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# Too Much Executive Power? Delegated Lawmaking and Comitology in Perspective

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# Too Much Executive Power? Delegated Lawmaking and Comitology in Perspective

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## Abstract

The post-Lisbon Treaty institutional mechanism of the European Union has been significantly altered by the introduction of a formal hierarchy of legal acts. This paper borrows from previous experiences with the comitology procedures in order to outline some very important, unanswered questions for the future institutional setting of the Union and the distribution of powers. The adoption of implementing acts by the European Commission is studied in two aspects. It is argued that the European Commission is likely to enjoy substantial discretion in delegated lawmaking. This loss of control by Member States over the adoption of delegated acts is not compensated for by other adequate mechanisms for ensuring accountability. In addition, the European Commission has been successfully positioning itself to diminish the influence of comitology committees on the adoption of implementing acts. The possible outcomes of this new institutional battle are analyzed in the context of the new challenges to the Community method. Some important implications of this institutional shift for the debate on the democratic deficit in the European Union are also drawn up.

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

## 1. Introduction

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

of a hierarchy of legal acts of the European Union (EU) for the exercise of implementing powers by the Commission. The previous experiences with the comitology procedures are used to evaluate this reform from a legal institutional perspective.

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

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

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

### *2.1. The Treaty of Lisbon*

After the failure of the ratification of the Constitutional Treaty, the Berlin Declaration<sup>1</sup> set a goal for a new reform of the Treaties before the EP elections in 2009. The Treaty of Lisbon<sup>2</sup>

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<sup>1</sup> Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome. Informal Meeting of the Heads of State and Government. Berlin, 24-25 March 2007.

entered into force on 1 December 2009. To a large extent the Treaty of Lisbon replicated the texts in the Constitutional Treaty, but merged those into the TEU and EC (now called Treaty on the Functioning of the European Union, TFEU).

The rules about the typology and hierarchy of legal acts of the EU were put in Articles 288-292 TFEU. A four-level hierarchy of legal acts was established. The treaty provisions formed the first level. The second level – legislative acts, was formed by acts adopted under the co-decision procedure, and special legislative procedures were provided for (Article 289 TFEU). The third level was delegated acts (Article 290 TFEU). The fourth level was for implementing acts (Article 291 TFEU). The main difference, however, was not their qualitative differentiation, but rather a different means for exercising the political supervision over these acts (Bergström and Rotkirch 2003: 54). Thus the important distinction was about the measures of political control over the adoption of the two types of non-legislative acts.

Delegated acts were subject to revocation or *ex ante* control. The implementing acts could be made subject to comitology procedures, but the rules governing these procedures should be adopted by the ordinary legislative procedure, that is – co-decision by the EP and the Council (Article 291, para. 3 TFEU). These mechanisms of control would be exercised solely by the Member States. This essential amendment in fact denied the EP access to and participation in the control mechanisms. The importance of this setting will be discussed further in the next two sections of this paper.

## *2.2. Post-Lisbon developments*

### *2.2.1. Delegated Acts*

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<sup>2</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJ C 306-2007.

In December 2009 the Commission issued a communication on the application of Art. 290 TFEU<sup>3</sup>. In the communication the Commission attempted to outline the scope of Art. 290 TFEU. The communication notes that purely in terms of the wording, the definition of delegated acts in Article 290, para. 1 TFEU is very similar to that of acts which, under Decision 1999/468/EC<sup>4</sup> (*"the comitology Decision"*), are subject to the regulatory procedure with scrutiny introduced by Decision 2006/512/EC<sup>5</sup>. According to the Commission in both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument. However, the Commission warns that in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny<sup>6</sup>. The Commission then focuses its attention on the interpretation of the verbs "*amend*" and "*supplement*" in Art. 290 TFEU. The Commission believes that by using the verb "*amend*" the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument, irrespective of whether the annex contains purely technical measures. As for the verb "*supplement*", the Commission believes that the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission<sup>7</sup>.

In respect of the opportunity to set a preclusive deadline of the delegation, the Commission does not believe that this requirement sanctions the practice of sunset clauses which automatically set a time limit on the powers conferred on the Commission. The Commission thinks that it is preferable not to increase the institutions' workload by introducing a binding system of short-term delegations. That is why it suggests that the delegations of power should

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<sup>3</sup> Implementation of Article 290 of the Treaty on the Functioning of the European Union. Brussels, 9.12.2009 COM(2009) 673 final.

<sup>4</sup> OJ L 184-1999.

<sup>5</sup> OJ L 200-2006.

<sup>6</sup> Ibid, p. 2.1.

<sup>7</sup> Ibid, p. 2.3.

in principle be of indefinite duration. In the cases that the delegation is, after all, restricted in time, the Commission advocates for a mechanism of tacit renewal<sup>8</sup>.

The Commission further reiterates its autonomy in the process of adoption of delegated acts. The Commission notes that it intends to “*systematically*” consult experts from the national authorities of all the Member States. However, the Commission underlines that that these experts will have a “*consultative rather than an institutional role*” in the decision-making procedure<sup>9</sup>. No reference is made to any further institutionalisation of the consultation process.

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

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

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<sup>8</sup> Ibid, p. 3.2.

<sup>9</sup> Ibid, p. 4.2.

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

Thus the first use of delegated acts represents a mixed picture. It appears that the Council and the EP chose to use all the procedural opportunities for restraining the discretion of the Commission in delegated lawmaking by using a sunset clause for the delegation, both revocation and tacit approval as control mechanisms, as well as significant material

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<sup>10</sup> Commission Delegated Regulation (EU) No 1059/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household dishwashers; Commission Delegated Regulation (EU) No 1060/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household refrigerating appliances; Commission Delegated Regulation (EU) No 1061/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of household washing machines; Commission Delegated Regulation (EU) No 1062/2010 supplementing Directive 2010/30/EU of the EP and of the Council with regard to energy labelling of televisions; OJ L 314-2010.

<sup>11</sup> OJ L 153-2010.

<sup>12</sup> Ibid, recital 19.

restrictions in the form of binding instructions for the Commission. On the other hand the preclusive term of the delegation can be automatically renewed, and the time limit for opposition is two months.

### *2.2.2. Implementing Acts*

In March 2010 the Commission proposed a draft regulation on the mechanisms for control by Member States of the Commission's exercise of implementing powers<sup>13</sup>. The Commission outlined two major principles for the new regulation of the comitology procedures: – that the Member States are unilaterally responsible for controlling the Commission's exercise of implementing powers, and that the procedural requirements should be proportionate to the nature of implementing acts<sup>14</sup>.

The proposal provided for two committee procedures - the advisory procedure, mirroring the existing advisory procedure (Art. 3 of Decision 1999/468/EC), and a new “*examination procedure*”, which would replace the existing management and regulatory procedures. The Commission proposed that the criteria for the choice of the examination procedure should be binding (Art. 2, para. 2 of the proposal). The main criterion is the adoption of implementing measures “*of general scope*”. Additionally, the examination procedure is applied to implementing acts in the areas of the common agricultural and common fisheries policies, the environment, the security, safety and protection of the health or safety of humans, animals or plants, and the common commercial policy. The advisory procedure should be used for all other measures. The Commission also wanted to abolish altogether the old comitology procedures for implementing acts in force, with the exception of acts under Art. 5a of Decision 1999/468/EC (the regulatory procedure with scrutiny).

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<sup>13</sup> Proposal for a Regulation of the EP and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Brussels, 9.3.2010, COM(2010) 83 final.

<sup>14</sup> Ibid, p. 2.1.

The EP started its work on the proposed regulation soon after the initial Commission proposal. This was happening in parallel with energetic discussions in the Council on the use of comitology committees for trade measures. Reportedly, a coalition led by Germany, the UK and Scandinavian countries had been lobbying hard to remove trade policy from the comitology review<sup>15</sup>. The compromise solution was to include a simple majority veto in the examination procedure. Some considerations of the EP were also included in the text.

The text of Regulation No 182/2011/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers ("the comitology regulation")<sup>16</sup> included a number of amendments of the initial Commission proposal. The regulation included new areas where the examination procedure should apply - programmes with substantial implications and taxation (Art. 2, para. 2 (b) of Regulation 182/2011/EU). The regulation included in Art. 3, para. 7 a new body – the so-called "*appeal committee*".

The examination procedure itself was substantially reorganized. The lack of decision taken with qualified majority by the examination committee authorizes the Commission to adopt the draft measures unless they related to taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures (Art. 5, para 4 of Regulation 182/2011/EU). Additionally, the basic act can also restrict the right of the Commission to unilaterally adopt the draft measures. A simple majority of the committee members can block the adoption of the draft measures by the Commission. In any of these three hypotheses the Chair of the committee may either submit the draft acts within one

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<sup>15</sup> "UK, Germany resist attempted EU power grab on trade". Euractiv. Published: 05 November 2010 ; updated: 08 November 2010. <http://www.euractiv.com/en/future-eu/uk-germany-resist-attempted-eu-power-grab-trade-news-499463> Accessed online on 14.2.2011.

<sup>16</sup> OJ L55/13 2011.

month to the appeal committee for further deliberation or submit to the committee within two months an amended version of the draft acts.

In relation to anti-dumping measures a specific variant is included in the case when the committee did not reach a decision with qualified majority (Art. 5, para. 5 of Regulation 182/2011/EU). The Commission should first conduct consultations with the Member States. Within one month of the committee meeting the Commission should inform the committee members of the results of those consultations and submit a draft act to the appeal committee. The appeal committee should then meet within one month at the latest after the submission of the draft act.

The appeal committee procedure is regulated in Art. 6 of Regulation 182/2011/EU. It serves as a second-level decision-making body in the cases of rejection of the draft measures by the examination committee with qualified majority or the hypotheses of Art. 5, para. 4 and 5 reviewed above. In these cases any member of the appeal committee may suggest amendments to the draft acts. The Chair should endeavour to find solutions with the widest possible support. The draft measures are adopted if the appeal committee has given a positive opinion with qualified majority or has failed to give an opinion within the prescribed period. However, in the case of definitive multilateral safeguard measures the Commission cannot adopt the draft measures unless they receive a positive opinion from the appeal committee. For a period of 18 months after the entry into force of the regulation the appeal committee will deliver its opinion on definitive draft anti-dumping or countervailing measures by a simple majority of its component members.

A very important addition was made regarding the transfer of committee documents. The Commission is obliged to transfer the agendas of committee meetings, the draft acts on which the committees are asked to deliver an opinion, and the final draft acts following the opinion

of the committees to the Council and the EP at the same time as they are sent to the committee members (Art. 10, para. 4 of Regulation 182/2011/EU).

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

Regarding the application of the new comitology regulation to the old legislative acts, the comitology regulation retained the principle that the old comitology procedures for implementing acts in force should be abolished, with the exception of acts under Art. 5a of Decision 1999/468/EC (the regulatory procedure with scrutiny). The Commission is obliged to present a report on the implementation of the regulation within five years of its entry into force (Art. 15 of Regulation 182/2011/EU). This report should not be mistaken with the annual report on the work of the committees (Art. 10. para. 2 of Regulation 182/2011/EU).

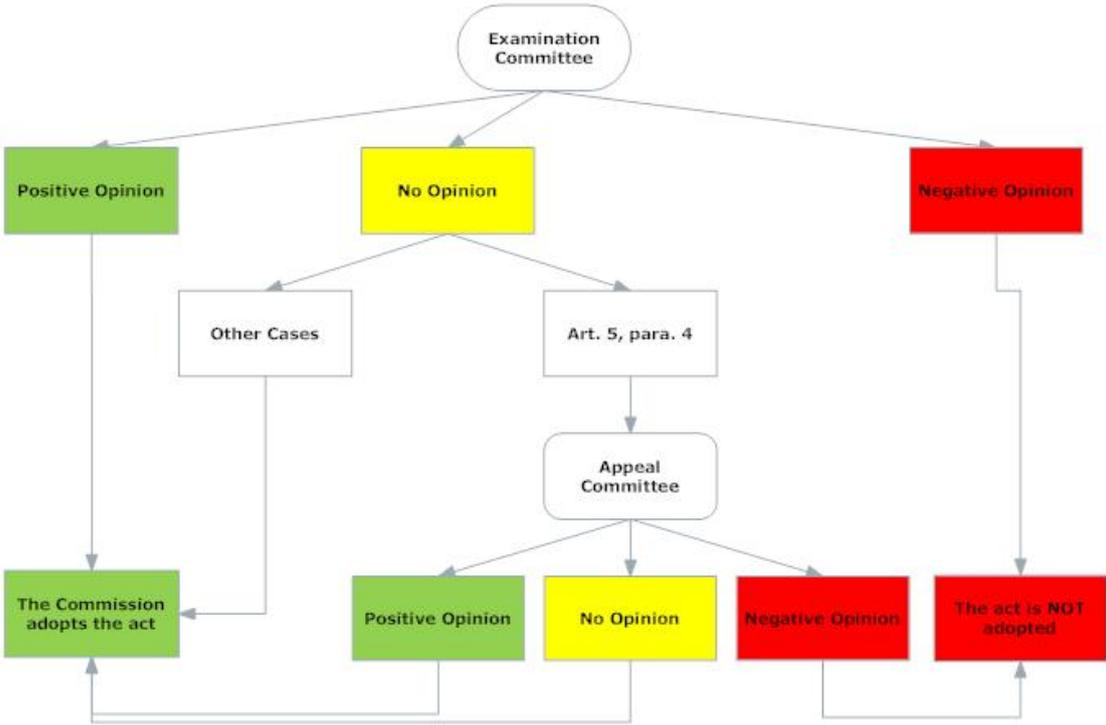


Figure 1. The examination and appeal procedures in the new comitology regime.

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

### **3. Legal and Institutional Implications of the New Institutional Setting**

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

#### *3.1. What Has Really Changed? Mapping Contentious Issues*

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

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

The second level of reform is represented by the regulation in the corresponding EU legislative acts. However, the first important distinction can be seen here – there is no horizontal regulation of the delegation of legislative powers (Art. 290 TFEU)<sup>17</sup>. Two procedures can be used to restrict the adoption of a delegated act – the right of call back or the right of tacit approval. The right of objection (or veto) is not bound by any substantive criteria. It will be much harder for the EP to exercise its right of control given the requirement of absolute majority (as opposed to simple majority for the adoption of the legislative act containing the delegation during the codecision procedure)<sup>18</sup>. In both cases the Council votes with qualified majority and is better positioned to impose its will on the Commission. What the EP can do is to include either prescriptive, binding instructions in the legislative act that further restrict the scope of delegation, or include a sunset clause that imposes a time limit on the delegation. As was shown in the previous section, both mechanisms were used in the case of Directive 2010/30/EU.

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

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

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<sup>17</sup> See also Kaeding and Hardacre 2010, p. 5.

<sup>18</sup> See Lenaerts and Desormer 2005, p. 755.

restrictions in the second subparagraph of Art. 5, para. 4 of Regulation 182/2011/EU<sup>19</sup> may lead to some difficulties in its interpretation, especially in relation to the “*protection of the health or safety of humans, animals or plants*”. The composition of the appeal committee (Art. 6 of Regulation 182/2011/EU) is not regulated in the new comitology regulation. This may well be the same committee that served as an examination committee, or may include representatives of the Member States at a higher administrative level. This uncertainty may probably be resolved through the standard rules of procedure (Art. 9 of Regulation 182/2011/EU). However, a comparison with the second stage of the regulatory committee and management committee procedures (Hardacre and Kaeding 2011: 15) is not accurate. The Council’s work has always been supported by the various working formats, including COREPER1 and COREPER2 (Beyers and Dierickx 1998, Bostock 2002). Now the appeal committee will be the only venue for discussion of the rejected or unapproved implementing measures. The importance of this fact will be discussed in the subsection on the democratic deficit below.

The implementing measures based on existing legislative acts that refer to Art. 4 of Decision 1999/468/EC (the management committee procedure) will be redirected to the examination procedure, but in these cases the second and third paragraph of Art. 5, para. 4 of Regulation 182/2011/EU not apply. This means that in the case when the committee does not reach a decision with qualified majority, the Commission could adopt the measures. In case the existing legislative act refers to Art. 5 of Decision 1999/468/EC (the regulatory committee procedure), it is presumed that the legislative act has referred to the second hypothesis of the second subparagraph of Art. 5, para. 4 of Regulation 182/2011/EU. Thus when the examination committee has not reached a decision with qualified majority the Commission must either submit the draft acts within one month to the appeal committee for further

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<sup>19</sup> See *infra* note 33.

deliberation or submit an amended version of the draft acts to the committee within two months.

### 3.2. *The Implications for the Institutional Balance*

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

Looking at the institutional shift from a pragmatic procedural perspective and in the light of recent developments it is quite obvious that the Commission has strengthened its hold on the execution of implementing powers (Craig 2004:32). It has become the default executive body at the supranational level; the Council can adopt implementing acts in “*duly justified specific cases*” but it cannot adopt delegated acts (Art. 291, para. 2 TFEU). In historic perspective that is a fundamental shift from the initial setting in the Treaty of Rome where the Council was the subject of implementing powers at the supranational level, and the Commission had only a supplementary *duty* to exercise the implementing powers conferred on it by the Council (Art. 155 TEEC in its 1957 version). Thus the Treaty of Lisbon completes the cycle of transfer of implementing powers from the Council to the Commission<sup>20</sup>. The importance of this shift cannot be underestimated.

Additionally, the Commission has been relieved from the control of comitology committees over the adoption of delegated acts. The hierarchical subordination of implementing acts under delegated regulations should further enhance the importance of the Commission as an executive organ vis-à-vis the Council (Schütze 2005: 18). But the conclusion that the Commission would be the winner if there is extensive use of delegated acts (Hoffmann 2009: 504) is somewhat premature. As was shown in the example of Directive 2010/30/EU, the EP

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<sup>20</sup> Bergström 2005, pp. 178-184 provides a comprehensive study of the reform of supranational implementing powers in the Single European Act

and the Council not only used all statutorily available instruments to limit the discretion of the Commission, but also included in the legislative act a number of binding instructions for the Commission for the adoption of the delegated acts. If this practice is continued, the Commission will only enjoy limited discretion in the adoption of delegated acts, staying in the shadow of the legislators' activism. The disparity of voting procedures for codecision and Art. 290 TFEU for the EP (simple vs. absolute majority) and the Council (qualified majority in both cases) may indeed result in some additional advantage for the Council. This may further stimulate the EP to seek maximum restriction of the discretion of the Commission and may also lead to more lobbying activity in the EP during the codecision procedure (Hardacre and Kaeding 2011: 14).

The new organization of the comitology procedures for implementing acts presents completely different challenges to the institutional balance. Here the EP is practically excluded from the procedure with the exception of the right of information (Art. 10, para. 4 of Regulation 182/2011/EU) and the right of scrutiny (Art. 11 of Regulation 182/2011/EU). The Council itself has also been excluded from the procedure. The examination committee procedure improves the standing of the Commission in the case of measures previously reviewed by the regulatory committee procedure under Decision 1999/468/EC, since the Commission can adopt the measures without having obtained the approval of the examination committee. Even in the cases of the second subparagraph of Art. 5, para. 4 of the comitology regulation, the Commission has substantial flexibility – it can either modify the measure, or submit it to the appeal committee. The lack of rejection with qualified majority in the appeal committee allows the Commission to adopt the draft measures (see Figure 1.). These procedural arrangements will substantially increase the discretion of the Commission in adopting implementing acts *sensu stricto* compared to delegated acts (Türk 2005: 1568).

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

Two different perspectives of the institutional shift deserve further analysis. First, the place of the implementing powers of the Commission in the analytical framework of multi-level governance will be reviewed. It appears that the new legal regime of the implementing powers of the Commission is moving the whole institutional mechanism of the EU closer to the Type I multilevel-governance as proposed by Marks and Hooghe 2004. The jurisdictions are clearly delineated; the framework is system-wide; functions are bundled; the levels of government are limited in number (Marks and Hooghe 2004: 17). While this was true for the old comitology regime, the new mechanism for execution of the implementing powers of the Commission has concentrated the powers in the Commission and has, to a large extent, stylized the executive power vector. It is important to note here that Type I multi-level governance is founded on the idea of federalism (Marks and Hooghe 2004: 17). This stylization brings forward a second dimension of the institutional shift. The system of comitology is part of the concept of *engrenage* – a general term that indicates the interlocking elements of the decision-making mechanism of the integration process. However, *engrenage* has been understood more often as a method of working that permeates the relationship between the Commission and Member States and in this sense has more to do with the effects

of socialization<sup>21</sup>. Seen through the lenses of legal institutionalism, *engrenage* has a different focus – it represents the *rules* that shape the outcomes of the decision-making process. In Monnet’s initial integration concept *engrenage* necessitates the consultation of interest groups and stakeholders in working out policy details (Featherstone 1994: 114). Comitology, *by extension*, allows national stakeholders to have a say on the implementing acts of the Commission. This is done through the national coordination mechanisms of Member States and the formation of Member States’ preferences (Turner and Binder 2009; Brandsma and Blom-Hansen 2010). The relative weakening of the comitology procedures results in less *engrenage* in its original sense. The correcting mechanisms in the procedure for the adoption of delegated acts have a much lower rate of both intensity and quality of interference. Thus the Commission has acquired the attributes of a *de facto* executive at the expense of the Member States and national stakeholders.

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

The weakening of the agenda-setting powers of the Commission deserves further study and consideration, especially in the light of the recent proposals for a dramatic overhaul of the

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<sup>21</sup> See for example an early reference in Bellier 1997; the well-known theses of Joerges and Neyer 1997; Trondal 2010 in Chapter 9 also devotes substantial attention to the question of *engrenage* as a social phenomenon.

procedures for economic governance coordination<sup>22</sup>. This is particularly important given the fact that the state dimension of power is instrumental in the deliberations of the European Council (Tallberg 2008), thus allowing the hijacking of the EU's agenda by the more powerful Member States (France, Germany and the UK). The new rules for qualified majority voting in the Council also eliminate the protection for the smaller Member States (Devyust 2008).

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

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

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<sup>22</sup> See Proposal for a Council Regulation amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure COM(2010) 522 final; Proposal for a Regulation amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies COM(2010) 526 final; Proposal for a Regulation of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances COM(2010)527 final; Proposal for a Council Directive on requirements for budgetary frameworks of the Member States COM(2010) 523; Proposal for a Regulation on the effective enforcement of budgetary surveillance in the euro area COM(2010) 524 final; Proposal for a Regulation on enforcement measures to correct excessive macroeconomic imbalances in the euro area COM(2010) 525 final.

2005: 319). That is why it is unlikely that the ECJ will interfere in a significant way in order to reduce the uncertainties.

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

### 3.3. *A Contribution to the Democratic Deficit?*

A substantial scientific literature has considered the different implications of the so-called “*democratic deficit*” in the EU and the relevance of the national legal and political traditions to the tasks of a supranational community<sup>23</sup>. Here a more focused approach will be used that will discuss the implications of the new regime of implementing powers for all vectors of input and output legitimacy of the EU (Lord and Magnette 2004). This framework of analysis is based on the concept of four vectors of legitimacy: indirect (derived from the legitimacy of the Member States); parliamentary (dual legitimation by a Council of governments and a directly elected Parliament); technocratic (derived through the ability of supranational institutions to offer ‘Pareto-improving’ solutions) and procedural (legitimation by observing principles such as transparency, balance of interests, proportionality, legal certainty and consultation of stakeholders)<sup>24</sup>.

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

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<sup>23</sup> See for example Lindseth 1999, Moravcsik 2002, Follesdal 2004, Follesdal and Hix 2006, Ladeur 2008, Hix 2008, Somek 2008. For an overview of the debates see Jensen 2009.

<sup>24</sup> See for more details Lord and Magnette 2004, pp. 185-188.

The regulation of delegated acts in Art. 290 TFEU is to a large extent reminiscent of the existing political controls of the legislators in Western democracies over the adoption of delegated acts by the executive. In these cases the legislature assumes political responsibility for the executive rule beyond the original empowerment by means of subsequent approval (Pünder 2009: 367). The model of Art. 290 TFEU is closer to the German model of control of the legislative delegation<sup>25</sup>. The EU model, however, does not provide for an *ex ante* control mechanism where the approval of the legislature is a *condition sine qua non*<sup>26</sup>. It may therefore be argued that the adoption of delegated acts is to a large extent legitimate based on the indirect and parliamentary vectors of legitimacy. The technocratic vector of legitimacy may also be considered “covered” to certain extent. It may be assumed that the Commission has sufficient administrative resources to manage the drafting of delegated acts, and that its expertise is relevant to the substance of the delegated acts. However, this is only an assumption, since studies of the Commission typically do not focus on its institutional capacity *per se*<sup>27</sup>. The effectiveness of the procedure for adoption of delegated acts is a stronger point for the technocratic vector of legitimacy, since here the Commission is not constrained by any additional procedure apart from the right of tacit approval that will usually delay the promulgation of the delegated act with two months.

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

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<sup>25</sup> Compare with Pünder 2009, pp. 364-365.

<sup>26</sup> As is the case with *Zustimmungsverordnungen* in Germany, Pünder 2009, p. 364.

<sup>27</sup> Compare the findings of Metcalfe 2000, Hooghe 2001, and Christiansen 2006.

stakeholders is a serious impediment to the social legitimacy of the delegated acts (but see the arguments in Smismans 2006). One additional question here is the possible involvement of the EP in the drafting process (Kaeding and Hardacre 2010: 7).

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

The parliamentary vector of legitimacy is practically non-existent in the new comitology regime due to the lack of participation of both the EP and the Council. The technocratic vector of legitimacy is to some extent accounted for by the comitology procedures inasmuch as they do produce Pareto-optimal solutions (Papadopoulos 2003). However, many EU regulations are not Pareto improvements (Follesdal 2009, Follesdal 2011). In fact in cases where the comitology system has been used to find solutions to politically salient problems with the characteristics of zero-sum games, the outcome has been sometimes quite negative. Such was

the case with the approval of GMOs (Tiberghien 2009, Christiansen and Polak 2009) and the measures against bovine spongiform encephalopathy (Harlow 2002:69, Krapohl and Zurek 2006). In the new comitology regime the Commission will have the opportunity to overtake the Member States and decide the issues in question once the examination or appeal committee has failed to deliver an opinion with qualified majority. Thus it is not self-evident that the comitology committees will represent a form of “*mixed administration*”, representing the *direct* decisional input by the Member States into the Union administration (Schütze 2010: 1423). The hypothesis that the formation and use of expert knowledge in the implementation of European policies creates gaps in Member State control (Böhling 2009), and the criticism of the comitology committees as epistemic communities (Kuo 2009:224-234) should also be kept in mind.

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

The overview of the new institutional setting of the implementing powers of the Commission after the Treaty of Lisbon has revealed a worrying picture. It appears that the new comitology regime in particular is contributing to, rather than helping to reduce, the democratic deficit of the EU. This observation is in line with some recent academic thinking on the accountability and legitimacy of the new modes of governance (NMG)<sup>28</sup>. The new comitology regime is

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<sup>28</sup> See Scott 2009, Bovens, Curtin & ‘t Hart 2010, Héritier and Lehmkuhl 2011, Bellamy and Castiglione 2011, Follesdal 2011.

obviously deviating from the three strands of democratic control proposed by H eritier and Lehmkuhl 2011: democratic accountability of governing actors to the constituency, a functional mode of representation of stakeholders, and the media-based critical public debate (H eritier and Lehmkuhl 2011:137-138). The findings of the present paper also support the claim that the alleged benefits of NMG are open to severe doubts, unless embedded within institutions that provide democratic and legal accountability (Follesdal 2011:100). While some may argue that the hierarchical assumptions about accountability may not be appropriate in the case of the EU (Harlow and Rawlings 2007), there is little evidence that the comitology committees act as an accountability network.

Three practical measures can be proposed *de lege ferenda* to counterbalance this negative trend: the institutionalization of the consultation process in the drafting phase by the Commission<sup>29</sup>, the use of COREPER1 or even COREPER2 as an appeal committee in the new comitology regime, and the more widespread use of sunset clauses in the legislative acts<sup>30</sup>. While these measures will not be sufficient to address all concerns about the legitimacy of the implementing powers of the Commission, they may well contribute to a more balanced and deliberative exercise of those powers.

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

#### **4. Conclusions**

This paper has studied the new legal regime for the exercise of implementing powers by the Commission at the supranational level. The introduction of a hierarchy of legal acts of the EU is a significant reform that has led to a new institutional setting. The outcomes for the

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<sup>29</sup> See more on the justification of this recommendation in Bellamy and Castiglione 2011.

<sup>30</sup> On the importance of sunset clauses for overcoming the democratic deficit see also Lord 2008, p. 20.

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

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

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

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