control on the implementing powers of the European Commission: the examination procedure and the advisory procedure. The examination procedure is used for the adoption of measures of a general scope, and measures related to programmes with substantial budgetary implications, the common agricultural and common fisheries policies, the environment, human, animal or plant safety and security, taxation, and the common commercial policy.[9] One of the main innovations of the 2011 regulation is the replacement of the Council as body of second instance by the appeal committee, which is a committee composed of Member State representatives who meet at the 'appropriate level' and is presided by the Commission. Finally, it is important to mention that the old procedures of the system before 2011 are all automatically aligned to the new system,[10] except for basic legal acts containing provisions that refer to the regulatory procedure with scrutiny for which a case-by-case alignment is taking place to determine whether these provisions fall under 290 TFEU or 291 TFEU.

On the implementation of Article 290 TFEU, although no further measures were necessary, the three institutions adopted a Common Understanding, which is a non-legally binding gentlemen's agreement on practical arrangements for the use of delegated acts. The Common Understanding builds on the Commission communication of December 2009 and the practice established thereafter. It includes time limits for the Council and the EP to use their right of objection, an

[7] European Commission, Communication from the Commission to the European Parliament and the Council on the Implementation of Art 290 of the Treaty on the Functioning of the European Union, (COM 2009 673 final).

[8] European Commission, *Implementation of the Treaty of Lisbon. Delegated Acts. Guidelines for the Services of the Commission* (Brussels, 2011), at 9.

[9] It is the first time that the common commercial policy is regulated under a unified system of control. Before, trade defence measures, such as anti-dumping or countervailing measures, were dealt with in separate regulations where opinions were often given by simple majority. Reg 182/2011 foresees that, from September 2012, these measures fall under the examination procedure with specific provisions saying that the Commission cannot adopt the measure if there is no opinion in the committee that exercises control, and that if—in this case—there is a simple majority against the measure, that the Commission shall conduct consultations with the Member States and submit the measure to the appeal committee, which will take the final decision.

[10] The advisory procedures remain. The management and regulatory procedures become examination procedures.

urgency procedure, a standard recital on the consultation of experts by the Commission when preparing a delegated act and model articles that can be inserted in the basic legal act. As already briefly alluded upon in the previous paragraph, Article 290 TFEU and delegated acts replace the former regulatory procedure with scrutiny. Yet there is no automatic alignment between the two. As Hardacre and Kaeding explain, delegated acts are fundamentally different as they 'will be subject to more inter-institutional discussions much earlier in the legislative process given that the objectives, scope, duration and conditions to which the delegation is subject can change in every legislative act'.[11] An additional innovation as opposed to the regulatory procedure with scrutiny is that both legislators can now object to a measure on any ground.

At the first meeting of the appeal committee on 29 March 2011, the Member States adopted a set of standard rules of procedure[12] for the committees as well as the rules of procedure for the appeal committee.[13] The standard rules of procedure, which every committee can modify, deal among other things with formal requirements for the setting of the agenda, the distribution of documents, written procedures, presence of third parties, minutes, and document confidentiality. Remarkably, Article 4.5 of the standard rules of procedure repeats one of the articles of the new regulation calling for the chair of the committee 'to find solutions which command the widest possible support within the committee', which was an important issue during the negotiations on the 182/2011 regulation in the Council where Member States wanted a strong commitment from the Commission to look for wider majorities than is formally necessary under the qualified majority rule.[14] The rules of procedure of the appeal committee include the general rules and time limits for convening a meeting, as well as articles on a written procedure, access to documents, and confidentiality and correspondence. Where the regulation said that the appeal committee should meet at the appropriate level, the rules of procedure further specify that each Member State can choose the composition of its delegation with a view to achieving a level as homogenous as possible during the meeting. This is a further testimony of the wish of the Member States that the appeal committee should be of a higher political level, reflecting the controversial nature of the measures that are to be discussed.

Now that the background for the analysis is set, we will look at the practical implementation of each instrument in order to determine to what extent they have been subject to non-legislative rule making. Non-legislative rules are adopted by the institutions outside the normal legislative process—often on an informal basis—in order to set up procedures not provided for by the treaty. We will, therefore, be looking at both informal procedures and non-binding agreements that were concluded in order to fully assess the implications of the treaty reform in this area.

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[11] A. Hardacre and M. Kaeding, *Delegated and Implementing Acts. The New Comitology*, EIPA Essential Guide (European Institute of Public Administration, 4th edn, 2011), at 14.

[12] European Union, Standard Rules of Procedure for Committees, 2011/C 206/06 (Brussels, 2011).

[13] European Union, Rules of Procedure for the Appeal Committee, 2011/C 183/05 (Brussels, 2011).

[14] T. Christiansen and M. Dobbels, 'Comitology after the Lisbon Treaty: Who is the Real Winner?' (2012) 16(13) *European Integration online Papers* 12.

III Comitology after the Lisbon Treaty: The New System for Adopting Implementing Acts

A The Reform of Comitology Procedures

As mentioned above, comitology had a long history in the EU, and the Lisbon Treaty—building on changes that were foreshadowed by the Constitutional Treaty and the 2006 reform—constitutes a milestone in this evolutionary process. While Lisbon implies a number of significant changes to the system (as discussed below), it might be sensible to start by emphasising the degree of continuity that has been present in this process. This includes the fact that the operation of comitology requires a legislative basis (the adoption of a specific regulation setting out the procedures to be followed), as well as additional horizontal rules that govern the system as a whole (eg Standard Rules of Procedure guiding the administrative protocol before, during and after committee meetings). This development also involves rules on transparency and access to documents, as well as requirements for annual reporting by the European Commission.

This presence of a legislative framework and procedural rules means that comitology is, in fact, highly formalised. Individual comitology committees may have their own *modus vivendi*, and informal practices might differ across various sectors of EU policy making,[15] but over time the normative frame for comitology has become more and more tight. The expanding case-law on comitology before the European Court is part of this phenomenon, turning earlier differences in interpretation about the rules of comitology into a more predictable environment.

As a result of this process of formalisation, there are now detailed rules on almost all aspects of comitology—either in the Comitology Regulation itself or in the rules of procedure for the committees: the choice of the procedure under which a committee is consulted, the length of time before a meeting is convened, the kinds of documents that need to be shared in advance of the meeting, the number of days before the meeting that draft measures and supporting documents are distributed to committee members, the majority required when the committee votes on a draft implementing act, the summary record of the meetings that are uploaded in the public register, and the actions required by the Commission in carrying out its mandate after the meeting. Even greater proceduralisation is the result of Commission internal rules and guidelines about how to manage comitology committee meetings, how to slot opinions from comitology committees into the Commission's inter-service consultation mechanism, and the growing practice of also submitting draft implementing measures to regulatory impact assessments.

Much of the recent debate about comitology rules has been about an effort towards 'simplification', with the aim of making decision making more transparent and efficient. The Lisbon Treaty reforms at first sight mark an important step in this regard because the new regulation adopted after the treaty came into force reduces the number of procedures from four (advisory, management, regulatory, regulatory with scrutiny) to two (advisory, examination)—a reduction that of course needs to be seen in the context of the introduction of the additional instrument of delegated

[15] The role of comitology in the governance of the Common Agricultural Policy is one such example. See Bianchi, D. (2009), 'La "Comitologie" dans la Politique Agricole Commune', in T. Christiansen, J. Oettel and B.Vaccari (eds) 21st Century Comitology—The Role of Implementing Committees in the Enlarged European Union (Maastricht: European Institute of Public Administration), 107–123.

acts. In addition, certain exceptions and additional procedural requirements that apply in specific cases can be seen to having actually increased the complexity in reality.[16]

While there is no fundamental change to the advisory procedure—voting in the committee is by simple majority, and the Commission is required to provide a reasoned opinion in case it insists on adopting a measure in the face of a negative vote—the interesting change from a systemic perspective is the abolition of the management procedure, which in the past was the main instrument for price- and quota-setting in the Common Agricultural Policy and financial disbursement decisions. Both management and standard regulatory procedure have been replaced by the examination procedure as the sole binding procedure on the Commission. The existing *acquis* is being aligned to these new procedures.[17]

Just as in the old regulatory procedure, under the examination procedure, the voting in the committee is by qualified majority vote (until the new double majority comes into force in 2014). However, whereas the Commission previously needed a positive opinion in a regulatory committee in order to avoid a referral of its draft measure to the Council, under the examination procedure it has more leeway: it cannot adopt an implementing act if the committee delivers a negative opinion. The Commission will then either propose a new version of the draft act or refer the matter to an appeal committee (see below). In case the committee delivers no opinion and the act concerns taxation, health or safety, or if a simple majority in the committee is against the proposed measure, the Commission can also not adopt the act but can resubmit a new version to the committee or send the measure to the appeal committee.

B The Introduction of the Appeal Committee

It is evident from these provisions that the introduction of a 'super-committee' in the shape of the 'appeal committee' is one of the major innovations in this reformed system. As the name suggests, the appeal committee receives draft measures that have not received the requisite majority in an ordinary comitology committee, and as such replaces the Council that was formerly the venue to which referrals from comitology committees were sent.

In a sign of how important the proceduralisation of comitology has become, there was considerable controversy about key aspects of the appeal committee, starting with the question of who—the Member States in a rotation mechanism or the Commission—should chair it, and at which level Member States should be represented within it, followed by prolonged debate about its own rules of procedure. Eventually, it was decided that the appeal committee is composed of Member State representatives who meet at the 'appropriate level' and is presided by the Commission—the latter provision constituting something of a 'victory' for the Commission in this instance of inter-institutional bargaining.

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[16] See P. P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review* 671–687.

[17] The new regulation contains two types of alignment: one that is automatic for all existing comitology procedures specified in Art 13 of the Reg 182-2011, and one for trade defence measures and Common Agricultural Policy spelled out in declarations adopted by the Commission attached to the regulation, that is case-by-case or through omnibus procedures.

The composition of the appeal committee in terms of the 'appropriate level' of Member States' representatives has been an issue during and after the first meetings of the new committee. Some Member States, including France and Italy, favour an appeal committee composed of high-ranking officials, and the initial agreement appeared to be to send deputy permanent representatives to appeal committee meeting. In effect, this meant that the committee initially met in something of a COREPER I composition, but due to a number of dynamics this has changed, and increasingly more attaches are sent to the meetings lowering the overall level.

The main issue here is to what extent the appeal committee does exercise power over the Commission when it comes to decision making on implementing acts, and in this regard the vague provisions in the regulation that require the Commission to seek 'the widest possible support' and to avoid going against 'a predominant position' within the committee have failed to make a significant impact. The Commission has generally taken the view that in the absence of a QMV qualified majority against its draft measure in the appeal committee, it is empowered to proceed with its adoption, which means that even a simple majority of Member States cannot block an implementing measure they oppose.

In terms of routinisation of non-legislative rule making, this is the one aspect of the reformed comitology system that has remained open to interpretation, and in this regard practice seems to indicate that the operation of the examination procedure in practice is closer to the old management procedure than to the standard regulatory procedure.

IV The System of Delegated Acts

A A 'Common Understanding'

As it was not legally necessary to adopt any implementing measures to give effect to Article 290 TFEU on delegated acts, the practice that has been established is not as highly formalised and proceduralised as the procedures on implementing acts. Indeed, the Common Understanding that was concluded among the Commission, the EP and the Council is not legally binding, and can best be described as a gentlemen's agreement containing the practical arrangements for the use of delegated acts based on the Commission Communication of December 2009 and the practice established thereafter. The *Communication on the implementation of Article 290 TFEU* is only binding to the Commission, although its draft had been discussed with Member State representatives in the Council.[18] It includes sections on the process of preparing delegated acts, provisions for an urgency procedure, explanations on the right of revocation and opposition, and most significantly the so-called model articles to be used in basic acts with time limits for the right of opposition and the urgency procedure. Despite this, a spirit of loyal cooperation between the Council and the Commission was lacking at this early stage: already in early 2010, negotiations on several legislative proposals became blocked on the issue of delegated acts. The sticking point here was the manner in which the Commission proposed to involve the co-legislators in the adoption of delegated acts at the drafting stage. Although in its Communication the Commission had stated that,

[18] See T. Christiansen and M. Dobbels (2012).

> [e]xcept in cases where this preparatory work does not require any new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted[19]

A majority of Member States in the Council wanted the inclusion of a recital in every future basic act. This recital would state that the Commission would consult national experts in the preparation of delegated acts. The Commission considered this unnecessary for two reasons: first, it would give the impression that the Council was trying to introduce comitology through the backdoor by adding a formal deliberating stage with national experts before the submission of the delegated act; and second, not all delegated acts might actually require expert input in the preparation phase. The EP, on the other hand, objected to the inclusion of such recitals as well, unless its own experts were also included here. In the event, a regulation on the non-commercial movement of pet animals, which was under time pressure to be adopted, forced a decision through the introduction of a sentence in a recital reading: 'It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level'.[20] The word 'national' had been deleted from the Council's recital, implying that any expert—including those designated by the EP—could be consulted.

However, on request of the EP, a Common Understanding was negotiated to streamline the practical arrangements for the adoption of delegated acts. The Common Understanding constitutes little more than a consolidation of the established practice, building on the Commission's original Communication.[21] The main difference with the Communication is that now all three institutions have politically endorsed this text. The Common Understanding is, therefore, a prime example of non-legislative rule making, in that it constitutes a non-legally binding political agreement on common practices, such as the procedure during recess or the use of a standard recital, model articles to be used by the institutions for the preparation of delegated acts, and modalities to exercise the rights of revocation and objection, which were not defined by the treaty.

B The Adoption of Delegated Acts in Practice

Although the *Common Understanding* wrote down some of the practical arrangements between the institutions on the use of delegated acts, the lack of formal agreement and the vagueness of some of the provisions in it mean that much of the process to prepare and adopt delegated acts is still subject to informal procedures and bargaining between the institutions. From this perspective, the following sections will analyse the two most contentious in the implementation of Article 290 TFEU, namely the preparation of delegated acts and the scope of Article 290 TFEU.

The standard recital inserted in a basic legal act when use is made of a delegated act ('It is of particular importance that the Commission carry out appropriate

[19] European Commission, Communication from the Commission to the European Parliament and the Council on the Implementation of Art 290 of the Treaty on the Functioning of the European Union, (COM 2009 673 final), 6.

[20] European Union, Reg (EU) No 438/2010 of the European Parliament and of the Council of 19 May 2010 amending Reg (EC) No 998/2003 on the animal health requirements applicable to the non-commercial movement of pet animals, (*Official Journal of the European Union*, L 132/3, 2010), at 2.

[21] European Parliament, Council of the European Union and European Commission, Common Understanding(Brussels, 2011).

consultations during its preparatory work, including at expert level') is one of the main sources of tensions between the institutions as it fails to define how these consultations should be organised and which experts should be invited by the Commission. When the first delegated acts were adopted by the Commission in the framework of Directive 2010/30 on energy labelling of energy-related products, some Member States in the Council were dissatisfied with the process. It prompted Denmark, the United Kingdom and Germany to submit a non-paper to Coreper I on the implementation of Article 290 TFEU.[22] The non-paper demands a formalisation of the preparation of delegated acts by pleading for formal agendas for discussions with experts from national authorities, either in 'relevant forums' or with a clear indication that the consultation phase has started, including a deadline for comments. In addition, the three Member States asked that national experts should be given the opportunity to comment on changes in the draft proposal *before* it is adopted by the Commission. They, furthermore, requested the Commission to give privileged access to national experts in that they are allowed to comment *after* the suggestions from civil society organisations are included. The non-paper concludes by proposing the Commission to confirm these commitments in either a declaration, the minutes to Coreper or verbally. However, apart from a general promise in Coreper that it would be more transparent in the future, the Commission refused to further formalise the preparation phase of delegated acts, arguing it would bring in comitology through the backdoor which would create tensions with the EP and go against the treaty provisions in Article 290 TFEU.

In its guidelines to its services, the general secretariat of the Commission recognises that the consultation phase in the preparation of delegated acts has been 'one of the most sensitive issues'.[23] While acknowledging that consultations are necessary to ensure efficient implementation and compliance with the objectives laid down in the basic legislative act, the Commission stresses that it 'enjoys a large measure of autonomy', that the legislator cannot impose compulsory consultations of national experts and that these experts have 'no institutional role in the decision-making process'.[24] That said, the general secretariat does call upon its services to systematically consult experts, including from all 27 Member States, where expertise is necessary. In addition, it asks the directorate generals that consultations are carried out in a timely manner, possibly by using existing expert groups or by creating new ones. Under no circumstance, however, a comitology committee can be asked to prepare a delegated act, and under no circumstances a vote can take place as there is no requirement for a formal opinion. Also, the Commission stresses that there is no obligation to provide the experts with the final draft before submission, but that it is 'indispensable' to get political feedback, which may indicate whether or not the Council could object the delegated act.[25] The Commission also partly meets one of the concerns expressed by the Member States in the Council, namely by stating that consultations with other stakeholders should not take priority over consultations with Member State experts. Most remarkably, the guidelines state that EP experts may be

[22] Denmark, United Kingdom and Germany, Implementation of Art 290 (TFEU): Delegated Acts (Brussels, 2010).

[23] European Commission, *Implementation of the Treaty of Lisbon. Delegated Acts. Guidelines for the Services of the Commission* (Brussels, 2011), at 22.

[24] *ibid*, 22–23.

[25] *ibid*, 25.

invited, if requested by the EP, but that directorate generals are not legally obliged to comply with this request. They are, however, warned about the political consequences of refusal.[26]

The issue of consultation of experts surfaced again in a dossier related to the Galileo project.[27] The point under discussion concerned the common minimum standards for updating the annex of the decision on the rules of access to the public-regulated service (PRS) offered by the global navigation satellite system established under Galileo. Because of the security implications involved in respect of the PRS, the Council, in a declaration, pressed for thorough consultation of Member State security experts asking to take 'full account of their opinion', established 'as far as possible' by consensus when preparing, drawing up and amending the common minimum standards by delegated acts.[28] The Commission, along with the Parliament, had resisted the use of implementing acts, arguing that the common minimum standards for updating the annex constitutes a non-essential element. It did, however, accept that Member States would designate their national authorities in the Security Board of the Galileo project as the experts and also 'welcomed' the endeavour to advise the Commission on the basis of consensus.[29] This not only shows how expert groups[30] are created or rebranded in the consultation phase on delegated acts, but also how more formal arrangements are being brought in the preparation of delegated acts. It was, however, stressed at the time that these were exceptional declarations and not a precedent for future decisions or regulations.

In addition, where the European Commission in its communication of December 2009 argued against the use of sunset clauses, which would set a time limit on the powers delegated to the Commission, an increasing amount of basic acts are adopted containing such sunset clauses in a whole range of areas.[31] The Commission pleaded against short-term delegations because it would increase the institutions' workload as the delegation would have to be renewed through a new legislative procedure. The Commission, therefore, proposed to use indefinite delegation in combination with the right of revocation if the legislators wish to put an end to the delegation. However, one of the model articles in the Common Understanding now contains the option of using sunset clauses, which are tacitly extended for periods of an identical duration. The delegation can be stopped either through the right of revocation or when the EP or the Council opposes the extension no later than three months before the end of each period.

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[26] *ibid*, 24.

[27] European Union, Dec No 1104/2011/EU of the European Parliament and of the Council of 25 October 2011 on the rules for access to the PRS provided by the global navigation satellite system established under the Galileo programme (Brussels, 2011 L 287/1).

[28] *ibid*, 1–2.

[29] *ibid*, 2.

[30] Other examples are the Expert Group 'Delegated act on safety features for medicinal products for human use' (E02719) or the European ITS advisory group (E02736).

[31] See, for instance, Reg 260/2012 on technical and business requirements for credit transfers and direct debits in euro; Reg 259/2012 on the use of phosphates and other phosphorus compounds in consumer laundry detergents and consumer automatic dishwasher detergents; Reg 70/2012 on statistical returns in respect of the carriage of goods by road; Reg 1343/2011 on certain provisions for fishing in the General Fisheries Commission for the Mediterranean; Reg 1337/2011 concerning European statistics on permanent crops; Dir 2011/89 regarding the supplementary supervision of financial entities in a financial conglomerate; Reg 1227/2011 on wholesale energy market integrity and transparency.

The account presented here on the implementation of Article 290 TFEU shows that in practice, the emphasis lies on soft law and informal procedures. Even though there were requests from both the Council and the EP to formalise practical arrangements, practice is still largely based on gentlemen's agreements, and thus soft law. This section has, however, shown that non-legislative rule making not only has an impact on the proceduralisation of Article 290 TFEU, but also has its effect on the substance of the legislation, as the lack of formal guarantees to control or influence the Commission's delegated powers pushes the Council towards the use of implementing acts, or the ordinary legislative procedure where the choice between the use of Articles 290 and 291 is not legally clear and subject to inter-institutional bargaining.

V Proceduralisation of Delegated Powers: Assessing the Impact of the Lisbon Treaty Reforms

The previous sections indicate that the Lisbon Treaty has had an impact on the way in which non-legislative rule making in the area of the Commission's delegated powers has been affected by the Lisbon Treaty, albeit in rather different ways with regard to comitology measures and delegated acts. Here, we will briefly analyse this divergent impact that the Lisbon Treaty has had on the proceduralisation of adopting either of the two types of instruments. We will also reflect on the relative absence of a procedure regarding the prior choice made between at the point of secondary legislation.

As regards comitology, the main elements of the system have been maintained, and the very fact that we can refer here to a 'system' indicates its generally high degree of proceduralisation. The Comitology Regulation sets out in great detail the procedure through which implementing measures are to be adopted, the manner in which committees are formed, convened and vote on the draft measures, and the formation of the appeal committee as a last resort for the referral of measures from ordinary comitology committees. The combination of a treaty article that demands for such procedures to be laid down in advance, and a horizontal piece of legislation that now provides for a straightforward choice between two comitology procedures (in addition to the safeguard procedure), constitutes a strongly institutionalised area of Union decision making in which little scope is left to decision makers to depart from the set procedures.

In addition, the system also involves a range of further, non-legislative instruments that structure the operation of these committees and their interaction with the European Commission: a set of *Standard Rules of Procedure* providing the template for each individual committee's internal rules of procedure; the creation of a comitology register in which key documents, such as agendas, summary records, draft measures and voting results, are published; and the publication of an annual report on the workings and the output of the comitology system—all elements of a rather tightly controlled policy space. Whether or not the way in which these procedural rules work out in practice advantages one institutional actor over another is a different question.[32] Here, the argument is simply that the adoption of implementing measures is a considerably proceduralised domain, a condition that, if anything, has been further reinforced by the Lisbon Treaty.

[32] See T. Christiansen and M. Dobbels, (2012).

In our analysis, we have only identified a number of minor qualifications to this finding. With regard to the setting up of the appeal committee, we have found that there was a degree of ambiguity over the level of the Member State representatives who would attend committee meetings, and the question as to whether the Commission would, or would not, be able to go against a 'predominant opinion' in this committee in the final adoption of implementing measures. Both of these questions were left unclear in the regulation, and were therefore answered through practice. As we sought to show, based on the limited experience so far, a particular pattern in both regards seems to be emerging, but the absence of written procedural rules leaves certain scope for future changes here. The potential for disputes based on contrasting interpretations of these provisions in the regulation also strengthen the case for tightening rules in this regard in any future reforms of the system.

While these are noteworthy exceptions to the overall image of strong proceduralisation in comitology, they do not take away from the stark contrast with regard to delegated acts. Here, one cannot speak of a system, at least not yet at the time of writing. Unlike comitology, there is no binding legislation that sets out standard procedures, but merely a 'Common Understanding'—a soft law instrument that ranks even lower than an inter-institutional agreement. Furthermore, the CU Common Understanding leaves unresolved a number of important questions that have been the subject of significant debate since the coming into force of the Lisbon Treaty: what is the mechanism under which the Commission is consulting with representatives of the Member States, and to what extent are representatives of the EP party to any such consultations? The Commission, intent on avoiding any commitment that would require submitting to an *ex ante* examination of draft delegated acts, and pointing to the *ex post* veto power that the two legislative institutions have over delegated acts, has successfully resisted the creation of any formal procedure of this kind. Instead, there is a general provision that 'national experts' may be consulted, and no mentioning of the involvement of the EP in any such exercise.

The overall impression of the initial phase of implementing Article 290 TFEU is that a fairly non-proceduralised way of adopting delegated acts has been established. The European Commission, faced with something of a procedural vacuum (compared with comitology), maintains a large degree of leeway in the way it runs the process and prepares delegated acts, while the Council and, even more so, the Parliament need to rely on their very broad powers set out in the treaty in seeking to influence the drafting and adoption of delegated acts. This does not mean, of course, that the last word on this question has been spoken, as both a number of Member States[33] and the EP have expressed their desire to improve on the status quo.

Finally, what has remained unregulated is arguably the most important kind of decision that is to be made in this area, namely the initial choice between implementing measures to be adopted through comitology on the one hand, and delegated acts on the other. Neither the treaty provisions, nor any legislative act, nor any non-legislative rules provide a definite guide as which of the two instruments should be used for what kind of problem. In fact, as Hofmann (2009: 496) already pointed out before the entry into force of the Lisbon Treaty, 'both [articles] have very different wording and do not seem to be written in the same style and approach'. Indeed, the

[33] See, for example, the 'non-paper' from Denmark, United Kingdom and Germany (2010) has called for a more formalised procedure in the preparation of delegated acts.

criteria of Articles 290 and 291 TFEU are not mutually exclusive: the provisions on delegated acts are clearly formulated in terms of scope and consequences, while the implementing acts article is defined on the basis of the rationale behind it, ie the necessity for uniform conditions to apply. In the absence of a clear distinction, decisions on whether a basic act is to be implemented through delegated or implementing acts are made on a case-by-case basis in the context of legislative bargaining. In a way, this is a clear step backwards from the situation before the Lisbon Treaty: the previous comitology decision, which had added the 'regulatory procedure with scrutiny' in—the forerunner to the delegated acts—to the range of comitology procedures stated legally binding criteria in Article 2 of the 2006 decision, which needed to be observed in choosing the kind of implementation measure during the adoption of legislation.[34] Even if there might have been difficulties in making these criteria justiciable, there clearly was a more formalised procedure by having simple criteria for choosing the right procedure before the introduction of delegated acts with the Lisbon Treaty.

Initial observations of the new situation show that the distinction between delegated and implementing acts is not that clear-cut in practice. Especially, the Council is seen to push to limit the scope and use of delegated acts, and the Parliament often drops its insistence in return for amendments on the substance of regulations.[35] The fact that Member State representatives have more control in comitology committees than under the informal consultation procedure set up by the Commission for the preparation of delegated acts is the Council's main motive to limit the use of delegated acts. The lack of substantial role for the EP in the implementing acts system makes it a natural proponent of the use of delegated acts. As Hofmann[36] predicted, the distinction between delegated and implementing is now a frequent ground for inter-institutional battles. This is also in line with previous research on the old comitology system as Blom-Hansen[37] and Héritier and Moury[38] show how both legislators are seeking to increase their control over delegated decision making.

In sum, we can say that overall the formalisation of non-legislative rule making in this area is a mixed picture at this point. While the routinisation of the comitology system continues with the Lisbon Treaty, the new instrument of delegated acts, for the time being, is adopted under a relatively informal and flexible procedure. Most significantly, the choice of whether to use one or the other instrument for the implementation of legislation is not conclusively regulated. As a result, the potentially significant repercussions of making this choice have the potential to engender political conflict, legislative deadlock and judicial review in the future.

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[34] European Union, Council decision of 17 July 2006 amending Dec 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (*Official Journal of the European Union*, 2006).

[35] See T. Christiansen and M. Dobbels (2012).

[36] H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', (2009) 15(4) *European Law Journal* 482–505.

[37] J. Blom-Hansen, 'The EU Comitology System: Inter-Institutional Battles in Daily Legislation', (2011) Paper prepared for the EGPA Conference, Bucharest, 7–10 September 2011.

[38] A. Héritier and C. Moury, 'Contested Delegation: The Impact of Co-Decision on Comitology', (2011) 34(1) *West European Politics* 145–166.

VI Conclusion

This article not only shows the importance of looking at non-legislative rule making through informal procedures and non-binding agreements in order to fully comprehend the implementation of treaty articles; it also lays bare an inter-institutional tension between the Commission on the one hand, and the Member States in the Council and the EP on the other, concerning the use of non-legislative rule making. On the implementation of Article 290 TFEU, both co-legislators demanded measures that would formalise the procedure even though, legally speaking, this was not necessary. The EP did so by demanding a Common Understanding, after an inter-institutional agreement was deemed unfeasible, and the Member States in the Council did so by demanding concrete and formal commitments of the Commission regarding the preparation of delegated acts. The mistrust in the use of delegated acts, especially on the side of the Council, has in the meantime led to a reduction of the intended scope of Article 290 TFEU. Member States are often seen arguing for either implementing acts or the ordinary legislative procedure, and promote the use of sunset clauses for delegating powers to the Commission. On the implementation of Article 291 TFEU too, this tension is visible as well. Member States emphasise provisions mentioned in the recitals of the new regulation that require the Commission to go beyond the formal voting thresholds and take account of predominant positions or look for the widest possible support. In addition, Member States struggle to validate the appeal committee as a relevant appeal body of a high political level. Both instances again show a mistrust *vis-à-vis* the Commission and a desire to have a more formalised approach.

Informal rule making is, thus, used as an additional layer of control where formal rules are not acceptable to all institutions involved. This is common when new institutional systems are implemented, and such tensions will only lift with time, practice and sustainable confidence building between the institutions.

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