Managing Choice: a close look at the differentiation of delegated and implementing acts

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1. Introduction

At the time of entry into force, the Lisbon reform of Commission powers and the separation between delegated and implementing acts has been hailed as a major innovation of the European system of legal rules.[1] Since then, the system has developed significantly. Legislation specifying the new 'comitology' system under Art. 291

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1 *Hofmann*, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality', 15/4 European Law Journal 2009, p. 482; *Peers/Costa*, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', 18/3 European Law Journal 2012, p. 427; *Mendes*, 'Delegated and Implementing Rule-Making: Proceduralisation and Constitutional Design', 19/1 European Law Journal 2013, pp. 22 ff.

TFEU has been passed,[2] and (as of now) three inter-institutional agreements pertaining to the adoption of delegated and implementing acts have been concluded.[3] Most recently, the Commission has started an attempt to amend the Comitology Regulation.[4] However, what this development depicts is not quite the radical change that the Treaty Reform initially promised.

In this article I will first expand on this point, namely that the actual differences between the adoption procedures of delegated and implementing acts is not as great as the Treaties would suggest. Moreover, it will become clear that with every change or clarification of the adoption procedures since the introduction of Art. 290 and 291 TFEU, these procedures have become more similar to each other, to the point where they hardly sustain any categorical differentiation anymore.

This situation raises the question of which obligation the separation of delegated from implementing acts in the Treaties actually created. Here, the different meanings of 'differentiation' play a role. Thus, Arts 290 and 291 TFEU are not necessarily already the foundation of a factual differentiation. The adoption procedures for delegated acts are legal under Art. 290 TFEU, notwithstanding the fact that they are very similar to the adoption procedures for implementing acts, and vice versa. However, I will argue that there is another side to differentiation, namely the normative side. Normative differentiation is that those applying Arts 290 and 291 TFEU are obliged to *make* a difference between delegated and implementing acts, because the regime spanned by these two articles requires one to be made.

In the second part of the article I will turn to how this construction of the difference between delegated and implementing acts can take place, using the already existing legislative requirements to state reasons and to explain the choice between legal bases through objective factors, amenable to judicial review.

2 Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011], OJ L 55 of 22/02/2011, p. 13.

3 *European Parliament/ European Commission*, Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304 of 20/11/2010, p. 47; *Council of The European Union*, Common understanding on Delegated Acts (2011), Council Document 8753/11; *European Parliament/Council of the European Union/European Commission*, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123 of 12/05/2016, p. 1.

4 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85 final.

In its analysis, this paper focuses less on the CJEU's case law than on developments in institutional rules and practice.[5] With its reference to the discretion of the legislating institutions, the Court points to institutional practice as responsible for providing any differentiation required.[6]

Indeed, the institutions, through their practice and acts, create normative rules and give guidance regarding constitutional developments. It appears reasonable to assume that the institutions, if so inclined, are able to differentiate themselves between the two kinds of rules of Arts 290 and 291 TFEU, by consistently differentiating between them when drafting legislative mandate.

The EU institutions are the ones who are in first instance putting flesh on the bones of Arts 290 and 291 TFEU. The way that the institutions interpret and apply the provisions on Commission empowerment and rule-making is the way these provisions manifest themselves in the EU polity and legal order. Even if some institutional practices are later overturned in Court – and so far, this has hardly been the case in respect to delegated and implementing acts – the Court's judgments can only redraw the arrangements on the canvas already spread and the foundation already applied by institutional interactions.

The arguments will be organised as follows. First, in section 2, the research approach will be laid out, describing the factual and normative dimensions of differentiation. In section 3, Commission rule-making will be introduced, giving a short historical overview over the developments that led to the current situation. In section 4, the developments since the introduction of the Lisbon Treaty will be presented with an eye to their capacity to create factual differentiation between delegated and implementing acts. In section 5, the current situation will be evaluated, and it will become clear that there is no factual differentiation between delegated and implementing acts that deserves this description. As a next step, the paper will explore the possibility of normative differentiation, pointing to the potential of the jurisprudence regarding the choice of legal basis to provide structures for the choice between delegated and implementing mandates. I will conclude in section 7, reiterating the advantages, but also showing some shortcomings of the normative approach to differentiating between Arts 290 and 291 TFEU.

5 For an analysis of this case law, to which I would have little to add in this paper, see *Bast*, Is There a Hierarchy of Legislative, Delegated and Implementing Acts?, in: Bergström/Ritleng (eds.), Rulemaking by the European Commission: The New System for Delegation of Powers, 2016, pp. 157-171; *Chamon*, Institutional Balance and Community Method in the Implementation of EU Legislation following the Lisbon Treaty, 53 Common Market Law Review 2016, pp. 1501-1544; *Zdobnoh*, Competition between articles 290 and 291 TFEU: what are these two articles about?, in: Tauschinsky/Weiß (eds.), The Legislative Choice between Delegated and Implementing Acts in EU Law- Walking a Labyrinth, forthcoming 2018.

6 CJEU, case C-427/12, *European Commission v. European Parliament, Council of the European Union*, ECLI:EU:C:2014:170, para. 40.

2. Research Approach: The Factual and Normative Sides of Differentiation

Before discussing the (lack) of differentiation between delegated and implementing acts, it is useful to first explore what 'differentiation' entails. Both the argument that the adoption procedures now do not express any categorical 'differentiation', and the argument that such a differentiation can be actively constructed by the institutions depend on the conceptualisation of 'differentiation'.

Obviously, 'differentiation' is about differences between delegated and implementing acts. The term in addition connotes that these differences adhere to a systematic logic, so that differences between a delegated and an implementing act are different in kind from the differences between two delegated or two implementing acts. As each act presents a specific rule-making instance, no two acts will be precisely the same. However, when delegated and implementing acts are differentiated, any act that is a delegated act will exhibit some characteristic that differs from the characteristics exhibited by those acts that are implementing acts.

At this point it is useful to remember that delegated and implementing acts will always have much in common. Both are adopted by the Commission, both need a legal basis in another act of Union law, both are legally binding and can take any of the established forms of EU legal acts. Consequently, any differentiation has to apply to characteristics other than the above, and focus on the characteristics that are not necessarily equal.

Generally, differentiation can apply to (adoption) procedures or the substantive scope and content of acts. Procedural and substantive differentiation describe two dimensions of the differentiation between delegated and implementing acts, yet these two dimensions should correspond. Procedural differentiation is justified by differentiation in substantive scope and vice versa. Differing substance provides for the functional need for specific and differing procedures; and differing procedures can be expected to result in substantively differing acts.

The current study will first focus on the procedural dimension. If, as has been claimed,[7] delegated and implementing acts cannot be distinguished by their content, then it is logical for any relevant factual differentiation to be evident in their adoption procedures, and the role that the different institutions play in them. This is why this contribution focuses on the adoption procedures, as described by the Treaties, legislative acts and inter-institutional agreements, as well as publicly available declarations of the institutions of how these legal texts are interpreted and used.

Beyond the procedural and substantive dimensions, 'differentiation' can be seen either as describing the fact that separate categories of acts exist, or as creating the need for a separation. These two are intertwined as well. There must be some form of factual difference which spurs the need to develop a normative framework that accounts for this difference. On the other hand, where categorical differences are established on the theoretical level, this will be the basis for a call for factual differentiation.

7 *Craig*, Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains, in: Bergström and Ritleng (eds.), (fn. 5), p. 173.

In the present case of the differentiation between delegated and implementing acts, the foundation of this differentiation both in fact and as a desideratum lies in Arts 290 and 291 TFEU. Yet, the practical regime through which delegated and implementing acts are given actual form is not yet enshrined by them, and has been and is being developed through institutional practice, case law, and possibly academic comments.

When researching the differentiation between delegated and implementing acts, it is useful to keep these dimensions of 'differentiation' in mind. The description in the next section focuses on the factual differentiation between delegated and implementing acts; looking for differences and their systematic relation. In the latter section of this study, I will turn to the normative obligations created by the separation of Commission rule-making into delegated and implementing acts.

3. Commission Rule-making

3.1 The Pre-Lisbon situation

Delegated and implementing acts were introduced by the Treaty of Lisbon, which took its cue from the Constitutional Treaty. The reform of Commission acts (sometimes referred to as a 'reform of comitology') was prompted by two problematic aspects: the complexity of the system and the comparatively small role that Parliament had in the oversight of Commission rule-making. Here, I will give only a very short introduction into this system, which is to serve first and foremost as a reminder. The Comitology system before Lisbon has been researched extensively and in much more detail than it would be possible for me to provide here.[8]

Before the Lisbon reform, there was only one category of Commission acts. Before 2006 these Commission acts could be adopted by one of four so called Comitology procedures, namely the advisory procedure, the regulatory procedure, the management procedure, or the safeguard procedure. These procedures were formally established in 1999.[9] They differed in the role that Committees of Member State representatives played in their adoption processes. The procedure to be used by the Commission was determined by the act creating the mandate.[10]

This system worked relatively smoothly and was successful in that the overwhelming majority of Commission acts were adopted in an orderly manner. While of course the content of some acts was criticised, overall, the system appeared functional in that it produced sensible and workable rules. However, the complexity of the different procedures which was moreover so different from any system to be found in a Member

8 For Example: *Blom-Hansen*, The EU Comitology System: Taking Stock Before the New Lisbon Regime, 18/4 Journal of European Public Policy 2011, p. 607.

9 *Council of the EU*, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999], OJ L 184 of 17/07/1999, p. 23.

10 *Harlow*, The Limping Legitimacy of EU Lawmaking: A Barrier to Integration, 1/1 European Papers 29, 2016, p. 36.

State, and the fact that Parliament was largely excluded, contributed to the perception of the EU as a bureaucratic moloch and thus enhanced its democratic deficit.

In 2001, the Constitutional Convention developed a new set up for Commission rule-making, by introducing a new kind of Commission act, the delegated act. The Convention had been tasked with simplifying the system of Union acts (including Commission acts) through the Laeken declaration, and was sympathetic to the argument that a greater involvement of the EP would increase the system's democratic legitimacy.[11] The provisions developed by the Convention are, except for small editorial changes, those that are now contained in the Lisbon Treaty.

The problems with the old system of comitology were deemed so great, that even after the failure of the Constitutional Treaty, these ideas of the Constitution were introduced into the pre-existing Comitology system, with the Commission proposing an amendment to the Comitology decision to that effect in 2002.[12] In 2006, the Parliament was given a role in the adoption process for acts adopted by the regulatory procedure with scrutiny.[13] This procedure accorded Parliament the power of vetoing any given act for the three reasons of the Commission overstepping its mandate, for reasons of incompatibility with the parent legislative act and because the draft did not respect the principles of subsidiarity or proportionality. Such a draft act could then not enter into force.

In sum, the old Comitology system was characterised on the one hand by the categorical unity of Commission acts, and on the other hand by procedural variety. At this time, there was no dogmatic differentiation between different forms of Commission acts, even though the Comitology decision provided for a greater number of adoption procedures than are now in place under Art. 290 TFEU and the Comitology Regulation.[14] The procedural differentiation was commonly depicted as having historical, functional or political reasons,[15] but not as motivated by categorical doctrinal considerations.

Interestingly, during this time there was not much academic debate about the choice between the different comitology procedures, even though the rule-making process here, too, differed between procedures, and there was ambiguity in the language of

11 *Brandsma/Blom-Hansen*, Controlling the EU Executive? The Politics of Delegation in the European Union, OUP 2017, pp. 58 f.

12 *European Commission*, Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 0719 final.

13 *Council of the EU*, Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200 of 22/07/2006, p. 1.

14 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

15 *Dogan*, Comitology: Little Procedures with Big Implications, 20/3 West European Politics 1997, p. 31; *Blom-Hansen*, The Origins of the EU Comitology System: a Case of Informal Agenda Setting by the Commission, 15/2 Journal of European Public Policy 2008, p. 208.

the provision regulating the use of the different procedures.[16] Nevertheless, there appears to have been much more institutional agreement on the use of this system, and much less academic fervour in differentiating the various procedures.

3.2 Establishing Delegated and Implementing Acts

As mentioned, the system of Commission acts (as the system of EU/EC acts more generally) was thought to be fraught with too much complexity. The system of Union acts was one of the topics to be discussed by the Convention for the Constitution of Europe as per the mandate of the European Council. It was relegated to the 'Working Group on Simplification'.[17] The mandate for this simplification was specified, among other aspects, by the question of whether a better differentiation between legislative and executive instruments could be made.[18]

Consequently, the Working Group on Simplification attempted to simplify the system of acts by separating its 'legislative' from its 'executive' aspects. Even though all Commission acts were technically 'non-legislative', Commission rule-making powers were nevertheless separated into delegated acts, which were, as they were based on 'legislative' delegation, properly the domain of Parliament and the Council, and implementing acts, which were properly the domain of the Member States as the ones responsible for the implementation of EU law.[19] Thus, the Commission would adopt delegated acts under the oversight of Parliament and the Council as the EU legislative bodies, and implementing acts under the oversight of the Member States through Comitology Committees.

This separation resonated well with the overall categorisation of acts in the Constitutional Treaty (TeCE). The TeCE made a difference between European (Framework) Laws, and European Regulations or Decisions, denominating the former as 'legislative' and the others as 'non-legislative'.[20] It is thus to be noted that the attempt of a separation between what was understood to constitute different categories of rule-making was an effort more consistently made by the Convention through the various levels of Union acts. This attempt is visible even though the conceptualisation of what constitutes the legislative character of these 'laws' might be found lacking.[21]

In the aftermath of the failure of the TeCE, the Member States adopted the Lisbon Treaty as a constitutional instrument, yet with less symbolic force, in terms of the

16 *Council of the EU*, Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006, OJ L 200 of 22/07/2006, p. 11, Art. 2.

17 *The Secretariat*, Note from the Secretariat to the Convention on Working Groups: Second Wave, 2002, CONV 206/02.

18 *European Council*, Laeken Declaration: Presidency Conclusions, European Council Meeting in Laeken 14 and 15 December, SN 300/1/01 REV 1, 2001, p. 22.

19 *Chairman of the Working Group IX on Simplification*, Report to the Members of the Convention: Final Report of the Working Group IX on Simplification (2002), CONV 424/02.

20 Treaty Establishing a Constitution for Europe, OJ C 310 of 16/12/2004, p. 1, Art. I-33.

21 *Türk*, The Concept of the 'Legislative' Act in the Constitutional Treaty, 11/6 German Law Journal 2005, p. 1555.

substance of the Treaty[22] as well as the 'constitutional' form.[23] The Lisbon Treaty took up many, although not all, of the innovations that the Constitutional Convention had proposed, leaving out some of the most symbolic ones, such as the introduction of European 'laws', instead defining them as 'legislative acts'. In this, the Lisbon Treaty innovated the system of EU legal rules,[24] but did not go as far as the Constitution.

While keeping the separation of delegated and implementing Commission acts, the Treaty did not keep the separation between legislation and regulation that the Constitution had introduced. In some ways, the differentiation between delegated and implementing Commission rule-making is an artefact of that separation of tasks of the Constitution.[25] Where in the TeCE this differentiation of Commission acts into delegated and implementing mirrored a similar differentiation of secondary Union law into laws and regulation, this connection has been lost in the Lisbon Treaty.

There is a wealth of literature comparing this system with the old procedures for the adoption of Commission acts. [26] The main features of the new system are the separation between delegated and implementing acts, not only in form but also in procedure. With delegated acts, a category of (tertiary law) Commission acts was created which did not involve representatives from Member State administrative bodies, but 'only' the Council. Formally, delegated acts involve only EU institutions, and thus could be seen to present a trend of centralisation and power shift from the Member States to the Commission.[27] Furthermore, commentators noted the fact that the Council was given no formal role in the committee procedures, even though this fact was considered with some scepticism as to its effects.[28]

It was widely agreed that the separation between delegated and implementing acts created two categories of acts. This separation was assumed to go beyond procedural differentiation, and to extend to the 'nature' of these acts. Delegated and implementing

22 *de Burca*, Reflections on the EU's path from the Constitutional Treaty to the Lisbon Treaty ,Jean Monnet Working Paper 3/2008, p. 10.

23 *Lietzmann*, The Symbolical Revocation of Symbolism, in: Wiesner/Schmidt-Gleim (eds.), The Meanings of Europe: Changes and Exchanges of a Contested Concept, 2014, p. 107.

24 *Best*,'The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance, 1 EIPASCOPE 2008, p. 7; *Pernice*, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 Columbia Journal of European Law 2009, pp. 370 ff; *Craig*, Delegated Acts, Implementing Acts and the New Comitology Regulation, 36/5 European Law Review 2011, p. 671.

25 This is not the only such artefact. The most clear and infamous one is the reference to 'regulatory act' in Art. 263 TFEU. On this and the decision not to differentiate between legislative and non-legislative act in acts of secondary law cf. *Schwarze*, 'European Administrative Law in the Light of the Treaty of Lisbon', 18/2 European Public Law 2012, p. 297.

26 *Hofmann*, (fn. 1), p. 482; *Craig*, The Lisbon Treaty: Law, Politics, and Treaty Reform, OUP 2010, pp. 246 ff; *Driessen*, 'Delegated Legislation after the Treaty of Lisbon: an Analysis of Article 290 TFEU', 35 European Law Review 2010, p. 837; *Bast*, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', 49 Common Market Law Review 885, 2012, pp. 908 ff; *Kaeding/Hardacre*, 'The European Parliament and the Future of Comitology after Lisbon', 19/3 European Law Journal 2013, p. 382.

27 *Bast*, (fn. 26), p. 918; *Limbach*, Uniformity of Customs Administration in the European Union, 2015, p. 202.

28 *Bast*, (fn. 26); *Craig*, (fn. 24).

acts were assumed to be of different kinds. At the same time, the Lisbon reform decreased overall procedural diversity. Instead of five procedures as under the Comitology Decisions, post Lisbon there are only three procedures for Commission rule-making.

As mentioned, the separation between delegated and implementing acts had been greeted as an important legal innovation of the Lisbon Treaty, although one which immediately created debate. The controversy centred on the rationale along which these two kinds of Commission acts are differentiated. It became clear rather quickly that the definition of delegated acts 'amending or supplementing' and implementing acts 'implementing' secondary Union law was hard to use as a basis for concrete criteria. Evidently, 'implementing' was in many cases not to be differentiated from 'supplementing and amending', so that no exclusionary criteria could be derived from this,[29] even though the Treaty established two mutually exclusive regimes.[30]

Thus, it is not entirely clear whether the attempt at 'simplification' of Commission acts by separating delegated from implementing rule-making was indeed successful. In as far as the differentiation between these acts has remained unclear, the result does not seem to have increased the simplicity of the system of Union acts.

This initial confusion was generally expected to be ameliorated as time progressed. The Court, as well as institutional practice play an important part in shaping this EU legal regime. However, a number of commentators have already laid out the case law of the Court so far.[31] This case law not only does not provide the awaited clarification, but more importantly it also provides little indication of the Court being willing to tackle this task. As a result, the main developments in the use of delegated and implementing acts respectively have been due to institutional practice.

4. Procedural Developments since 2009

The provisions of the Lisbon Treaty did not enter into force in an institutional vacuum, but instead were met by the organisational structures and political dynamic already in place. Even though arts. 290 and 291 TFEU were originally thought to depict a radically new system of Commission acts, the practices and legal development since then have served to assimilate the procedures.

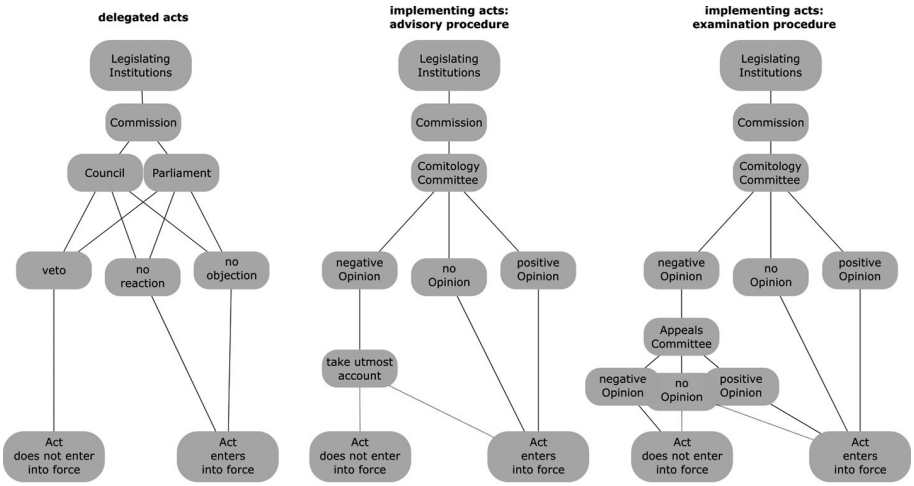
Thus, the position of the institutions in delegated and implementing rule-making processes is central to the development of the system. Unfortunately, the categorical differentiation sought after is difficult to find in the adoption procedures. While procedural differences remain, these are hardly of a categorical nature, but instead appear to be a matter of degree.

29 *Craig*, (fn. 24); *Bast*, (fn. 5), p. 151; *Craig*, (fn. 7), p. 173.

30 There can be no act which is at the same time a delegated and an implementing act. Even though the criteria for the choice are under debate, it appears to be common ground that a choice must be made. Cf. also CJEU, case C-65/13, *Parliament v. Commission*, ECLI:EU:C:2014:2289, para. 45.

31 *Chamon*, (fn. 5); *Zdobnoh*, (fn. 5).

Figure 1: Adoption Procedures



4.1 Archetypical Adoption Procedures

The legally prescribed adoption procedures for delegated and implementing acts differ in terms of their complexity. The procedure under Art. 290 TFEU is relatively straight-forward. The adoption procedure under Art. 291 TFEU, formulated in Regulation 182/2011 is more complex, as such a legal act can be adopted in a number of ways. The different procedures are well known and shall be described only briefly here. Their typical description is depicted in Figure 1.

Delegated and implementing acts are both drafted by the Commission. Delegated acts will be forwarded to Parliament and Council, implementing acts will be presented to a comitology committee. In the case of delegated acts, Parliament and Council have two months to either veto an act or declare no intention to object.[32] If Parliament and Council do not react within the time limit, an act will be considered to not have raised objections and will enter into force.

For implementing acts, the Comitology committee will vote to be either in favour or against an act, thus giving either a favourable or a negative opinion. Where no majorities can be reached, no opinion will be given. The legislative basis on which the implementing acts are adopted will have specified a choice for either the advisory or the examination procedure. The parameters of this choice are determined by Regulation 182/2011, Art. 2.

Where implementing acts are adopted under the advisory procedure, this opinion will be taken by the majority of component members of the Committee, and will have

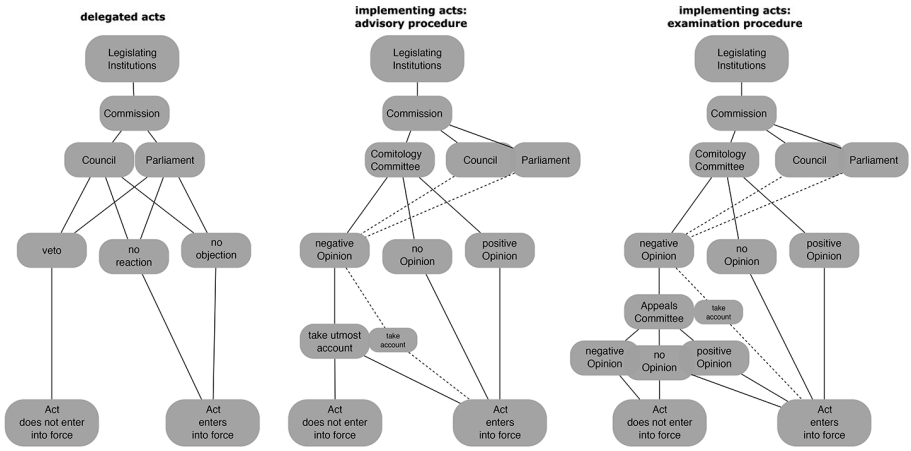
32 Parliament has until now objected to at least five delegated acts. Cf. *European Parliament*, Resolutions numbered P8_TA(2016)0347, P8_TA(2016)0015, P8_TA(2015)0206, P8_TA(2015)0205 and P7_TA(2014)0218. The Council raised objections in two cases. Cf. *Council of the EU*, Council Document 15147/14 and Council Document 17336/13.

only the effect that the Commission is obliged to take 'utmost' account of the discussion in the Committee and this opinion.[33]

Where the examination procedure is used, the same majorities as in the Council apply, namely the votes are weighed according to a key laid down in the Treaties.[34] In the case of a negative opinion in this procedure, the Commission can either amend the draft act within two months and resubmit it, or transmit it within one month to the appeals committee. Where the Committee does not give an opinion, the further procedure depends on the basic legislation and the issue area in question. In many cases the Commission can simply proceed with the adoption of the act, but in specific issue areas,[35] the absence of an opinion evokes the same procedures as a negative opinion.

In the cases of a positive opinion of the appeals committee, the act will be adopted by the Commission. In the case of no opinion, the Commission is usually free to adopt the act, whereas in the case of a negative opinion, the Commission is barred from adopting it.

Figure 2: Adoption Procedures with art. 10/11 Regulation 182/2011



4.2 'Deviations' through the Comitology Regulation

However, it is a too little regarded fact that Regulation 182/2011 which provides for the adoption procedures for implementing acts, gave some procedural rights also to Parliament and Council and thus brought some oversight by Parliament to implementing rule-making. Thereby it departed to some extent from the division of labour between legislator and Member States that is apparent in Arts 290 and 291 TFEU.

33 Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55 of 28/02/2011, p. 13, Art. 4.
34 Ibid., Art. 5(1), referring to TFEU Arts 16(4) and (5).
35 Listed in: Ibid., Art. 5(4).

Under a strict division, the legislating institutions were not to be involved in the adoption of implementing acts, since these are the domain of the Member States.[36] However, Arts 10 and 11 of the Comitology Regulation oblige the Commission to inform Parliament and Council of the content of a draft implementing acts at the same time as the relevant Comitology Committee. This makes it possible for Parliament and Council to become involved also in the adoption of implementing acts, even if does not give them a formal veto over their content. This configuration is shown in Figure 2.

Through this procedure, Parliament and Council can make their opinion known about a specific implementing act.[37] This way, Parliament 'advises' on the draft implementing act, even though it does not represent Member States. The Commission is under no formal obligation to follow Parliament's 'advice', rather it is simply obliged to 'review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act'.[38] Yet, the Commission may nevertheless be influenced by the opinion and arguments given, as may the Comitology Committee which is to vote on the act and does have formal powers.

It is noticeable that in an advisory procedure, where the Comitology Committee is only consulted and does not have to agree, the powers of Parliament and Council to object are comparable to that of the Comitology Committee, with the only difference that the Commission is obliged to take 'utmost' account of the Committee opinion and (only simple) account of the Opinion of Parliament and Council. Yet, it is unclear which legal or procedural consequences this 'utmost' could carry.

The reform of Commission rule-making thus had the effect of inserting an element known from the regulatory procedure with scrutiny into the other procedure for Commission rule-making, namely the involvement of the 'legislator' and in particular Parliament. In effect, this is the extension of 'scrutiny' to all kinds of Commission acts, even if this scrutiny takes only a light form. Such an involvement of Parliament and the Council is not mentioned in Art. 291 TFEU, and appears not to have been envisaged by the drafters of the Treaties. Art. Art. 291 TFEU relies on oversight by the Member States in juxtaposition to Art. 290 TFEU which relies on oversight by the 'legislator', some might even question the legality of the procedure set up.[39]

36 *Fabrizius*, Das Kontrollrecht von Rat und Parlament nach der Komitologie-Durchführungsverordnung, Europäische Zeitschrift für Wirtschaftsrecht 2014, pp. 453, 454 ff.

37 The first such resolution by Parliament was: *European Parliament*, Resolution of 13 March 2013 on the draft Commission implementing regulation amending Annexes II and III to Regulation (EC) No 110/2008 of the European Parliament and the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks, 2013/2524(RPS), P7_TA(2013)0083, which was followed by about 15 more such resolutions up until 01/01/2018. So far, the Council appears to not have availed itself of this opportunity. (Cf, although with slightly outdated data, COM (2016) 92 final, p. 8).

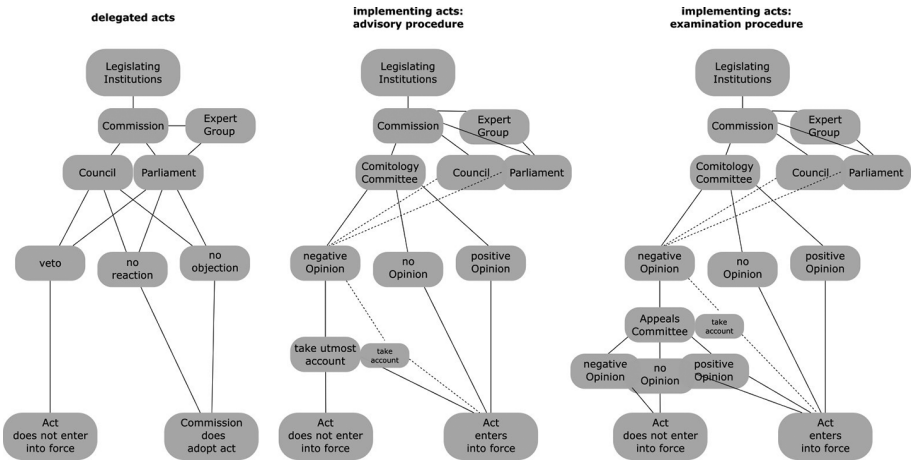
38 Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55 of 28/02/2011, p. 13, Art. 11.

39 *Fabrizius*, (fn. 36), pp. 454 ff.

Yet, it might be in the nature of things that the legislative institutions, i.e. the ones conferring rule-making powers to the Commission seek to exercise oversight over it. The legislative institutions have an inherent interest to stay informed about the use of the powers they have awarded to the Commission. This oversight strengthens the Commission's accountability and the legislative control over Commission powers. In fact, this enacts some form of a 'principal-agent' relationship, even though Art. 291 TFEU regards the implementation of Union law not as a delegated task, but the original domain of Member States. This shows that implementing acts are in the paradoxical situation that even though implementing powers originally belong to the Member States,[40] the Commission's implementing powers are nevertheless formally created by the Union's legislative institutions' conferral.[41] This ambiguity between the constitutional source of implementing powers and their practical creation adds to the complexity or even confusion around delegated and implementing acts.

The effect of this oversight by Parliament and Council is to blur the dividing line between delegated and implementing rule-making that the Lisbon Treaty had created. The Lisbon Treaty focuses on providing for different institutional domains for delegated and implementing acts by connecting delegated acts to the legislating institutions and implementing acts to the Member States.

Figure 3: Commission acts after the 2016 IIA



40 *Stelkens*, Art. 291 AEUV, das Unionsverwaltungsrecht und die Verwaltungsautonomie der Mitgliedstaaten – zugleich Abgrenzung der Anwendungsbereiche von Art. 290 und Art. 291 AEUV, 5 Europarecht 2012, p. 512.

41 Art. 291(3) TFEU does not make such a formal legislative conferral necessary, as it does not specify who would have the authority to determine whether 'uniform conditions for implementation' are necessary. However, Regulation 182/2010 clearly assumes that such a legislative conferral will be used.

4.3 Further Development through Interinstitutional Agreement

Regulation 182/2011 was not the last word on the adoption of Commission acts. There were two issues, which particularly troubled Parliament and Council, namely their role in the adoption process of implementing acts and the desire to involve 'Member State experts' in the decision-making processes.

Already long before the entry into force of the Lisbon Treaty it was the Commission's practice to involve expert groups in its decision-making processes,[42] including in the drafting of Commission acts. The first step in the adoption procedure of both delegated and implementing acts, is often the discussion of a draft with an expert group or interest group. This is not mandated by either Art. 290 or Art. 291 but is practically an entrenched part of Commission practice for any kind of rule-making. These expert groups were and are institutionally distinct from comitology committees, and they have no formal rights in the adoption procedures.

Since the 2016 Interinstitutional Agreement, this practice has congealed into a formal obligation to consult with 'Member State experts' also in the case of delegated acts, wherever feasible. Given the widespread use of expert groups even before the Agreement, the feasibility criterion appears to apply in all but the most urgent cases. Parliament can be present at the deliberation among experts, but has so far not gained formal access to Comitology Committees.[43] This situation is depicted in Figure 3.

Drafting with the help of expert groups is a common element of delegated and implementing acts. Even though expert groups are usually understood to draw on their (independent) expertise, their membership is predominantly recruited among Member State officials, with the remainder being recruited from industry and NGOs.[44] At times, Member State representatives which staff a comitology committee will likely already have taken part in the negotiations on the draft at the expert group stage.[45] In effect, the (mandatory) inclusion of expert groups in the drafting process thus presents the involvement of Member State administrations. As a result, these expert groups can be seen as providing an additional layer of comitology, and also a form of weak comitology involvement in the case of delegated acts.[46]

This results in a situation in which the 'divide' between delegated and implementing acts has been 'breached' in both directions: Parliament and the Council are involved

42 *Larsson*, Precooking in the European Union. The World of Expert Groups. A Report to the Expert Group on Public Finance, Stockholm: Ministry of Finance. ESO Ds 2003:16. 2003.

43 *European Parliament/European Commission*, Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304 of 20/11/2010, p. 47, Art. 15 and Annex I.

44 *Gornitzka/Sverdrup*, Who are the Experts? The Informational Basis of EU Decision Making, Arena Working Paper 14/2008.

45 *Schaefer and others*, The Experience of Member State Officials in EU Committees: A Report on Initial Findings of an Empirical Study, 3 EIPASCOPE 2000, p. 29.

46 For a discussion of the particular role of expert groups see also *Lafarge*, The impact of the Better Regulation policy on EU delegated and implementing acts rule-making, in: Tauschinsky/Weiß (eds.), (fn. 5), in particular section 2.1.2.

in the adoption of implementing acts, and Member State officials are, through expert committee memberships, involved in the drafting of delegated acts.

This 'breach' is problematic mainly in context of the assumption that delegated and implementing acts present different kinds of acts, different categories. As this situation serves to make the adoption procedures for delegated and implementing acts more similar to each other, and to extend Member State involvement to all 'kinds' of Commission acts, it makes it hard to find a procedural criterion for the categorical differentiation that is still generally assumed to have been created by the Lisbon Treaty.

4.4 New developments

This situation is not improved by the recent Commission proposal to amend the Comitology Regulation.[47] In this proposal, the Commission seeks to change only the procedures of the appeal stage,[48] a stage that is reached only in about 1% of all processes leading to implementing acts, even though these may well present cases of particular political salience.[49] The proposal is aimed at avoiding instances of 'no opinion' decisions of the appeals committee as the Commission proposes to change the voting rules to this effect. Interestingly, the Commission also proposes to revert back to the possibility to present cases in which it is particularly difficult to reach an opinion to the Council – similar to the situation under the old Comitology decision.[50] This arguably sits uncomfortably with arts. 290 and 291 TFEU which treat the Council as a Union institution, and as appears to distinguish between the Council as a legislative institution on the one hand (giving it a role in delegated rule-making), and the oversight over implementation by Member States on the other hand. Here, the Commission seeks to re-use a procedural solution, which was already in place before the Treaty of Lisbon but discarded in the wake of the reform of Commission acts for the sake of differentiation.

Of course, the realisation of this proposition still depends on the reaction of Parliament and the Council in the course of the ordinary legislative procedure: As per Art. 291 TFEU, the Comitology regulation (and any amendments) has to be adopted through the ordinary legislative procedure described in Art. 294 TFEU. So far, there

47 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85 final.

48 Thus, these changes implicate only the examination procedure. Yet, this procedure is used in more than 90 % of all Commission acts. Cf. COM (2016) 92 final, p. 7.

49 This salience is indeed how the Commission justifies the proposal as necessary. *European Commission*, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85 final, pp. 1-2.

50 *Council of the EU*, Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184 of 17/07/1999, p. 23, Arts 4-6.

are no amendments by Parliament or Council registered on the EUR-Lex website, however, three parliaments (the French Senate,[51] the Czech chamber of deputies[52] and the Polish Senate)[53] have registered their disapproval and the Presidency Conclusions of the Council are unfavourable as to the success of the Commission Proposal.[54] The opinions of the Parliamentary Committees, in so far as already available,[55] generally work towards greater transparency and a greater role for Parliament alongside the Council. Possibly the most interesting amendment is the one proposed by the Committee on Constitutional Affairs, namely that in cases where the Commission has trouble securing majorities in the relevant Committees in the implementation of a basic act, the corresponding conferral of implementing powers should be reviewed.[56] However, the fate of all these amendments, as of the proposal itself, is still unclear.

In sum, the division between delegated and implementing acts which was created as a defining characteristic of the system Commission rule-making post-Lisbon has in practice been downsized significantly. Where the Treaties seem to have erected a wall between delegated and implementing rule-making, subsequent developments have reduced this wall to a garden fence, a barrier which is permeable and can be jumped if one has a mind to do so. Such a small and flexible barrier appears quite similar to the differentiation between the different Comitology procedures pre-Lisbon.

5. Differences and Differentiation

The procedures created since 2010 certainly differ from the procedures established by the old Comitology decisions, and it is not the aim of this paper to dispute that there are differences between the old Comitology regime and the current system of Commission rule-making, nor to dispute that there are differences between delegated and implementing adoption procedures. The argument here is that despite this diversification, there is little evidence of categorical differentiation. Characteristic for this procedural structure are the use of relatively similar institutional arrangements for delegated as for implementing acts as well as the fall back on common solutions, such as expert advice. This situation is evidenced by the fact that acts adopted under the advisory procedure are no more different from delegated acts than acts adopted under

51 *Council of the EU*, Council Document 14272/17 of 4 December 2017.
52 *Council of the EU*, Council Document 10385/17 of 28 September 2017.
53 *Council of the EU*, Council Document 10012/17 of 7 June 2017.
54 *Council of the EU*, Council Document 10127/18 of 15 June 2018.
55 Available at the point of writing were Opinions of 5 Committees: the Committee on Economic and Monetary Affairs (PE 610.743 v 03-00), the Committee on International Trade (PE 610.686 v 02-00), the Committee on the Environment, Public Health and Food Safety (PE 615.396 v 02-00), the Committee on Industry, Research and Energy (PE 604.503 v 02-00) and the Committee on Constitutional Affairs (PE 604.673 v 02-00). The main responsibility for the file lies with the Committee on Legal Affairs, whose opinion is still pending.
56 Opinion of the Committee on Constitutional Affairs (PE 604.673 v 02-00), p. 7.

the examination procedure, as described above. The question thus is, how this situation is to be evaluated from a legal point of view, in light of the fact that neither the adoption procedures for delegated acts, not those for implementing acts would appear to be by themselves in breach of the Treaties.

Arts 290 and 291 TFEU clearly have changed the Treaties, however given the above, it is doubtful that the process by which Commission acts are adopted should be described as now being fundamentally different. The procedures for the adoption of Commission acts underwent changes, but the result is, at the moment, not a radical departure from the system before the introduction of the Lisbon Treaty, but more of a gentle evolution of that system. This evolution consists of the extension and deepening of Parliamentary oversight and the restriction of Member State oversight in one area of Commission rule-making. These, together with the trend of increasing rule-making activities by agencies, can easily be seen as a further evolution of trends already visibly before the adoption of the Lisbon Treaty, which are simply taking their course now. The state of the adoption procedures of Commission acts now does not suggest that the Lisbon Treaty presented a major innovation of Commission acts.

Yet, this situation is unsurprising in so far as the Regulatory Procedure with Scrutiny was introduced expressly with the aim of anticipating the introduction of delegated rule-making through the Constitution for Europe.[57] Since Decision 2006/512 was intended to introduce the changes of the new Commission procedure already under the old Treaty framework, it should not come as such a surprise that the entry into force of the new Treaty regime led only to subtle changes. Even if Arts 290 and 291 TFEU introduced a new outlook on Commission rule-making, it is clear that these articles accord to the EU institutions a measure of discretion. While they set an outer frame, they allow for a broad range of behaviour and procedural arrangements. The arrangements made by the institutions have not reduced the overlap between the scope of Arts 290 and 291 TFEU. This way, the institutions have established a situation where in many cases there is pragmatic choice between delegated and implementing Commission empowerment and they have done little to normatively solidify the parameters of this choice.

Yet, if the result of the above is that the adoption of Commission acts has not changed substantially since the introduction of the Lisbon Treaties, then the question is, what the main difference introduced by the new provisions, namely the separation of legal bases and the formal creation of different kinds of Commission acts, actually signifies.

It is important to pragmatically recognise that the procedural developments since the entry into force of the Lisbon Treaty have likely answered to a need arising in institutional interactions. If the institutions see the same political forces applying to delegated and implementing rule-making, it is likely that they would seek to apply equivalent, if not equal institutional interactions. Likewise, if diversification answers

57 *European Commission*, Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2002) 719 final.

to technical or political requirements, then convincing as the need for simplification might seem from an abstract, constitutional perspective, it appears to not be sustainable to reduce greatly the flexibility of the institutions and the available problem-solving mechanisms. The fact that the procedural regime of Commission rule-making has reverted to a large extent to the regime before 2010 speaks for the fact that this old regime captured some institutional, political or technical need better than the system that the Lisbon Treaty promised.

At the same time, it would be incorrect to claim that the Arts 290 and 291 TFEU did not change the legal situation because they did not introduce truly new decision-making procedures. Even though this latter statement is true, the Lisbon Treaty created two categories of Commission acts. Thus, even though the new procedures now look very much like the old ones, reading these provisions in a structural way, it can be argued that the Lisbon Treaty established the need to differentiate clearly between them.

While it is necessary to differentiate between delegated and implementing acts, it is possible to at the same time acknowledge that their substantive overlap is a part of their interrelation. While the institutions need to make a choice between empowering the Commission under Art. 290 or 291 TFEU, there is a need to re-evaluate the nature of this choice. Rule-of-law considerations require this choice to not be arbitrary; however this does not mean that it is predetermined by unambiguous legal facts. The next section will elaborate on this point.

6. Back to Legal Bases

6.1 Differentiating between Treaty Provisions

The situation should prompt a re-examination of what the divided Treaty base for delegated and implementing acts more precisely requires. The Treaty provisions in substance allow for relatively similar procedures, as nothing in their texts prohibits the use of relatively similar procedural regimes. At the same time, the fact of the division into two legal bases was clearly intentional, and should be given meaning. As a result, a mode of differentiating is necessary that can nevertheless accommodate the close procedural similarities, which the institutions apparently require.

At this point it is useful to return to the disambiguation of the term 'differentiation' which was discussed in section 2. To recall, differentiation can refer to a factual situation of two comparable, but categorically different sets of acts. As elaborated above, this factual categorical differentiation is rather questionable for the case of delegated and implementing acts. At the same time, 'differentiation', in particular in a legal context, will also refer to the normative requirement to create and respect a systematic separation. Thus, if Treaty provisions differentiate between delegated and implementing acts, this creates the normative obligation to *make* this difference, quite apart from any factual differences described in these provisions. It is this normative separation that I would like to argue here.

Early commentators on Arts 290 and 291 expressed criticism of the fact that the scope of application of delegated and implementing acts overlaps.[58] Apparently, the expectation was that the definition of delegated and implementing acts would provide for criteria which define one kind of act to the exclusion of the other.[59] Thus, the desideratum was that not only the application of one provision excluded the application of the other, i.e. that they could not be used in conjunction for the same act, but that the scope of Commission acts would be clearly divided into an area that would fall under Art 290 TFEU and an area that would fall under Art. 291 TFEU. As it has by now become clear that such a division cannot be made, it is time to re-examine that desideratum.

It is clear that Arts 290 and 291 TFEU provide for two different legal bases for the adoption of Commission acts. However, it is not clear why this would mean that their scope of application is a priori mutually exclusive. As the Treaties award the European institutions various competences, the situation that the Union has recourse to several grounds for action which may require differing procedures is usually accepted without searching for a criterion for mutually exclusive scope of application.

The creation of two separate legal bases creates the obligation to separate between the two, while it is now generally agreed that Arts 290 and 291 TFEU give no mutually exclusive criterion on the basis of which this differentiation in fact is to be maintained. The result of the lack of clear separating criteria is that the institutions can choose between using Art. 290 or Art. 291 TFEU,[60] while the normative aspect of differentiated provisions calls for the creation of separating principles.

Of course, there are appreciable differences between what is usually understood to constitute the choice between legal bases and the choice between Arts 290 and 291 TFEU. Firstly, commonly this choice refers to different bases for legislative action and describe substantive competences of the EU. In the present case, the articles in question describe modes of (legislative) delegation, and do not contain substantive competences. However, the competence to delegate is also a competence under EU law, albeit a procedural one. Just like many treaty articles describe how and under which conditions the institutions can create legal rules, binding the EU institutions and its Member States, so do Arts 290 and 291 describe how and under which conditions the institutions can delegate rule-making capacity to the Commission, likewise binding the EU institutions and its Member States. Even though the use of this doctrine on the choice between delegated and implementing rule-making might be unconventional, an application of this doctrine at least by analogy is warranted. In how

58 *Craig*, (fn. 24), p. 672.

59 See *Kröll*, Delegierte Rechtsetzung und Durchführungsrechtsetzung und das institutionelle Gleichgewicht der Europäischen Union, Zeitschrift für öffentliches Recht 2011, p. 298; *Sydow*, Europäische exekutive Rechtsetzung zwischen Kommission, Komitologieausschüssen, Parlament und Rat, Juristenzeitung 2012, p. 157.

60 The situation of choice or discretion of the legislating institution in the matter of delegated or implementing mandates in legislative acts has most clearly been pronounced by the Court in CJEU, *European Commission v. European Parliament, Council of the European Union*, (fn. 6), para. 40, and repeated in CJEU, case C-88/14, *European Commission v. European Parliament and Council of the European Union*, ECLI:EU:C:2015:499.

far the use of this doctrine would require a further development of case law will be discussed below.

The result of accepting that a choice between Commission empowerment under Arts 290 or 291 TFEU respectively is a choice between two legal bases is a doctrinal acceptance of the discretion of the legislating institutions in the matter of the choice between delegated vs implementing powers.[61] This is a turn away from the search for a binary, unambiguous regime that predetermines the choice of act, towards the acceptance of institutional discretion. However, this choice does not happen in a normative vacuum. Rather, the situation of choice simply opens the way for another sort of legal obligation, namely obligations pertaining to the choice itself. This acceptance of institutional choice leads the focus away from the search for as complete as possible criteria to pre-determine this choice, towards the structure this choice must have in order to not be arbitrary. In other words, this changes the matter from attempting to restrict the institutions' discretion to elaborating mechanisms that shape this discretion.

This solution would also include the acknowledgement that for one and the same task a delegation under Art. 290 TFEU would be as reasonable as conferral under Art. 291 TFEU as tasks can be (quasi-)legislative *and* administrative at the same time, and that legislative and administrative aspects cannot always practically be divided into separate legal acts. It is this fact that a subject matter spans across these scopes of application that makes it necessary (and possible) to choose between Arts. 290 and 291 delegation.

The focus on the act of choosing between delegated and implementing acts puts the normative dimension of differentiation centre stage. As this normative dimension requires that, in choosing, the institutions make a difference between delegated and implementing acts, it can be instantiated through the legal obligations that describe this choice.

The Commission appears to suggest a similar approach in the Biocides case. The Commission, as presented by the Court, submitted that the choice between delegated and implementing empowerment must be based on 'objective and clear factors, that are amenable to judicial review.'[62] The Commission then goes on to argue for a specific differentiating criterion. In its reasoning, the Court does not respond to this argument, thereby it neither refutes nor accepts it expressly.

The argument presented here is somewhat different from that presented by the Commission in that the focus is put on that first element of choice, and not on the second element of the Commission's submission, namely that of the definition of a specific differentiating criterion. It is hoped that the Court remains open to placing emphasis on the procedural aspects of this choice, and to applying its doctrine regarding the choice of legal basis also to this case.

61 On this choice see also *Tauschinsky/Weiß*, Introduction, in: Tauschinsky/Weiß (eds.), (fn. 5).

62 CJEU, *European Commission v. European Parliament, Council of the European Union*, (fn. 6) para. 23.

6.2 The Choice of Legal Basis

The situation that the EU institutions have a choice between two (or more) provisions of the Treaties with overlapping scope as basis for their legal acts is common in EU law. There is established jurisprudence on the parameters of this choice. To sum up the case law, the institutions have to make this choice according to 'objective factors, amenable to judicial review',[63] and a 'centre of gravity' test[64] is applied where these factors would refer to more than one Treaty provision. Even though the choice of legal basis is a frequent point of contention, it is one which the institutions and the Court habitually resolve. It appears quite possible to apply these parameters to the choice between Arts 290 and 291 TFEU also.

Importantly, it is to be noted that these criteria describe the considerations on the basis of which a choice is to be made. To make these considerations visible (and thus enforceable), they need to be connected to the reasoning requirement of Art. 296 TFEU. Thus, the institutions are required to publicly[65] put forward the objective factors that have led to the choice of legal basis, so as to make them reviewable by Court. The parameter of 'objective factors' according to which the institutions decide, refers to the fact that the choice must be reasoned on principled grounds.[66] Practical or political consideration can only develop a limited effect. The most important aspects of these objective factors are the aim and content of the proposed measure. Thus, these factors cannot be an expression of ad hoc pragmatic preferences.

If this doctrine were applied to the choice between Arts 290 and 290 TFEU delegation, the institutions would be required to give objective factors for the cases in which they choose either of these possibilities. As quite a number of acts include both, delegated and implementing Commission empowerment,[67] these reasons would have to be different. This could spark a dynamic were the legislating institutions, together with the CJEU when the Court reviews these reasons, would develop the reasons which determine the choice for either delegated or implementing acts. Through the interaction between the institutions and the Court, a consistent set of factors would likely emerge on how recourse to Art. 290 TFEU or conversely to Art. 291 TFEU can be justified. It is to be noted that this would present a marked departure from legislative practice so far. Recourse to Arts 290 and 291 TFEU respectively is now simply men-

63 CJEU, case C-45/86, *Commission of the European Communities v. Council of the European Communities*, ECLI:EU:C:1987:163; CJEU, case C-363/14, *European Parliament v. Council of the European Union*, ECLI:EU:C:2015:579, para. 41.

64 CJEU, case C-300/89, *Commission of the European Communities v. Council of the European Communities*, ECLI:EU:C:1991:244.

65 These reasons are usually stated in the chapeau and preamble of an act. However, this is not prescribed by Art. 296 TFEU.

66 CJEU, Opinion 2/00, *Cartagena Protocol*, ECLI:EU:C:2001:664, para. 5.

67 As an early such example: see Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions, OJ L 334 of 17/12/2010, p. 17 and its articles 32(4), 48 and 74. A review of legislative acts shows that about half of all legislative acts contain clauses for Commission empowerment, whereby a little less than a third of all legislative acts contain both forms of empowerment.

tioned in legislative acts. The reasons given hardly depart from a literal repetition of the provisions of the Treaty.[68]

Given the proximity between delegated and implementing rule-making, it is quite possible that these reasons would also not be able to construct exclusive scopes of potential application. Instead, just like in the case of more substantive competences, it is likely that it will be possible to justify that a task will be delegated under Art. 290 at the same time as the task could be justified as implementing under Art. 291 TFEU. While a certain kind of principled differentiation between delegated and implementing acts should emerge from more stringent reasoning requirements and the necessity to justify the choice through 'objective factors', it is still likely, that quite a number of cases will remain in which recourse to either Arts 290 or 291 TFEU could be reasoned. In these cases, the doctrine describing the choice between legal bases prescribes a 'centre of gravity' test.

This test prescribes that, were a measure to touch upon several Union competences, the competences most closely linked to the main goal of the measure is to be taken as a legal basis.[69] Thus, the institutions are to determine the 'centre of gravity' of a measure and choose the legal basis accordingly even if the measure impacts on other Union competences. To be able to apply this doctrine in analogy to the choice between differing Union competences, the institutions would have to be able to define the scopes of Arts 290 and 291 TFEU as well as align the purpose of a mandate to these scopes.

The challenge in the application of the choice between Arts 290 and 291 TFEU as legal basis for empowering the Commission to adopt binding Union law lies in the fact that the determination of a centre of gravity presupposes this existence of a substantive scope of application. Whereas this substantive scope is quite evident in, for example, the choice between environmental and trade competences, this substantive scope is much weaker in the case of delegated and implementing rule-making.

Many commentators have written on how to construct this substantive scope, without a satisfactory result. Yet, as mentioned the search was for a scope for delegated and implementing acts which in combination presents a binary choice: if this scope leads to the conclusion that a power is a delegated power, then in should not at the same time also be an implementing power. The reasons which would lead to concluding that one option is applicable should in this framework preferably at the same time be reasons for why the other option is not.

However, the context of the centre of gravity test is different; here reasons do not have to work in a binary fashion. The reasons for why a measure presents a measure of en-

68 For example, the Union Customs Code simply states that 'In order to supplement or amend certain non-essential elements of this Regulation, the power to adopt delegated acts in accordance with Article 290 TFEU should be delegated to the Commission.' (Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, recital (3)) and that 'In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission' (ibid, recital (5)). There are no reasons given for how the specific task awarded as one or the other rule-making power correspond to these purposes.

69 CJEU, case C-42/97, *European Parliament v. Council of the European Union*, ECLI:EU:C:1999:81, paras 43 f.

vironmental policy are different from the reasons for why it presents a trade measure. The validity of the reasons for one option does not impact on the reasons for the other option. Instead, the decision is a different one: the legislating institutions are called on to assign weight to these different reasons. This weighing, together with more stringent reasoning requirements is then the procedural implementation of the normative requirement to differentiate between delegated and implementing rule-making.

It is quite possible that the differentiation thus constructed aligns with one or several of the substantive criteria advanced in literature, such as the description of delegated acts being legislative in substance and implementing acts being executive or administrative.[70] Similarly, the supranational characteristic of delegated acts could be used in combination with a more 'federal' or 'intergovernmental' nature of implementing acts.[71] A third such substantive division is that delegated acts regulate 'substantive' question, while implementing acts determine 'procedural' issues.[72] In any case, it is notable that the conceptual overlap between these scopes is considerable.

As a result, it is quite possible to refer to, for example, the legislative – administrative scopes of application, with an understanding that in the EU legislation is more supranational in nature, and administration, through its compound nature, more 'federal'.[73] Similarly, these terms can include the understanding that within the EU, again linked to its specific institutional organisation, procedural questions are of a more administrative nature, whereas substantive questions are to be agreed in (quasi) legislative acts. However, as the use that the Court would make of these terms is unclear, this remains speculation.

In sum, the argument for greater recognition of a normative obligation to differentiate between delegated and implementing acts is an attempt to remedy the lack of differentiation attestable now. The advantage of the creation of procedural obligations to differentiate instead of substantive obligations to differentiate according to a predefined principle, is that the institutions can shape the mode of differentiation according to their needs. As a result, this proposition puts a greater burden on the institutions, as it demands that their reasoning become more principled and purposeful when pertaining to the choice between Art. 290 and Art. 291 TFEU mandates. At the same time, the Court is called upon to enforce these procedural obligations and to demand more stringent and principled reasoning from the institutions. At least one recent judgment contains evidence of an increasing impatience of the Court with the institutions' inability to fill the separation of delegated from implementing rule-mak-

70 *Craig*, (fn. 26), ch. 7.

71 *Schütze*, 'Delegated' Legislation in the (new) European Union: A Constitutional Analysis, 74/5 Modern Law Review 2011, pp. 661-693.

72 *Tauschinsky*, Searching for order: exploring the use of delegated and implementing acts in the EU customs code, 6/1 The Theory and Practice of Legislation 2018, pp. 53-73; *Röttger-Wirtz*, Delegated and implementing acts in the regulation of pharmaceuticals – an analysis through the lens of subsidiarity, in: Tauschinsky/Weiß (eds.), (fn. 5), section 4.1; *Moloney*, EU Securities and Financial Market Regulation, OUP 3rd edition 2014, pp. 903 f.

73 This 'federal' refers to the composite nature of the EU. While this is often referred to by the term 'intergovernmental', this terms is less appropriate in the context of administrative bodies which are not necessarily part of the 'government'.

ing with life.[74] This gives support to the expectation that the Court could indeed start to hold the institutions to account in terms of the factors they put forward to reason the choice between delegated and implementing acts.

7. Conclusions

The development of the adoption procedures of delegated and implementing acts is an ongoing matter. However, so far, no new institutional agreement that would sustain a factual differentiation is in sight. As a consequence it appears that for the foreseeable future, other avenues will have to be explored to fill the separation between delegated and implementing acts with life.

Treating the question of differentiation as a question of choosing a legal basis mitigates the necessity of finding this factual, categorical criterion for differentiation. The question of legal basis is habitually resolved by the institutions. It is commonly treated as turning on principled, but not necessarily mutually exclusive reasons. This makes the question a more legal matter than pure institutional bargaining would be, enabling judicial review. At the same time, because the institutions are free in which objective factors to put forward, this situation would preserve legislative flexibility more than a categorical criterion could. The centre of gravity test in particular is a mechanism that allows to acknowledge the substantial overlap between the scope of application of delegated and implementing acts, without as a result making the choice an arbitrary decision. It is the fact that a subject matter spans across these scopes of application that makes it necessary (and possible) to choose between Arts 290 and 291 delegation, so as to determine on which legal basis it should be appropriately placed.

This approach would most immediately have as a result the need for more elaborate reasoning on the choice between delegated and implementing acts by the institutions. Since the reasons given for empowering the Commission under Art. 290 or 291 TFEU at the moment hardly deserve that name, this could arguably improve the overall legitimacy and intelligibility of Union legislation that employs Commission empowerment.

Such reasoning habits could be introduced by a stricter overview by the Court of Justice, which appears to turn towards requiring more substantial mandates from the legislating institutions. However, in this practical reliance on the willingness of the Court to enforce greater reasoning requirements also lies the weakness of this approach. The Court has so far been very reluctant to use its clout for solving the question of Arts 290 and 291 TFEU.

Even though the Commission made the argument turn in a different direction, the suggestion that the choice between delegated and implementing mandates is (similar to) the choice between two legal bases has already been made before the Court. The Court did not take up the argument then. It is possible that the Court would find suggestions in this direction more helpful now.

74 CJEU, case C-696/15 P, *Czech Republic v. European Commission*, ECLI:EU:C:2017:595, paras 40-66.