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# Delegated Powers and Inter-institutional Relations in the EU before and after the Lisbon Treaty

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## ABSTRACT

The European Union's system of delegated powers, traditionally known as 'comitology', underwent significant changes after the coming into force of the Lisbon Treaty in 2009. This paper compares and contrasts the main features of the system before and after these changes, with a particular focus on the roles played by the three main institutions involved in this process (European Parliament, European Commission and Council). As part of this analysis, a distinction is made between the changes that occurred at the level of treaty reform (and which generally favoured the EP in assuming a greater role in the process of policy-implementation) and the subsequent legislative reforms and developments in soft law (through which the Council and the European Commission have reasserted their powers in this domain). In conclusion, the paper argues that inter-institutional relations with regard to delegated powers remain dynamic, and that an assessment of the 'winners' and 'losers' in this area requires analysis of the way in which the formal constitutional provisions in the treaties are being implemented and exercised in practice.

**Key words:** comitology, delegated acts, implementing acts, inter-institutional relations, Lisbon Treaty, Council, European Parliament, European Commission

## 1. Introduction

The European Union's system of conferring implementing and delegated powers to the European Commission, traditionally known as 'comitology', underwent significant changes after the coming into force of the Lisbon Treaty in 2009. Two new articles, 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), form the treaty base for the new system that makes a distinction between delegated and implementing acts. Under the first category of acts both the Council and the European Parliament have post-hoc control rights and can either object the act as proposed by the Commission within a given time limit or revoke the delegated powers. The system concerning implementing acts resembles to a large extent the old comitology procedures: a committee composed of Member State representatives exercises control over the implementing powers conferred on the Commission. The new system reduces the procedures from five to two and does

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away with referral to the Council of Ministers for controversial cases. Instead, there is now an appeal committee composed of Member State representatives and presided by the Commission that will handle the controversial cases that do not get approval at committee level.

This paper compares and contrasts the main features of the system before and after these changes, with a particular focus on the roles played by the three main institutions involved in this process, the European Parliament, the European Commission and the Council. As part of this analysis, a distinction is made between the changes that occurred at the level of treaty reform (and which generally favoured the European Parliament in assuming a greater role in the process of policy-implementation) and the subsequent legislative reforms and developments in soft law (through which the Council and the European Commission have reasserted their powers in this domain). After having briefly described the pre-Lisbon system and the new procedures concerning delegated and implementing acts, each institution's role before and after the Lisbon Treaty will be compared in-depth and the implications for the inter-institutional relations will be outlined. In conclusion, the paper argues that inter-institutional relations with regard to delegated powers remain dynamic, and that an assessment of the 'winners' and 'losers' in this area requires analysis of the way in which the formal constitutional provisions in the treaties are being implemented and exercised in practice.

## **2. Delegated Powers before Lisbon**

Delegation of implementing powers to the European Commission, and the control of these powers through committees of representatives from national administrations had been established in the European Communities since the early 1960s. This system of 'comitology' had proved itself to be an efficient system of centralized implementation in the Community. Beyond member state oversight over the Commission's use of its delegated powers it also constituted an arena for the fusion of administrative expertise from national and European-level executives. Apart from a number of legal challenges, the system was fairly uncontroversial until the arrival of co-legislative powers of the European Parliament in the 1980s. From then on, however, there has been almost constant tension between the institutions about the degree of influence that the European Parliament as co-legislator would have on the oversight of legislative implementation (Christiansen and Alfé 2009).

These inter-institutional tensions, driven on the one hand by the EP's desire for greater transparency and parliamentary oversight of comitology, and on the other hand by the Commission's and member states' concern to maintain the efficiency of the system, led to a series of reforms over the past two decades. The EP's underlying ambition in this process was to achieve something like 'equality' with the Council in a way that mirrored the growing powers it was receiving in the legislative procedure through successive treaty changes.

The basis for comitology in the Treaty before the changes arising from Lisbon had been Art.202 which set out the legal foundation for the delegation of implementing powers and its control by the member states. This article called for rules and general principles for the mechanisms of control by member states to be set out in advance,

and thereby required the passage of legislation to provide a 'menu' of different comitology procedures which could be inserted into new legislative acts that involved delegated powers. Crucially, such comitology decisions were adopted under the co-operation procedure, hence only requiring Parliament to be consulted. Under these circumstances, the member states still dominated comitology, even if over the time the EP managed to acquire an ever-greater foothold in the area.

The most recent reform to comitology had been in 2006, and had added a new procedure – the “Regulatory Procedure with Scrutiny” or RPS – to the system. This was in addition to the advisory, management and (standard) regulatory procedures that had already been on the 'menu' before. These four procedures, set out in detail in Council Decision 1999/468 provided the legislative institutions with an element of choice regarding the degree of freedom the Commission would have in adopting implementing measures: the advisory procedure, as the name suggests, facilitated only the giving of non-binding opinions by the comitology committee, whereas management and regulatory procedures created opportunities for the representatives of the member states in the relevant committees to block the Commission's adoption of implementing measures.

In such cases, the draft implementing measure would be referred to the Council, which could overrule the Commission and adopt an amended measure by qualified majority. However, such referrals to the Council were extremely rare, usually amounting to less than one per cent of the thousands of measures adopted annually by the Commission. This might be seen as an indication that the interaction between Commission and member states in the context of comitology worked well, or that the Commission managed successfully to anticipate and avoid objections from the member states, making good use of the possibility to discuss intended plans for implementation in the committees before actually submitting draft measures to a vote.

Despite – or perhaps because of – such good cooperation between Commission and member states, there had been latent calls for greater transparency and accountability in the comitology. Such concerns were raised not only, as mentioned above, by the European Parliament, but also from academic observers (Dehousse 2003; Brandsma 2010). The criticism here has been that in a system populated entirely by non-elected officials, from national, European or, in some cases, regional administrations, there would be little scope for democratic control – something considered problematic in the context of a growing number of decisions being taken through comitology that were not only a question of technocratic expertise, but also involved serious normative judgments (Christiansen 2012).

In response to these concerns and the pressure the EP had attached to their resolution, non-binding information and scrutiny rights had already been established in a reform in 1999. As a result, the Commission had been obliged to publish annual reports on comitology, to inform the EP systematically of all draft implementing measures arising from legislative acts adopted under co-decision, and to create a public register in which basic information on all comitology committees would be published. These changes had brought some light into a system that previously often appeared as a 'black box', but one might ask whether the greater transparency actually benefitted organised interests more than MEPs or even ordinary citizens. In

fact, the limited scope control afforded to the EP under the 1999 decision was only activated in a handful of cases, and in no instance actually stopped the Commission from proceeding with the adoption of the proposed measures.

In this regard, the RPS procedure added in 2006 was a more significant advance, creating as it did for the first time an opportunity for the EP to veto the adoption of implementing measures, and thereby gaining something of equal powers to the Council in supervising the Commission. Unlike the traditional procedures, the RPS provided for an automatic referral to Council and Parliament, and gave both institutions the possibility to veto the adoption of draft measures. It was only applied in a selected number of legislative acts which had been adopted through co-decision, but at least in this area did give the EP something like equal powers to the member states (even if it was limited to oppose draft measures only because they were found to contravene principles such as subsidiarity and proportionality rather than substantive content).

The 2006 reform left the Union in something of a limbo: while it did advance the role of the EP in comitology and introduced for the first time genuine legislative control over the European executive, it was also considered a “half-way house” that did not go far enough in genuinely empowering the European Parliament (St Clair Bradley 2008). It also created much greater complexity and legal uncertainty: the RPS procedure was meant to operate only in a tightly circumscribed area – implementing acts that “supplemented, deleted or amended non-essential aspects of the legislation” – but its ultimate application owed more to political bargaining than it did to these legal provisions. In the event, the time between the reform in 2008, which was only fully implemented some two years later, and the coming into force of the Lisbon Treaty and its new provisions, was too short to fully assess the operation of the new procedure, and to see whether it would indeed require adjudication by the ECJ in order to establish the limits of its application.

In sum, comitology before the Lisbon Treaty was still work in progress – it had seen some four decades of successful and expanding operation at the heart of the EU’s administrative system, but had also been the cause of much disagreement between the EU’s legislative institutions. A series of limited reforms had greatly changed the nature of the system, making it more transparent, accountable and political, yet still had not settled the underlying tensions. The more fundamental reform, foreshadowed by the Constitutional Treaty and finally introduced by the Lisbon Treaty, promised to make more fundamental changes to the system that might ultimately create a more stable framework for the delegation of powers which would not be in constant need of further reform.

### **3. Delegated Powers after Lisbon**

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 Treaty on the Functioning of the European Union (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 (European Union 2010a: 172). The article also

provides for post-hoc control to be exercised by the European Parliament 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 European Commission where there are uniform conditions for implementation. Neither the Council nor the European Parliament 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 the most controversial cases as explained in the previous section. Article 291 TFEU also requires that regulations are adopted under the ordinary legislative procedure (OLP) in order to lay down the rules and general principles for the mechanisms of control by Member States. It is the first time the European Parliament is co-legislator on such a regulation since, as noted earlier, in the past the mechanisms for control were adopted through Council decisions.

Regulation 182/2011 (European Union 2011a) which was negotiated between the three institutions in 2010 reduces the number of procedures from four to just two: the examination procedure and the advisory procedure. The examination procedure, which replaces the management and regulatory procedures, 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, safety and security, taxation, and the common commercial policy. Under the examination procedure, the Commission 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. 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. For all other areas, the advisory procedure applies, where non-binding opinions are delivered according to simple majority voting. One of the main innovations of the 2011 regulation is the replacement of the Council as a 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.

Apart from the procedures, one of the main innovations of the new regulation is that it now incorporates the whole common commercial policy. Under the old system, trade defense measures such as anti-dumping or countervailing measures were dealt with in separate regulations where opinions were voted by a simple majority. Regulation 182/2011 foresees that from September 2012 new regulations containing anti-dumping and countervailing 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. The old regulations containing the

simple majority rule are in the meantime adapted through omnibus-regulations to reflect the new system. This innovation constitutes a small revolution in the EU's trade defense policy, since the threshold to stop the Commission from adopting such measures is higher, making it more difficult for third countries to put (often smaller) EU member states under pressure to vote against such measures.

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 includes time limits for the Council and the European Parliament to use their right of objection, an 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. Article 290 TFEU and delegated acts replace the former regulatory procedure with scrutiny (RPS). Yet, there is no automatic alignment between the two and legal texts containing RPS are adapted on a case-by-case basis to see whether RPS-provisions fall under article 290 or 291 TFEU. An additional innovation as opposed to the RPS is that both legislators can now object to a measure on any ground.

In the following section we will compare the roles of each of the institutions involved in the pre- and the post-Lisbon system. We will also address the impact of the new procedures on the inter-institutional dynamics in delegating and implementing measures.

## **4. Dynamics of Change**

### *4.1 The European Parliament: Promise unfulfilled?*

As the previous section indicated, the pressure from the EP was the main driving force behind the reform of the system, and the EP's quest for equality with the Council is ultimately responsible for the creation of a new type of implementing instrument – the Delegated Act. Since the adoption of Delegated Acts by the Commission does not require a committee stage, but rather direct control by the two legislative institutions, the cumbersome and limited RPS procedure is gone. Instead, under Art. 290 the EP now has the possibility to object to individual draft measures submitted by the Commission, or to revoke the delegation altogether. The new treaty article also opens the door for more systematic use of 'sunset clauses', something which the Council had previously only agreed to in a small number of selected cases. This combination of *ex ante* and *ex post* controls that the EP enjoys over Delegated Acts since Lisbon is a significant improvement over its previous involvement in this area.

However, while the benefits of this new instrument for the EP are evident, there are a number of reasons to be more nuanced in the analysis of what this means for parliamentary influence. First, the absence of implementing committees in the procedure for adopting Delegated Acts does remove some of the advantages that member states have had in comitology. However, it does so only formally, leaving the (very real) possibility that the Commission will consult the member states informally through expert committees, thus excluding or at the very least

disadvantaging the EP in the important drafting stage for Delegated Acts. The very fact that this might happen informally will make it all the more difficult for the EP to understand what is being discussed, and to influence the drafting process accordingly. Indeed, the working arrangements emerging under the Common Understanding for Delegated Acts remind one of the early years of comitology during which much of what happened in the system prior to adoption was ‘in the dark.’

The EP has demanded to be present in any such consultation meetings, and their representatives are now participating in meetings of expert groups, albeit only as observers. This creates a kind of symbolic presence, but actually provides the EP with very little if any input into the process. EP officials from the staff of committee secretariats devote their limited time to attending such expert group meetings without having either the opportunity not – due to their lack of detailed expertise – the capacity to influence proceedings. . In addition, it has also been necessary to set up an informal circuit among officials working for the various EP committees in order to exchange practices and develop a common strategy. All of this requires time and other resources which are scarce in the Parliament – a point to which we return below.

In addition, the very instrument of a ‘common understanding’ falls somewhat short of the EP’s initial demand which was for an inter-institutional agreement. The Common Understanding instead of including legally binding rights appears more as more of a guideline on how the process should work. It presents the EP with a scenario under which there is much scope for Commission and member state officials to cooperate in the drafting stage of delegated acts, with the EP eventually being presented with a *fait accompli* that it might (threaten to) veto – an unlikely option and an undesirable position for the EP to be in. Consequently, the overall impression one is left with now that the treaty provisions are being translated into practice is that the EP was the ‘winner’ at Lisbon, but the ‘loser’ in the subsequent implementation ‘game’ (see Christiansen and Dobbels 2012)

In addition to the mixed picture that emerges (from the EP’s point of view) in the area of delegated acts, the EP also appeared to have gained much with regard to the traditional comitology which, as we have seen, remains as an option for implementation. Here, the adoption of comitology procedures – previously the exclusive domain of the Council – now falls under the OLP, thereby also giving the EP equal rights with the Council also in this domain. Not much else changed in the treaty with respect to comitology – the essential effect of the Lisbon Treaty here was to require the adoption of a new “Regulation of the European Parliament and Council” to replace the pre-Lisbon “Council Decision” which set out the various comitology procedures. Thus, with respect to comitology – and in contrast to the adoption of Delegated Acts – binding legislation on prior procedures was required and could only be adopted with the agreement of the EP.

This might have been the foundation for the EP to push for much greater involvement in comitology – continuing the quest of previous decades we discussed earlier. However, in the event, the EP’s input into the wording of the new comitology regulation was rather minimal, with the main negotiations happening among the member states and between them and the Commission. The new regulation does

little to empower the EP, since it merely provides an opportunity to set out ways in which the *member states* – and not the Parliament itself – may oversee the Commission’s use of implementing powers. As it happens, the Parliament largely ignored the details during the negotiations on the new regulation, and was sidelined in the debates about the extension of comitology to trade measures, while working on the assumption that in the future it could rely on its greater influence over Delegated Acts rather than needing to get involved in the intricacies of comitology.

In fact, this observation leads to a much larger question, namely the manner in which the choice is made whether a certain legislative act is to be implemented via Art 290 (Delegated Acts) or via Art 291 (comitology). Under the previous comitology regime, there was in the comitology decision a binding rule on the circumstances in which the RPS procedure would have to be used. Under the Lisbon Treaty, by contrast, there is no guidance, and certainly nothing that is legally binding, regarding the choice of instrument and procedure. This state of affairs creates some uncertainty and leaves the door open for further tensions and possibly litigation among the institutions (Craig 2010: 65). While the Council prefers the use of comitology acts, the EP is bound to push for the use of Delegated Acts in every conceivable case. The result may be squabbles over the choice of instrument that has to be made during the negotiations of legislative acts, something which has already caused delays in their adoptions and could well be subject to judicial challenges in the future.

The discussion of the EP’s position in this area is not complete without considering the resource issues that result from it. We mentioned above that historically the EP had maintained a generalized push for greater involvement in the oversight of legislative implementation, but that this had largely been rebuffed by Council and Commission, and that as a result the experience the EP has had in this area was rather selective. Only with the advent of the RPS procedure was there the expectation of a more regular involvement in this area, but this system had hardly started to operate before the Lisbon Treaty came into force. The fact is that the EP, notwithstanding its principled position, has had little opportunity and limited resources to actually scrutinize implementing acts before their adoption. Now, following the Lisbon changes, there is the possibility for doing so, at least when it comes to Delegated Acts. This requires considerable resources, given the technical expertise the Commission’s services (and their expert committees) as well as member state administrations can muster. The EP already had to hire additional staff to deal with the growing workload under the RPS, and the scrutiny of Delegated Acts presumably will require even greater resources in the future. It will also add new demands to the agenda of EP committees, which would have to debate any motion to object to a draft Delegated Act prior to a vote in plenary, and would have to do so within the very restrictive timetable under which such objections can be made. The EP is traditionally disadvantaged vis-à-vis the other two institutions when it comes to both technical expertise and time, and the consequence in this area might be that without a major effort at internal institutional reform the EP may find it difficult to effectively influence the decision-making process in this domain.

The Lisbon Treaty certainly brought some advances for the European Parliament, but what appears as a fundamental shift of power in the treaty text appears as a more

subtle development when looking in detail at how the new provisions have been put into practice. Formally speaking the EP has gained significant powers to block the adoption of Delegated Acts, but the exercise of these rise may be difficult, and will probably have to be highly selective, both for political and practical reasons. In the area of comitology, the discrepancy between formal treaty reform promising a transformation and little actual change in practice is even more stark. In conclusion, the revolution that the Lisbon Treaty promised the Parliament in this area turn out to be more of an evolution that only marginally improves the EPs capacity to influence legislative implementation.

#### *4.2 The Council: the Appeal Committee as the Council in disguise?*

The principal change for the Council in the new system has definitely been its formal removal from the decision-making process in comitology, now the procedures based on article 291 TFEU. The Council only has a non-binding right of scrutiny together with the European Parliament, which entails verifying whether the Commission is respecting the scope of the conferred powers as defined in the basic legal act. As explained above, the examination procedure, which replaces the old management and regulatory procedures, no longer foresees referral to the Council for controversial measures which are voted down or fail to rally a qualified majority in the basic committee. In its initial proposal, the Commission (2010) had already included this removal arguing that article 291 TFEU makes no reference to any role of the Council for non-CFSP or defense related measures (except for duly justified specific cases), and puts the right to exercise control over the Commission's implementing powers firmly into the hands of the member states. It therefore considered the reintroduction of the Council, as demanded by some member states, to cross one of its red lines (interview 1). In addition, the Commission argued that since the new regulation is decided under the ordinary legislative procedure and since the Lisbon Treaty de facto puts the European Parliament on equal footing with the Council it would be difficult to deny the former a role in the new system if the latter has decision-making power in the procedures, something which was unacceptable for a majority of Member States in the Council (interview 2). A compromise that was in the end acceptable to both the European Parliament and the Commission was the introduction of a 'safety net', a higher body of appeal for controversial measures. This appeal committee is composed of Member State representatives and is chaired by the Commission – an explicit request of both the European Parliament and the Commission itself (Christiansen and Dobbels 2012)).

Current practice shows however, that even though it is presided by the Commission, the distinction between the appeal committee and the role the Council used to play in the pre-Lisbon system is mainly formal. In the first year after the entry into force of regulation 182/2011, the appeal committee met five times, in four of these meetings a majority of Member States were represented by their Deputy Permanent Representative (DPR), almost mirroring a meeting of Coreper I (interview 3)<sup>3</sup>.

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<sup>3</sup> The five meetings show a decline in presence of DPRs with 24 out of 27 for the meeting in which the rules of procedure were adopted, 19 and 14 for the second and third meeting, 0 for the fourth meeting as it was scheduled on the same moment as a ministerial Council

Meetings of the appeal committee are reportedly short in that they never exceed 45 minutes. Also, the outcome compared to the basic committee did not change (interviews 3 and 4). The Commission indeed ended up adopting all measures that passed through the appeal committee, even though there was no qualified majority in favour. The difference with the old system and the referral to the Council is therefore hard to discern, leaving some Member States wondering what the added value of the appeal committee is (interview 4). It thus seems that even though the Council has been formally removed from the new procedure, the appeal committee mirrors the role played by the Council, and is in fact the Council in disguise – the only difference being that meetings are presided by the Commission and a majority of member state is represented at DPR- instead of ministerial level.

Article 290 TFEU on delegated acts which replaces the RPS also entails a reduced role for the Council. The RPS foresaw that apart from its usual role in the regulatory procedure, the Council – acting by a qualified majority – could oppose the adoption of a draft act by indicating that the Commission exceeded its implementing powers or that the draft act was not compatible with the aim or content of the basic legal act or did not respect the principles of subsidiarity and proportionality (European Union 2006: 3). Article 290 TFEU only gives the Council post-hoc control rights, namely the right of objection and the right of revocation. As with the new comitology regulation, it has no more decision-making function as body of higher instance for controversial measures. In addition, the post-hoc rights of control are in fact quite drastic as they only entail the nuclear option of voting against. The Council can no longer adopt a different decision. In addition, the threshold for the Council to object or revoke, namely finding a qualified majority, is high as well. Member States in the Council therefore have tried to find other ways of influencing the process of the adoption of delegated acts by focusing on the preparation stage.

Indeed, a sensitive point in the implementation of article 290 TFEU is the involvement of Member State experts in the preparation of draft delegated acts by the Commission (see Christiansen and Dobbels 201X: X). Before the adoption of the Common Understanding, early in 2010 the legislative process briefly came to a halt on this issue. The sticking point was the inclusion of a recital which said 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 European Parliament, on the other hand, objected to the inclusion of such recitals as well, unless its own experts were also included. In the end, the recital that was adopted and hence forth included in every basic legal act containing delegated acts read “*It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level*”. The word ‘national’ had been deleted from the recital, implying that any expert - including those designated by the

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meeting on Transport and 22 for the fifth meeting. The high number in the last instance was reportedly due to the measure being GMO-related, traditionally politically sensitive.

European Parliament - could be consulted. This created further tensions when during the preparation of the first delegated act on Directive 2010/30 on energy labeling, Member States in the Council were dissatisfied with the process and demanded more transparency of the Commission and privileged status for Member State experts (see Christiansen and Dobbels 2012) The Commission refused to give any formal assurances, but recognised the sensitivity in the guidelines on delegated acts which it sent to its Directorates General. In these guidelines, the Commission calls upon its services to take the matter of consulting Member State experts seriously, without introducing voting procedures or comitology through the backdoor (European Commission 2011).

It is clear from this analysis that even though the Council's formal role has been diminished by the new system, Member States have been pushing to regain control over both the process on implementing acts – by introducing the appeal committee – and the process on delegated acts – by demanding privileged status in the consultation phase on the preparation of delegated acts by the Commission.

#### *4.3 The European Commission: new challenges*

Taking account of the more limited role conferred upon the Council by the treaties and with the European Parliament still struggling to find its place in the system overlooking delegated and implementing powers, the conclusion seems to be that for the moment, the Commission is the institution that won most with the recent reforms.

Admittedly, the Commission had to give in on a number of points during the inter-institutional negotiations on both the practical arrangements on delegated acts and the regulation regarding implementing acts. In the first case it had to accept the negotiation of a Common Understanding which effectively replaced its own communication of December 2009. Although the differences with the communication are not that significant, the Commission saw itself forced to give more assurances to Member States on the consultation of experts in the preparation phase of delegated acts, the transmission of documents and to include a standard recital on consultation as part of the model articles.

The negotiations on the regulation concerning implementing acts are a different story. First of all, they are of a legislative nature and therefore more binding than the soft law created by the Common Understanding. Secondly, the proposal for a regulation put forward by the Commission in March 2010 was considered by many as the first step in a negotiation process rather than a balanced legislative proposal (interview 5). Indeed, the Commission was not a broker but a player with a vested interest in the negotiations as it concerned the control over it exercising implementing powers (see Christiansen and Dobbels 201X: X). Its initial proposal included a simplification of the system from five to two procedures, automatic alignment of the old system to the new, no referral to the Council after a negative opinion in the committee, complete inclusion of the common commercial policy, and more loosely defined criteria for the examination procedure. Analysis has shown that this proposal was watered down substantially and primarily by the Council (see Blom-Hansen and Brandsma 2011). Compared to the initial proposal, the final

regulation indeed includes exceptions on the automatic alignment, stricter criteria for the selection of a procedure, the referral to the appeal committee as discussed above, provisions demanding the Commission to look for the “widest possible support” – even if a qualified majority is reached – and to avoid going against a predominant position in the committee – even though no qualified majority is against, as well as transitional measures and special procedural provisions for anti-dumping and countervailing measures in the common commercial policy (ibid.: 15).

To claim however that the Commission has suffered a loss of influence and power in the new system, would be mistaken. When compared to the previous system, it is even fair to argue that the Commission has gained a stronger position. Despite the pressure of Member States to formalise the preparation stage of delegated acts, the Commission in fact has more leeway for this type of measures than under the previous system where the regulatory procedure with scrutiny applied. Indeed, control is now post-hoc without any possibility to substantially amend the act. As explained above, both the Council and the European Parliament have only the nuclear option to either prevent the act from being adopted or to revoke the delegation. The best proof of how this loss of influence is felt by the Council, is their continuous insistence on the use of implementing acts or the ordinary legislative procedure whenever during legislative negotiations the demarcation with delegated acts is not clear-cut (see Christiansen and Dobbels 2011).

Even though substantial changes were made to its proposal on the regulation for implementing acts, the overall result of the negotiations should not sadden the European Commission. After intense negotiations with the Council, it managed to include trade defense measures such as anti-dumping and countervailing measures in the new regulation giving more power to DG Trade as the threshold for Member States to stop such measures from being taken became much higher with a qualified majority required. The chairmanship of the appeal committee is another, be it more limited, improvement of the Commission’s position in the new system. It is no longer the rotating presidency chairing the Council that deals with controversial acts that did not pass the committee stage. The decision whether or not to send an act to the appeal committee, as well as the agenda, the date and place of the meeting, the invitations to the meeting and the actual meeting itself are all handled by the Commission’s services now. Last, but not least, recitals and provisions in articles calling upon the Commission to find “the widest possible support” – and thus going beyond a qualified majority – and to “avoid going against a predominant position” – giving a role to a simple majority – have so far proven to be dead letter (interviews 3 and 4). As one interviewee stated: *“Even more than before, Member States have lost the power to converge. The Commission seems to pursue the strategy that if no qualified majority is reached, they stay with their position”* (interview 3). Even though, the fact that the Commission is no longer obliged under the new system to adopt an act in the case no qualified majority is found for or against was presented as an innovation of the new system, it thus far has opted to adopt all acts going through the appeal committee, even though there was no qualified majority in favour.

In conclusion, it is fair to say that even though the Commission has given in on a number of issues during the negotiations on the new system and even though it

looks like the scope of delegated acts is being reduced in legislative negotiations, its role in the new system is stronger than that in the previous one. With the fundamental change in trade defense policy and its dominance of the appeal stage it has an even firmer grip than before on the system of implementing and delegated powers.

#### *4.4 Inter-institutional implications: greater scope for inter-institutional bargaining*

Having looked at the effect of the Lisbon changes on each of the three legislative institutions in turn, a comprehensive analysis of inter-institutional relations before and after the treaty also requires assessing possible changes to the interaction among the institutions. While we have already alluded to some of these effects, this section aims to bring together the impact on inter-institutional dynamics more systematically.

The first observation in this regard is the influence of Art.290 and 291 on the process of adopting legislative acts. Here one can expect – as indeed has already been observed – increasing delays in the adoption of legislative acts, given that there is now considerable scope for disagreement among Council and EP over the choice of between Delegated Acts or comitology acts as the method of implementing legislation. Such differences may not prevent the adoption of legislative acts, but the additional scope for bargaining might extend the time it takes to reach a conclusion in co-decision.

Compared to the status quo ante, when preferences between the institutions were similarly misaligned – the EP pushing for the use of the RPS against the Council favoring the standard regulatory procedure – the post-Lisbon situation implies a higher degree of uncertainty, given that the old Comitology Decision included legally binding criteria regarding the choice between these procedures. These criteria may not have been entirely deterministic (Christiansen and Vaccari 2006), but they did reduce the opportunity for disagreements as to which procedure would be included in a given legislative act.

With respect to comitology, the creation of the regulatory framework for the continued operation of implementing committees was also the subject of hard bargaining between the legislative institutions, taking the better part of year before a new Comitology Regulation was agreed. On the face of it, this new framework delivered on the promise of simplification, with only two procedures now left on the ‘menu’. But also here much depends on the way the new system will operate in practice, with the Commission having achieved considerable leeway in the way in which aspects in the regulation can be interpreted.

The overall impression must be that the Lisbon Treaty did clarify the situation in the area of delegated powers somewhat, specifically by formally elevating the European Parliament to an equal of the Council when it comes to the control over the Commission. However, as we have seen, in practice the promise of formal equality has not been translated into institutional balance due to the legislative framework and non-legislative arrangements that followed the treaty change. It has become evident that other factors, such as the availability of technical expertise or the speed

with which an institution is able to respond to proposals do matter in order to make good on formal provisions in the treaty, and in this regard the EP is structurally disadvantaged vis-à-vis both Commission and Council.

Furthermore, the system as a whole has benefitted in the past from a high degree of predictability: historically, more than 98 per cent of all Commission measures put to a vote in comitology committees were ultimately adopted. This trend may well continue, but for the time being, until the new arrangements have settled in, there is a degree of uncertainty as to whether this stability can be taken for granted. The automatic right to review delegated acts that both Council and EP now have may lead to only very few actual challenges, but without the comitology system here acting as a formal consultation process, reactions of member states and in particular of the EP are difficult to anticipate and might lead to surprises. Given how much of legislative implementation is sensitive to markets, competitiveness and the efficient functioning of the EU's regulatory system, this can have serious repercussions for stakeholders.

An extension of this concern is the possibility of litigation arising from the Lisbon Treaty: in the absence of clear guidance in the treaty about the respective application of Art.290 and Art.291, member states as well as the institutions may find themselves in front of the Court, which in turn may have to reprise the important role it played in the early years of comitology to establish greater clarity in the system. However, considering the time it usually takes for cases to make it to the court and get adjudicated, this can also add to a prolonged period of uncertainty.

In sum, inter-institutional relations after the Lisbon Treaty remain dynamic: the Treaty ensures that the EP is now a legitimate player and equal partner in the area of delegated acts, but whether that will lead to a new stable equilibrium among the institutions remains to be seen. It will depend in part on the actions of each of the institutions (and possibly the jurisdiction of the Court), and it may therefore take some time before the *modus operandi* post-Lisbon has been established. What we can say on the basis of the limited experience so far is that the EP does face serious challenges to make effective use of its new powers, both with respect to its relations with Council and Commission (who have managed to regain the upper hand during the implementation of the treaty articles) and with respect to its internal arrangements and resources (which need to be strengthened in order to turn rights into results).

## **5. Conclusions**

The previous observations already summarises some of the key observations that can be made about the changes that the Lisbon Treaty has effected in this area. In addition, it might be opportune to reflect briefly on some of the normative aspects of this reform. Analyzing the way in which broad treaty provisions have been turned into practical working arrangements for the daily routine of EU decision-making has required a focus on technical detail. Coming back to the bigger questions what this means for European governance leads us to examine whether two key objectives of the reform have been achieved: a simplification of a system that is often regarded as

arcane and impenetrable, and improving the accountability of decision-making in this area.

With regard to both of these, we have observed that the Lisbon Treaty presents us with a mixed picture. The Treaty does indeed clarify the respective roles of the three institutions, and simplifies somewhat the arrangements in comitology. The departure of the convoluted RPS procedure is certainly an improvement in this respect, but at the same time there are complex procedures with regard to both Delegated Acts and implementing acts – procedures which are subject to informal arrangements that are hardly more ‘simplified’ than the *status quo ante* which at least relied on the clarity of written rules.

Finally, the arrival of the EP, at least formally, as an equal player is not only the main development overall, but also the ultimate driving force in reforming the system with a view to greater accountability and democratic legitimacy. If the intended distinction between, on the one hand, more ‘political’ Delegated Acts being scrutinized by the legislative institutions, and more ‘technical’ implementing acts being scrutinized by member state experts in comitology committees, becomes a reality, then indeed one might expect an improved accountability of the system. The absence of a clear dividing-line between the two types of instruments, however, threatens to negate this potential advance somewhat. Already we have seen via the Appeal Committee the potential for the politicization of comitology as well as attempts to (re)introduce via expert committees greater technocratic governance to Delegated Acts. In sum, while the new formal procedures promise an improvement in accountability, the fact that much of the functioning of the post-Lisbon system will depend on new informal arrangements raises new questions and concerns.

As we have seen, the Lisbon Treaty certainly did have a significant impact on the system of delegated powers and their oversight. Clearly the creation of the new instrument of Delegated Acts and the arrival of the EP at its final destination of equal of the Council heralds a new era in this domain. However, there is no clear-cut shift from ‘before’ to ‘after’. Instead, we have observed that implementing the new treaty provisions has been a protracted affair which has raised new questions and has given rise to new informal arrangements. The Lisbon Treaty has changed much, but some of the old challenges of great complexity, lack of transparency and limited accountability still remain, ensuring that developments in this area will remain dynamic.

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## **Interviews**

- Interview 1, Official from one of the EU institutions, 24 March 2010, Brussels.
- Interview 2, Official from the Permanent Representation of an EU Member State, 29 March 2010, Brussels.
- Interview 3, Official from the Permanent Representation of a medium-sized EU Member State, 14 October 2011 and 7 February 2012, Brussels
- Interview 4, Official from one of the EU institutions, 10 April 2012, Brussels.
- Interview 5, Official from one of the EU institutions, 12 March 2010, Brussels.