1 12 March 2010

**Delegated and implementing acts under the Treaty of Lisbon**

**- A background note -**

**Introduction**

The Treaty of Lisbon abolishes the 'old' comitology system based on the classic comitology procedures (advisory, management and regulatory procedures, as categorised by the 1999 Comitology Decision), plus the regulatory procedure with scrutiny (RPS) since the reform of 2006. The common denominator of all these procedures was the transfer in a varying degree of implementing powers to the Commission and the subsequent control of these powers by the Member States as the principally responsible for the implementation of EU legislation.

In this complex and highly intransparent system Parliament achieved over the years to establish a right of information for all relevant documents as well as the possibility of adopting a non-binding resolution when Parliament considered that the Commission had exceeded its implementing powers (*'droit de regard'*). The 2006 Comitology Decision introduced as a new procedure the regulatory procedure with scrutiny, which applied only to legislative acts adopted under codecision. This procedure gave Parliament, for the first time, the possibility to veto a draft implementing measure that could eventually lead, among other options, to a new legislative proposal from the Commission under the codecision procedure.

The new system of implementation of EU legislation under the Treaty of Lisbon is not based on comitology anymore, but on a two tier structure consisting of delegated and implementing acts (Articles 290 and 291 TFEU respectively). Since the 1st December 2009 the old comitology regime does not apply anymore and is replaced by the implementing and delegated acts. This has different consequences for legislation adopted after (a) and before the 1st December 2009 (b).

a) All 'new' legislation adopted after the 1st December 2009 cannot contain any comitology provisions, but only implementing or delegated acts. However, due to legal and practical reasons, which will be outlined below, transitional arrangements for a limited period of time are necessary for all legislative proposals containing provisions on implementing acts.

b) The old comitology system continues to apply for the *acquis communautaire* adopted before the 1st December 2009. However, in the interest of coherence, this acquis should also be aligned as soon as possible to the new system of the Treaty of Lisbon, in order to have in the future only one single set of rules for the implementation of all EU legislation.

**Implementing acts (Article 291 TFEU)**

***Article 291 TFEU***

*1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*

*2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.*

*3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*

*4. The word ‘implementing’ shall be inserted in the title of implementing acts.*

Generally, it could be noted that all elements surviving from the old comitology regime are taken up in the new instrument of implementing acts. In particular, Article 291(1) TFEU provides that Member States shall adopt all measures of national law necessary to implement legally binding Union acts, thus bearing the principal responsibility for the implementation of EU law. However, *'where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission*', and in some specific cases also on the Council (Article 291(2) TFEU).

Moreover, Article 294(3) TFEU stipulates that, for the purposes of the transfer of such implementing powers to the Commission, regulations shall lay down in advance the rules and general principles concerning mechanisms for control by Member States. Such regulations will be adopted in codecision ('ordinary legislative procedure') between the European Parliament and the Council.

*The current situation: interim arrangement*

With the entry into force of the Lisbon Treaty on 1 December 2009 comitology was replaced by the new system of implementing acts. The Regulation, however, which would lay down the relevant rules and principles *'in advance'* (see above), has not been adopted so far. The Commission submitted its proposal for this Regulation on 9 March 2010.

Given that this Regulation, which shall lay down the specific provisions for the functioning of the system of implementing acts, must be co-decided between the EP and the Council - a process which necessarily requires a certain amount of time even if the two Institutions do their outmost to accelerate the procedure - the question was raised what to do with the legislative proposals still pending on 1 December 2009 or with any new proposals containing implementing provisions.

This question was not only of theoretical value since on 1 December 2009 several proposals with comitology implications were open: either still under negotiation or principally concluded but awaiting confirmation or legal-linguistic verification. All those pending files could not be concluded on the basis of the old comitology system since with the entry into force of the Lisbon Treaty this had ceased to exist and was replaced by implementing acts. At the same time, the new system of implementing acts could not be applied either, since the necessary Regulation was not in place yet.

Faced with this complicated situation the three Institutions decided to opt for a pragmatic solution in order to de-block any legislative jam and allow the legislative process to advance: as an interim solution, the old comitology system based on the comitology decision of 1999 (thus excluding the regulatory procedure with scrutiny; see below) would exceptionally continue to apply until the new Regulation on implementing acts is adopted.

For this purpose, the three Institutions adopted a Joint Declaration (see Annex A), which sets out the relevant frame and lays down the conditions for the application of this interim solution. Parliament expressed its agreement to this declaration by a decision of the Conference of Presidents on 17 December 2009. This interim solution allows the three Institutions to carry on work on the pending files and thus avoid a complete blockage of EU legislation containing implementing provisions, until the new Regulation is in place.

Moreover, for the purposes of legal certainty, Parliament's Services suggested the inclusion in all pending legislative proposals with provisions on implementing acts of a recital, in line with the text of the relevant declaration, which seeks to stress the exceptional and interim character of the agreed solution.

*What to look at in the future*

In the short and medium term particular attention should be given to the following aspects:

1. The agreed solution is only an interim arrangement of exceptional character. A satisfactory and legally sound solution will be ensured only when the new Regulation is in place. The new Regulation should therefore be adopted in the soonest possible deadlines.

The Commission submitted to Parliament and Council its proposal for this Regulation on 9 March 2010[[1]](#footnote-1). The basic concept of this proposal is simplification: the current comitology procedures should be reduced to two, the advisory and the examination procedures. The rules for the former will be very similar to the existing rules for advisory committees. The rules for the latter will integrate the existing rules for the management and regulatory procedures and in addition provide for the possibility to block the adoption by the Commission of the proposed draft measure. According to the Commission, the alignment of the existing comitology acquis should be automatic (advisory becomes new advisory; management and regulatory become examination).

2. The adoption of the new Regulation is of primary importance in order to ensure legal certainty regarding implementing acts. The European Parliament, the Council and the Commission stated in the joint declaration (see Annex A) their intention to achieve speedy agreement on the new Regulation, *'with a view to its entry into force already during the Spanish Presidency'*. At the same time, it is important for Parliament to safeguard its prerogatives as a co-legislator in the long-term, since once the Regulation is in place it is going to stay there as a permanent solution.

In this context Parliament should pay particular attention to the suggestion of an automatic alignment along the above described lines as this would mean that policy areas without codecision before the entry into force of the Treaty of Lisbon (e.g. agriculture, fisheries, international trade, freedom, security and justice, etc.) would only obtain implementing acts (a precondition for the regulatory procedure with scrutiny was that the relevant legislative act was adopted with codecision).

Moreover, the Commission proposal does not foresee any instrument for the legislator to monitor whether the Commission has exceeded its implementing powers when adopting an implementing act. Under the 'old' comitology regime Parliament had a *'droit de regard'* (see above). It is difficult to comprehend that Parliament should not be able to maintain this established right under the new system of implementing acts.

3. Both regarding pending and new legislative files, but especially regarding the alignment of the comitology *acquis*, particular attention should be given to the proper distinction between implementing and delegated acts. For various reasons, many issues that were dealt with in the past on the basis of the 'classic' comitology procedures could qualify for the new system of delegated acts. It goes without saying that Parliament has a strong interest in moving as many issues as possible from the implementing to the delegated acts (see Conclusions of this note). Therefore, as already stressed, Parliament should be particularly attentive with the Commission suggestion for an automatic alignment along the above described lines.

**Delegated acts (Article 290 TFEU)**

***Article 290 TFEU***

*1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.*

*The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.*

*2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:*

*(a) the European Parliament or the Council may decide to revoke the delegation;*

*(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.*

*For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.*

*3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.*

Delegated acts are not 'comitology', but constitute a completely new category of EU norms. They concern the non-essential elements of a legislative act by conferring to the Commission the power to specify, amend or supplement these elements, while at the same time establishing effective control mechanisms by the legislator.

In particular, Article 290(1) TFEU provides that a '*legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act*'. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of a legislative act can only be modified by another legislative act and accordingly shall not be the subject of a delegation of power.

Moreover, Article 290(2) TFEU stipulates that legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may stipulate that (a) the European Parliament or the Council may decide to revoke the delegation; (b) that the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority. This list of conditions for the delegation is non-exhaustive; the legislator has thus the option to include also other conditions in the legislative act (e.g. the possibility to repeal a delegated act already in force).

The scope of delegated acts could be seen as similar with the comitology instrument of RPS introduced in the 2006 reform. However, while it seems that all implementing measures previously subject to RPS should become delegated acts, Parliament might consider that, in some cases, also some 'classical' comitology procedures (management or regulatory) could meet the criteria of delegated acts (see above).

*The specific conditions of delegated acts*

Given that delegated acts constitute a completely new instrument it is very important to stress again the specific conditions for their implementation:

*a) A legislative act may delegate to the Commission the power to adopt delegated acts; it is thus up to the legislator to decide whether or not to delegate such power to the Commission.*

*b) Such delegated acts are i) non-legislative acts of general application[[2]](#footnote-2) ii) to supplement or amend certain non-essential elements of the legislative act. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.*

*c) The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts*.

The delegation of implementing powers to the Commission must be established in the legislative act itself. Insofar it is a matter of decision by the co-legislators (EP and Council) whether or not to decide for such a delegation of power as well as its specific conditions.

Contrary to implementing acts, delegated acts do not require any kind of regulations or further specifications for their application. They are directly regulated in the Treaty and their specific conditions are a matter of negotiation and agreement between the co-legislators. The instrument of delegated acts, therefore, is not just in principle but also in practice applicable already from 1 December 2009.

*The current situation*

Also in this case the question was raised how to proceed with the proposals containing implementation measures ('comitology'), including the regulatory procedure with scrutiny, which were pending on 1st December 2009. Regarding the regulatory procedure with scrutiny, given its close relationship with the instrument of delegated acts, the answer was quite straightforward: where a legislative proposal provided for the regulatory procedure with scrutiny the latter should be transformed into a delegated act and the specific conditions of delegation of power to the Commission should be established in the legislative act itself.

With regard to provisions entailing classic comitology procedures things are more complicated: one should first check whether some of these provisions could possibly qualify for the instrument of delegated acts, i.e. as non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. If this was the case, then the above described procedure should apply; otherwise, one should refer to the interim solution agreed for implementing acts (see above).

As already mentioned, the specific conditions for the delegation of power to the Commission shall be established and defined in the legislative act and are therefore subject to negotiations between the co-legislators. In order to facilitate such negotiations and ensure a certain consistency, the Commission submitted to Parliament and Council on 9 December 2009 a Communication on the Implementation of Article 290 TFEU (COM(2009)0673), proposing also a number of standard text models for inclusion in the legislative act. These models constitute a first step, but Parliament might not agree completely with them considering that in many aspects they do not fully preserve its prerogatives as a co-legislator (e.g. right of revocation and opposition, urgency procedure etc).

More generally, Parliament might consider that the specific conditions for the delegation of powers to the Commission are a matter of codecision between the EP and the Council. Therefore, they should be decided and agreed on a case by case basis, in line with the specific conditions and needs of every individual file and not necessarily uniformly, on the basis of predefined standard models. The latter may be useful as a starting point, but the final decision should be the result of negotiations and agreement between the co-legislators.

In reaction to this Communication, the Conference of Presidents authorized the JURI committee to draw up an initiative report on "Power of legislative delegation" for which Mr Szájer has been appointed rapporteur. The intention of JURI is to involve all committees concerned and adopt the report in the quickest possible deadlines, in principle by April 2010.

Meanwhile, in a number of urgent legislative files (within different committees, mainly ENVI, AGRI, ITRE, TRAN), which cannot wait until the INI report is finalised, Parliament entered into negotiations with the Council on the wording for delegated acts. The first agreement on such wording for delegated acts was reached in the file "Animal health requirements: non-commercial movement of pet animals" (report De Brún, which was voted on 9 March[[3]](#footnote-3).

**Conclusions**

Based on what was described above, the new hierarchy of EU norms introduced by the Treaty of Lisbon consists of three levels, which could be summarized as follows:

1. Legislative acts (regulations, directives or decisions) are adopted by the legislator on the basis of the Treaty provisions, in accordance with the ordinary or the special legislative procedures, and contain the fundamental policy choices and essential elements in a given policy field.
2. In order to avoid excessive legislation, often too technical and complicate and thus difficult to follow and overlook, delegated acts provided for in the legislative act itself could flesh out the details or amend or supplement certain non-essential elements of the legislative act. Such delegation of power to the Commission should be decided by the legislator and be subject to limits and conditions as well as to a control mechanism determined by the legislator in the legislative act itself.
3. In exception of the principle that Member States are responsible for the implementation of EU legislation, where uniform conditions for the implementation of legally binding EU acts are needed, the power for the adoption of such implementing acts will be conferred to the Commission. For this purpose, the rules and general principles concerning control mechanisms by the Member States shall be laid down in a Regulation adopted in codecision ('ordinary legislative procedure') by the EP and the Council.

To sum-up, it could be noted that Parliament is particularly strong as regards the adoption of EU legislation on the basis of the ordinary legislative procedure since it can co-decide all essential policy elements with the Council (legislative act).

In the same context and in specific cases Parliament can negotiate and co-decide with the Council the specific conditions for the delegation of power to the Commission concerning non-essential elements of the legislative act (delegated acts). In this case Parliament maintains the right to object to the specific measures proposed by the Commission or even to revoke the delegation completely.

Parliament however is in a less strong position when it comes to implementing acts. As a rule, Member States bear the principal responsibility for the implementation of EU legislation and only where 'uniform conditions' are needed, shall implementing powers be conferred on the Commission. Parliament will co-decide with the Council the details of the general Regulation on implementing acts, which was just proposed from the Commission. Therefore, at this instant it is still not clear which influence Parliament shall be able to exert in the future on the implementing acts as such.

**Annex A**

**Declaration of the European Parliament, the Council and the Commission concerning the implementation of Article 291 of the Treaty on the functioning of the European Union**

Noting that, under the terms of Article 291 of the Treaty on the functioning of the European Union, as amended by the Treaty of Lisbon, rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers shall be laid down in advance by a regulation adopted in accordance with the ordinary legislative procedure;

Considering that, in accordance with this provision of the new Treaty, the Commission will shortly submit a proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the implementing powers conferred on the Commission (hereafter “the new Regulation”);

The European Parliament and the Council, noting the Commission’s intention to submit a proposal as one of the first acts of the new Commission, undertake to endeavour to achieve speedy agreement on the new Regulation, with a view to its entry into force already during the Spanish Presidency. In the meantime, Council Decision 1999/468/EC of 28 June 1999 continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable.

1. COM(2010) 83 final, 9 March 2010 [↑](#footnote-ref-1)
2. They are not legislative acts as they are not adopted on the basis of one of the legislative procedures laid down in the Treaty, but by the Commission, and they are of general application as they are not addressed to specific persons or cases but are defined with general characteristics. [↑](#footnote-ref-2)
3. In this specific file, the delegation of power to the Commission has been agreed for a period of 5 years, automatically extendable for further periods of 5 years, unless Parliament or Council decide to revoke the delegation. The EP and Council will have 2 months to object the draft delegated acts proposed from the Commission; this deadline can be extended by a further 2 months from either institution. The draft delegated act will enter into force only once these deadlines have passed without objection from the co-legislators. There are also procedures for early non-objections in urgent cases. The Commission also agreed to take into account the period of recess and the elections. Further, a recital states that *'the Commission (shall carry out) appropriate consultations during its preparatory work, including at experts' level'*. [↑](#footnote-ref-3)