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The Role of the European Parliament under the Lisbon Treaty

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This chapter seeks to address the likely impact of the Lisbon Treaty on the European Parliament and its role in the decision-making

process. I shall begin by considering the role of the EP in relation to the legislative process, and then consider the powers accorded to the EP in relation to other matters such as the appointment of Commission and the President thereof and its power over the dismissal or censure of the Commission. It is important to understand that the formal legal powers accorded to the EP by the provisions of the Lisbon Treaty are only part of the story and that these must be seen against the backdrop of how the institutions have interacted in the past and how are they are likely to do so in the future.

I. The EP and the Legislative Process: The EP as 'Winner'

There is a real sense in which the EP emerged as a winner in the Lisbon Treaty and this is so notwithstanding the qualifications that will be made to this picture in the ensuing discussion. The principal evidence for this is to be found in the provisions concerning the legislative process, and more specifically to those concerning the ordinary legislative procedure.

In relation to 'primary legislation', inter-institutional balance, as opposed to separation of powers, has characterised the relationship, de jure and de facto between the major players. The Commission has retained its 'gold standard', the right of legislative initiative. The EP and the Council both partake in the consideration of legislation and do so now on an increasingly equal footing. The EP and the Council are said to exercise legislative and budgetary functions jointly.[1] This is embodied in Article 14(1) TEU-L, which provides that the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions, and this provision is replicated in relation to the Council in Article 16(1) TEU-L.

The co-decision procedure is now deemed to be the ordinary legislative procedure,[2] and this procedure consists in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. The reach of the ordinary legislative procedure has been extended to cover more areas than hitherto, including, for example, agriculture,[3] ser-

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1 Art 14(1) and Art 16(1) TEU-L.

2 Arts 289 and 294 TFEU.

3 Art 43(2) TFEU.

vices,[4] asylum and immigration,[5] the structural and cohesion funds,[6] and the creation of specialised courts.[7]

This development is to be welcomed. The co-decision procedure has worked well, allowing input from the EP, representing directly the electorate, and from the Council, representing state interests. It provides a framework for a deliberative dialogue on the content of legislation between the EP, Council and Commission. The extension of the ordinary legislative procedure to new areas is a natural development, building on what has occurred in earlier Treaty reform. It enhances the legitimacy of Union legislation and its democratic credentials by enabling the EP to have input into the making of legislation in these areas.

We should nonetheless be mindful of the way in which co-decision has operated more recently, which has reduced, or carries the danger of reducing, the 'space' for meaningful dialogue within the co-decision procedure. The institutionalisation of trialogues has been of particular importance in this respect.[8] The trialogue contains representatives from the Council, EP, and Commission, normally no more than ten, from each institution. These informal meetings have been common since the mid-1990s and were originally devised so as to precede and exist alongside formal meetings of the Conciliation Committee with the object of facilitating compromise. There is however now evidence that they have moved 'earlier up' in the co-decision process, such that trialogues are now increasingly commonly used to broker inter-institutional compromise prior to second reading, thereby limiting the potential for meaningful dialogue by a broader range of members of the EP and Council.[9]

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4 Art 56 TFEU.

5 Arts 77-80 TFEU.

6 Art 177 TFEU.

7 Art 257 TFEU.

8 European Parliament (2004), 13-15; *Shackleton / Raunio* (2003), 177-179.

9 I am grateful to *Deirdre Curtin* for this point, see *Curtin*, (forthcoming).

II. The EP and the Legislative Process: Delegated and Implementing Acts

The role of the EP in relation to the legislative process would however be incomplete without consideration of the provisions concerning delegated and implementing acts under the Lisbon Treaty. *Bruno de Witte* has already provided a valuable analysis of these provisions[10] and the discussion that follows builds on those foundations.

A. Delegated and Implementing Acts: The Provisions of the Lisbon Treaty

It will be remembered that the Constitutional Treaty introduced a hierarchy of norms, which distinguished between different categories of legal act, and used terms such as 'law', 'framework law' and the like.[11] The European Council of June 2007, which initiated the process leading to the Lisbon Treaty, decided that the terms 'law', and 'framework law' should be dropped. The rationale given was that the Lisbon Treaty was not to have a 'constitutional character',[12] although it is not readily apparent why the terminology of 'law' or 'framework law' should be assumed to have a constitutional character. It was nonetheless decided to retain the existing terminology of regulations, directives and decisions.

A version of the hierarchy of norms is however preserved in the Lisbon Treaty, which distinguishes between legislative acts, non-legislative acts of general application and implementing acts.

Thus Article 289 TFEU defines a legislative act as one adopted in accord with a legislative procedure, either the ordinary legislative procedure, which is the successor to co-decision, or a special legislative procedure.

Article 290 TFEU deals with what are now termed non-legislative acts of general application, whereby power to adopt such acts is delegated to the Commission by a legislative act. Such non-legislative acts can supplement or amend certain non-essential elements of the legislative act, but the legislative act must define the objectives, content, scope and duration of the delegation of power. The essential elements of an area cannot be delegated. The legislative act must specify the conditions to which the delegation is sub-

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10 Contribution of *Bruno de Witte* to this volume, Chapter V.

11 Arts I-33-39 CT.

12 Brussels European Council, 21-22 June 2007, Annex 1, para 3.

ject. Such conditions may allow the EP or the Council to revoke the delegation; and / or enable the EP or the Council to veto the delegated act within a specified period of time.

The third category in the hierarchy of norms, implementing acts, is dealt with in Article 291 TFEU. Member States must adopt all measures of national law necessary to implement legally binding Union acts. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in certain cases on the Council. It is for the EP and Council to lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

B. Non-Legislative Acts: The Implications for the Role of the EP

1. A formal distinction

We should recognise at the outset that the distinction between legislative and non-legislative acts is formal in the following sense. Legislative acts are defined as those enacted via a legislative procedure, either ordinary or special; non-legislative acts are those that are not enacted in this manner. This should not however mask the fact that the latter category of delegated acts will often be legislative in nature, in the sense that they will lay down binding provisions of general application to govern a certain situation. This is implicitly recognised in the nomenclature used in the Lisbon Treaty, which speaks of delegated acts having 'general application'. This moreover accords with the use made of 'secondary regulations' under the regime prior to the Lisbon Treaty. Such regulations were and are very commonly used to flesh out the meaning, scope or interpretation of provisions in the relevant 'parent regulation' in a manner analogous to the use made of delegated legislation, secondary legislation or rulemaking in national legal systems. It is interesting to contrast the label attached to delegated regulations in the Constitutional Treaty and non-legislative acts in the Lisbon Treaty, with the Convention on the Future of Europe Working Group's more honest depiction of these acts as a new category of legislation.[13]

13 Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 8.

2. The Political History

It is important to be aware of the significant 'history' that underlies these provisions on the hierarchy of norms. The Commission's primary goal has been to dismantle the established Comitology regime, at least insofar as it entails management and regulatory committees. It has supported the *ex ante* and *ex post* constraints on non-legislative acts contained in Article 290 TFEU in the hope that the Member States might then be persuaded to modify the existing Comitology oversight mechanisms for delegated regulations.[14]

The Commission's desire to have greater autonomy over this area has been apparent for some time,[15] and was an explicit feature of the White Paper on *European Governance*.[16] The key to the White Paper was the Commission's conception of the 'Community method',[17] with the Commission representing the general interest and the Council and the EP as the joint legislature, representing the Member States and national citizens respectively. This is in itself unexceptionable. It is the implications that the Commission drew from it that are contentious.

It was, said the Commission, necessary to revitalise the Community method.[18] The Council and the EP should limit their involvement in primary Community legislation to defining the essential elements.[19] This legislation would define the conditions and limits within which the Commission performed its executive role. It would, in the Commission's view, make it possible to do away with the Comitology committees, at least so far as they had the powers presently exercised by management and regulatory committees.

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14 *European Governance*, COM(2001) 428 final, paras 20-29; *Institutional Architecture*, COM(2002) 728 final, paras 1.2, 1.3.4; 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, 2; Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 12.

15 Cf. *Bergström* (2005).

16 COM(2001) 428 final. The White Paper provoked a variety of critical comment, see *Joerges / Mény / Weiler* (2001).

17 COM(2001) 428 final, 8.

18 *Ibid* 29.

19 *Ibid* 20.

There would instead be a simple legal mechanism allowing the Council and EP to control the actions of the Commission against the principles adopted in the legislation. The possibility of enhancing the Commission's control over delegated regulations by abolishing or amending the Comitology procedure was raised again by the Working Group on Simplification.[20]

It remains to be seen whether the Commission is successful in this regard. It also remains to be seen whether the controls embodied in Article 290 will be effective, if the Comitology regime is dismantled.[21] Let us assume for the sake of argument that the only controls on non-legislative acts are those set out in Article 290 TFEU, and that this does not include Comitology type controls of the kind that are mentioned explicitly in relation to implementing acts.

3. The EP and Delegated Acts: The Positive Interpretation

The controls contained in Article 290 TFEU are important, more especially so since they accord to the EP the simple power to reject a non-legislative act. Viewed from this perspective, the EP emerges as a winner from the Lisbon Treaty in relation to delegated acts as well as legislative acts, because it is accorded an important power that it did not have hitherto. This may well prove to be so, but the picture in this area is more complex and less certain for a number of related reasons.

4. The EP and Delegated Acts: A More Cautious Interpretation

There are a number of reasons to be more cautious about the overall impact on the EP of the new regime concerning delegated acts.

First, we should be mindful of the trade-off that is inherent in this schema for non-legislative acts. In essence the pre-existing regime was based on generalised ex ante input into the making and content of the delegated norms, with the possibility of formal recourse to the Council in accord with the Comitology procedures. It allowed for regularised, general and detailed input into the content of such norms by Member State representatives, with increasing control exercised by the EP, more especially since the 2006 reforms. The Lisbon Treaty is premised on a system of ex ante speci-

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20 Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 12.

21 *Craig* (2004), Chap 5; Craig (2006), Chap 4.

fication of standards in the primary law, combined with the possibility of some control ex post should the measure not be to the liking of the EP or Council.

Secondly, the controls contained in Article 290(2) TFEU are not mandatory. The conditions of application to which the delegation is subject 'shall' be determined in the legislative act. These 'may' entail the possibility of revocation of the delegation by the EP or the Council, or a condition whereby the delegated regulation enters into force only if there is no objection expressed by the EP or the Council within a specified period of time. These controls will therefore only operate where they are written into the legislative act.

Thirdly, the methods of control contained in Article 290(1) TFEU will be difficult to monitor and enforce. It is true that the non-legislative acts can only amend or supplement 'certain non-essential elements of the legislative act', and cannot cover the 'essential elements of an area'. These must be reserved for the legislative act, which must also define the 'objectives, content, scope and duration of the delegation of power'. It will often be difficult for the Council and the EP to specify with exactitude the criteria that should guide the exercise of delegated power by the Commission. The Council and the EP will often have neither the knowledge, nor the time to delineate in the legislative act precise parameters for the exercise of regulatory choices. The real issues about the assignment of regulatory risks and choice will often only be apparent when the matter is examined in detail. It was for these very reasons that the Comitology process was first created. It will therefore not be easy for the legislative act to define with precision the 'objectives, content, scope and duration' of the delegation.

If these requirements are to be taken seriously then there will have to be oversight by, *inter alia*, the Community courts. They will have to enforce a non-delegation doctrine, striking down delegations where the legislative act was insufficiently precise about the 'objectives, content, scope and duration' of the delegation. Whether the Community courts would be willing to do this with vigour remains to be seen, and history does not indicate vigorous judicial enforcement of such criteria by the Community courts.[22]

22 See, e.g., Case 156/93 *European Parliament v Commission* [1995] ECR I-2019; Case 417/93 *European Parliament v Council* [1995] ECR I-1185. Experience from other legal systems is mixed. The non-

It would of course be open to the Community courts to review compliance with these criteria more forcefully than it has done hitherto, and it might choose to do so precisely because there will not be the Comitology controls that existed hitherto. It should nonetheless be recognised that even if this were to happen the controls contained in Article 290(1) would still be of limited efficacy. This is because even if the EP and Council take seriously the obligation to specify the essential elements in the legislative act, and even if compliance with these criteria is taken seriously by the Community courts, important regulatory choices, and issues of principle will still be dealt with through delegated acts. This is because the legislative act itself will often be set at a relatively high level of generality, since the Council and the EP will often have neither the knowledge, nor the time to delineate in the legislative act precise parameters for the exercise of regulatory choices with the consequence that the meaningful issues only become apparent when the provisions of the legislative act are worked through in greater detail in the delegated acts.

Fourthly, we should also be mindful of the limits to the controls set out in Article 290(2) TFEU. We have already seen that these controls are not mandatory. Article 290(2) states that the conditions of application to which the delegation is subject *shall* be explicitly determined in the legislative act and that they *may* consist of revocation of the delegation, and / or entry into force only if there is no objection from the Council or the EP. The wording of the analogous provision in the Constitutional treaty was consciously altered to make it clear that 'these conditions do not constitute a mandatory element of such a law or framework law'.[23] Let us assume, however, that such controls are imposed in the relevant legislative act that governs an area. We should nonetheless be mindful of the limits of these controls.

Revocation of the delegation might be useful as an ultimate weapon, but it is ill-suited by its very nature to fine-tuned control over the content of a particular non-legislative act. This can only be achieved by recourse to the other control specified, the prevention

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delegation doctrine in the USA has, for example, provided little by way of control of broad regulatory choices accorded to agencies, *Aman / Mayton* (2001), Chap 1; *Rogers / Healy / Krotoszynski* (2003), 312-345.

23 CONV 724/03, Annex 2, 93.

of entry into force of a delegated regulation to which the EP or Council objected. It should be noted that neither the Council nor the EP is accorded any formal right to propose amendments to delegated acts, but only the power to prevent their entry into force. The threat of use of the latter power might be used as de facto leverage to secure amendment to a delegated act, but this does not alter the fact that Article 290(2) does not contain any formal power to amend.

The exercise of the 'veto' power is moreover crucially dependent on knowledge and understanding of the relevant measure. Neither the Council nor the EP will be in a position to decide whether to object to the measure unless they understand its content and implications. The Member State representatives on the Council clearly have neither the time nor expertise to perform this task unaided. The committees of the EP might develop such expertise, but have not yet done so in a sustained and systematic manner across all areas of EU law. They have hitherto been able to draw on informational resources from the Comitology committees, in order to understand the relevant measure and decide whether to object to it. Assuming that such committees cease to operate in relation to delegated acts, then the relevant EP committee will have significantly less material to help it to comprehend the relevant measure and decide whether to object to it. Even if advisory committees of Member State representatives are retained under the new regime, there is no certainty that the EP would be able to access any information about the content of the delegated act in the manner that it has done hitherto

These difficulties would be more pronounced given that the EP and Council would have to raise any such objection within a period specified by the legislative act. The period will vary depending on the area, but it will probably be relatively short.[24] The Council and EP would therefore have to 'get their act together' pretty quickly if either institution sought to prevent the non-legislative act becoming law.

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24 The amendment to the Second Comitology Decision specifies a period of four months for the EP to oppose a measure under the 2006 reforms, but this is premised on the continued existence of Comitology committees, which means that the measure would have received detailed scrutiny already, albeit by committees on which Member State interests were represented.

It might be argued that the concerns expressed above are misplaced or overplayed because non-legislative acts will, in any event, only deal with relatively minor technical matters. This will not withstand examination. The very depiction of delegated acts as non-legislative serves, whether intentionally or not, to dispel fears that the Commission is making legislative choices of its own volition. The reality is that secondary regulations often deal with complex regulatory choices or policy issues, which are not rendered less so by the fact that they are concerned with matters of detail or technicality. To the contrary, the devil is often in the detail, which is of course the very reason why the Comitology committees were created in the first place, so as to allow Member State oversight of these complex regulatory choices.[25] The fact that the matters are often complex and detailed does not alter this important fact. The committees were created precisely because the Member States sought greater regulatory input into the detail of secondary regulations than allowed for in the then existing Treaty provisions. Comitology-type committees were created as soon as the need to delegate extensive powers to the Commission became a reality. They have been part of the institutional landscape for over forty years. They were established to accord Member States an institutionalised method for input into the content of delegated legislation. These regulatory choices will not disappear. They will continue to be made through the new style non-legislative acts, and these will, so it is intended be made against the background of less detailed primary legislative acts.

C. Implementation Acts: The Implications for the Role of the EP

The Lisbon Treaty, following the Constitutional Treaty, also makes provision for implementation acts in Article 291 TFEU, which are distinct from non-legislative acts, which are dealt with in Article 290 TFEU. Assessment of the implications of Article 291 for the role of the EP is predicated on addressing two issues: when Article 291 will apply and the role of Comitology therein. These will be considered in turn.

1. The Sphere of Application of Article 291

The first issue, when Article 291 will apply, appears to be answered by the wording of the Treaty article: where uniform conditions are required for implementing legally binding Union acts, those acts

25 *Joerges / Vos* (1999); *Andenas / Türk* (2000); *Bergström* (2005).

shall confer implementing powers on the Commission, or, in certain cases on the Council. Matters are not quite so simple.

Binding legislative acts can take the form of regulations, directives and decisions. This follows from Article 289 TFEU, which lists these measures and provides that whenever they are adopted pursuant to a legislative procedure they constitute legislative acts. Binding non-legislative acts, deemed delegated acts, can also, in principle take the form of regulations, directives or decisions, although regulations have been most commonly used hitherto as the legal medium for the passage of secondary legislation.[26] We need however to tread carefully to see precisely when Article 291 will come into play.

If the primary legislative act is a regulation, as defined in Article 288 TFEU, then it is directly applicable within the Member States' legal systems, and is binding as to means as well as ends. It does not require adoption or transformation before it acquires legal force within those systems, and the ECJ has moreover held that they should not normally be cast into national legislation.[27] It is therefore difficult to see how the need for 'uniform conditions for implementing legally binding Union acts' justifying conferral of implementing powers on the Commission would be of relevance in relation to such legislative acts themselves, given that they are directly applicable.[28] The primary legislative regulation might itself specify in detail the way in which it is to be implemented, which

26 The Working Party on Simplification considered that it would be possible for implementing acts to be made pursuant to delegated acts, as well as legislative acts, and this is clearly correct in principle, given that delegated acts are legally binding, Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 9-11.

27 Case 34/73, *Variola v Amministrazione delle Finanze* [1973] ECR 981

28 It is true that a regulation might require consequential changes in other areas of national law, but where this is so the nature of those amendments are bound to differ as between the Member States, precisely because their previous laws in the area will often be very different. It will not therefore be possible to contemplate uniform changes to these other national legal provisions that could be stipulated by the Commission. The Member States would simply have the obligation, pursuant to Article 291(1), to adopt all measures necessary to implement legally binding Union acts.

would then be directly applicable in the same way as the remainder of the regulation. This does not however serve to explain the conferral of implementing powers on the Commission, since by definition the job would have been done by the primary legislative act itself. Where the legislative act is a regulation there is therefore no need for recourse to Article 291 in relation to implementation of that legislative act itself. Article 291 would be used to enact implementing norms made pursuant to the legislative act, in circumstances where the conditions warrant uniform conditions of implementation. Thus there could be instances where past experience reveals that a primary legislative regulation in a particular area has been implemented somewhat differently within different Member States and that greater uniformity is required. Thus when a new version of the primary legislative regulation is enacted it could contain power for the Commission to enact uniform implementing measures, without the need to amend the primary legislative act itself. Whether recourse to Article 291 by the Commission is warranted would however depend upon the nature of any measures introduced. It should be remembered that Article 290, which deals with non-legislative acts, is operative whenever the primary legislative act is supplemented or amended by a later measure. There may therefore be difficult borderlines between instances of 'pure implementation', where recourse to Article 291 is warranted, and those instances where the later measures in effect 'supplement or amend' the primary legislative act, where recourse should be had to Article 290.

We must be equally careful when considering the application of Article 291 where the primary legislative act is a directive. The very nature of a directive leaves Member States with discretion as to means of implementation. That is its very *raison d'être*. It would therefore be odd, to say the least, to enact a directive, but to empower the Commission to impose uniform conditions for implementation. The reality is that if the Commission's power to impose uniform conditions for implementation were to be used in relation to directives it would radically alter their nature. It would create a new hybrid species of primary legislative act, in which the means of implementation, normally left to the discretion of the Member States, would be exercised by the Commission. Once again the proper sphere for application of Article 291 would be in situations where it is thought necessary to accord the Commission uniform powers to make implementing measures pursuant to some aspect or

article of the legislative directive, not the directive itself. Once again, as in the discussion in the previous paragraph, there could be difficult borderline issues as to whether such measures fell within Article 291, or whether they should be regarded as coming within Article 290, because they supplement or amend the primary legislative directive.

It might be possible to envision circumstances in which Article 291 could be used where the primary legislative act was a decision of the more generic kind. Article 288 TFEU contemplates two kinds of decision, the most common being a decision addressed to a particular individual or firm, as exemplified by cartel decisions imposing fines. There can however also be decisions of a more generic nature, which are not addressed to a particular person.[29] There could be circumstances where such decisions require uniform methods of implementation, thereby triggering the Commission's powers to devise uniform implementation pursuant to Article 291(2). This same Article also expressly contemplates the Council imposing uniform conditions for implementation pursuant to Articles 24 and 26 TEU-L, which are concerned with the CFSP.

The reasoning in the preceding paragraphs concerning the circumstances in which the Commission is justified in imposing uniform conditions of implementation is equally applicable where the legally binding act takes the form of a non-legislative act made pursuant to Article 290 TFEU. This is because the reasoning set out above would also be operative where the non-legislative act took the form of a delegated regulation or delegated directive. This is subject to the following caveat. It would seem possible in principle for the Commission to enact, for example, a delegated regulation, for the Commission to decide that uniform implementing conditions are required, and for the Commission to then give itself the implementing power in the delegated regulation. This seems to follow from a reading of the Articles of the Lisbon Treaty. Whether it is desirable in normative terms is far more contestable. It would, if used in this manner, certainly increase the Commission's degree of control over the legislative process taken as a whole. The only formal constraints on this happening would be the possibility for the Council or EP to object to the entry into force of such a delegated regulation pursuant to Article 290, or through Comitology to the extent to which it might still exist pursuant to Article 291(3).

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29 Contribution of *Bruno de Witte* to this volume, Chapter V.

2. Implementing Acts, Comitology and the EP

We can now consider the second issue, the role of Comitology in relation to implementation acts. There are four points to note in this regard.

First, the continuance of Comitology is expressly envisaged by Article 291(3), which provides that where uniform conditions for implementation are needed and therefore the requisite powers have been conferred on the Commission, the EP and the Council shall lay down in advance by means of a legislative regulation enacted by the ordinary legislative procedure the rules and principles concerning mechanisms for control by the Member States of the Commission's implementing powers.

Secondly, there is however nothing in Article 291(3) which stipulates the form or nature of the controls over the Commission's implementing powers. They might simply replicate the existing Comitology regime. It is more likely that they will not do so. It should be noted in this respect that the wording of Article 291(3) is framed in terms of 'control by Member States'. It is not even framed in terms of the Council, and says nothing of control by the EP. It is therefore questionable whether provisions which gave the EP some control over such matters would be interpreted to be *intra vires* that Article. It is in any event doubtful, given the *raison d'être* of Article 291, whether the Commission would conceive of the EP as having any proper role in relation to such matters, given that they are meant to be about 'pure implementation', and therefore of concern for the Member States either in their individual guise, or through the collectivity of the Council.

Thirdly, the circumstances in which any Comitology regime would operate would however be subject to the limits discussed in the previous section. Furthermore, the divide between instances where Article 290 should apply, because the further act supplemented or amended the delegated act, and those instances where recourse could properly be had to Article 291 and implementing acts, could be problematic. It could also lead to inter-institutional litigation, more especially so if, as is likely to be the case, the EP is given no role in relation to implementation acts. Assuming this to be so, there could well be instances where the Commission seeks to have recourse to implementation acts, and this is challenged by the EP on the ground that the relevant measures either supplement or amend the legislative act, and hence should have been made pursu-

ant to Article 290, thereby enabling the EP and Council to exercise the controls specified in that Article.

Fourthly and finally, we should be mindful of the change that the Lisbon Treaty could bring about in relation to the passage of acts other than legislative acts. The preceding discussion has been premised on the assumption that Comitology and its attendant procedure applies only in relation to implementation acts, and not in relation to non-legislative acts, although this assumption will be questioned below. The assumption is premised on the fact that there is no mention of Comitology procedures in Article 290, which deals with non-legislative acts. If this assumption proves correct then it will represent a marked change in the Community regime. The 'cause' of this shift resides ultimately in ambiguity as to the meaning of the word implementation. It can bear the meaning that it has in the current Article 202 TEC: delegated rulemaking or decision-making subject to Comitology conditions. Implementation can also mean the execution of other norms, whether Treaty provisions, primary laws or delegated regulations: the relevant norm will be applied or executed, but without any supplementation or amendment. The Comitology procedure has hitherto applied to implementation that included the first sense of this term: it was the condition attached to delegated rulemaking or decision-making by the Commission. The discussion in the Convention on the Future of Europe revealed an important shift in thought. The Comitology procedures were not mentioned in relation to the making of delegated regulations, even though this was the true analogy with the status quo ante, the implication being that they would be replaced by the controls in Article I-35(2) CT, now replicated in Article 290(2) TFEU. The Convention documentation considered the legitimacy of Comitology primarily in the context of implementing acts covered by Article I-36, where the emphasis was on implementation in its second sense, as execution or application. This was apparent in the literature from the Working Group.[30] It was apparent again in the Convention comments on Article I-36(3), which provision allowed for Member State control over implementing acts.[31] The Presidium stated that several amendments were opposed to the current committee mechanisms, and wished to delete this Article, while other

30 Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 9.

31 CONV 724/03, Annex 2, 94.

comments proposed confining the control mechanisms to advisory committees alone. The Presidium considered that this was a matter for secondary legislation and therefore did not amend the Article. The assumption was therefore that in the future Comitology would be relevant only in the context of implementing acts, and not in relation to delegated regulations, even though this was in stark contrast to the circumstances where Comitology is currently used.

III. The EP and the Legislative Process: Conclusion

The EP undoubtedly emerged as a winner from the Lisbon Treaty in relation to the passage of legislative acts: the formal endorsement of the EP as co-legislator with the Council, combined with the extension of the ordinary legislative procedure to new areas will strengthen the EP's role in relation to the primary legislative acts.

The position of the EP in relation to non-legislative acts is more equivocal. It is true that Article 290 TFEU strengthens the EP's powers by according it a general right to reject such an act if it so wishes. The difficulties with the regime of ex ante and ex post controls embodied in Article 290 have however been set out above. The reality is that non-legislative acts will continue, as they have done hitherto, to address matters of importance that involve the making of contentious value judgments. The Article 290 regime on its face does not allow for input into the making of such norms by either the EP or the Council, nor does it formally contain any power to amend. The ability of either Council or the EP to reject a non-legislative act is therefore crucially dependent on developing an understanding of the measure within the time limit laid down in the legislative act in order to decide whether they wish to oppose it.

It remains to be seen whether Comitology will disappear from the 'world of non-legislative acts'. A touch of political *realpolitik* is warranted here. The Member States are unlikely to accept the abolition of a regime whereby they can have input into the making of non-legislative acts. They have insisted on this for forty years, and it is difficult to see why they would dismantle a regime that has allowed them input into the content of such norms while they are being formulated. It is equally doubtful whether they would accept the downgrading of all such committees to become merely advisory committees, thereby doing away with management and regulatory committees. If this were to happen, if the regulatory regime of the last forty years were to be discontinued, the Council would in any event quickly recognise that it could only make meaningful judg-

ments as to whether to oppose a particular non-legislative act if it had the knowledge from which to make such a considered judgment. It would therefore have to re-create some form of committee system to oversee the content of non-legislative acts, which would of course be déjà vu all over again.

IV. The EP and Executive Power

The discussion thus far has been concerned with the role of the EP in relation to the legislative process under the Lisbon Treaty. The analysis now turns to consideration of the EP's powers in relation to executive organs.

We can begin by considering the election of the Commission President. The relevant provisions of the Lisbon Treaty mirror those of the Constitutional Treaty. Article 14(1) TEU-L provides, *inter alia*, that the EP shall elect the President of the Commission.[32] The retention of state power is however apparent in Article 17(7) TEU-L.[33] The European Council, acting by qualified majority, after appropriate consultation, and taking account of the elections to the EP, puts forward to the EP the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the EP by a majority of its members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure.

The Lisbon Treaty also follows the Constitutional Treaty in relation to the election of the other members of the Commission. Article 17(7) TEU-L provides that the Council, by common accord with the President-elect, adopts the list of the other persons whom it proposes for appointment as members of the Commission, these having been selected on the basis of suggestions made by Member States. The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission are then subject as a body to a vote of consent by the European Parliament. It can therefore be expected that the EP will continue with its 'senate-like' confirmation hearings of proposed Commissioners, in which it subjects aspirant holders of such posts to fairly intense scrutiny to determine their expertise and likely ap-

32 The equivalent provision was Art I-20(1) CT.

33 The equivalent provision was Art I-27(1) CT.

proach to the area over which they are to have responsibility. It should nonetheless be noted that Article 17(7) TEU-L provides once again for the retention of state power, in that while the EP's consent is necessary for the appointment of the President, High Representative and members of the Commission, the actual formal appointment rests with the European Council, acting by a qualified majority. This is in accord with the final version of the Constitutional Treaty.[34]

It is interesting to reflect on the way in which state power and control has been 'ratcheted up' in relation to appointment of the Commission. The version of the Constitutional Treaty produced by the Convention on the Future of Europe and submitted to the IGC differed from the above. It provided that each Member State established a list of three persons whom it considered suitable to be Commissioner, that the President-elect made the choice from within each list, and that the final list was then to be collectively approved by the EP.[35] The final version of the Constitutional Treaty made changes in this respect as a result of discussions in the IGC. State power was enhanced in two complementary ways: it is now the Council, in accord with the President-elect, which adopts the list of proposed Commissioners, and it is now the European Council that makes the formal appointment of the Commission, after the EP has given its consent.

The EP has retained its 'nuclear-strike' power in relation to censure of the Commission. Thus Article 17(8) TEU-L stipulates that the Commission is responsible to the EP, and that if the EP votes in favour of a censure motion the members of the Commission must resign and the High Representative of the Union for Foreign Affairs and Security Policy must resign from the duties that he carries out in the Commission.

V. The EP, Policy and Politics

It is interesting to reflect briefly on the impact of the preceding provisions on the functioning of the EU, and more particularly the extent to which they will render the system more truly 'parliamentary' than hitherto. There is no doubt that there is some movement in this direction. Thus, while the European Council retains ultimate power

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34 The relevant provision of the CT was Art I-27 CT.

35 CONV 850/03, 18 July 2003, Art I-26(2).

over choice of Commission President, it is unlikely to attempt to force a candidate on the EP that is of a radically different persuasion from the dominant party or coalition in the EP.

The rules contained in the Lisbon Treaty on this issue generally cohere with recent practice, and they go some way to improving the linkage between policy and politics in the EU. Insofar as the EU has been depicted as a polity in which policy is divorced from party politics, a formal linkage between the dominant party / coalition in the EP and the appointment of the Commission President serves to strengthen the connection between policy and party politics, the assumption being that the designated President of the Commission will share similar political views on policy to that of the dominant party in the EP.

We should nonetheless be mindful of the obstacles that subsist to a closer link between policy and politics in the EU, even after the Lisbon Treaty reforms. Four such factors deserve mention.

First, the President of the Commission may well be *primus inter pares*, but he or she is still only one member of the Commission team. The other Commissioners will not necessarily be of the same political persuasion as the President or the dominant party in the EP, and it has been common for Commissioners to come from varying political backgrounds. Thus even if there is some commonality of view between President and EP in terms of politics and policy, this will not necessarily be shared by all Commissioners. Nor, insofar as this is perceived to be a problem, which is itself open to debate, can it be resolved through EP hearings of individual Commissioners.

Secondly, and even more importantly, is the fact that the policy agenda in the EU is of course not exclusively in the hands of the EP and / or Commission. The Council and the European Council both have input both de jure and de facto into the policy agenda for the EU. The extended Presidency of the European Council is likely to increase this tendency further, since the incumbent of the office will have the time and opportunity to develop a set of ideas for the EU in the way that the pre-existing regime of six-monthly rotating presidencies precluded. It should moreover be noted that the Lisbon Treaty, like the Constitutional Treaty, accords the Commission the power to initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.[36] This is ex-

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36 Art 17 TEU-L.

plicitly premised on the assumption that other institutional players will and should have an impact on the development and shape of politics and policy. Thus even if the EP and Commission President were very closely allied in terms of substantive political vision for the EU, the policy that emerges will necessarily also bear the imprint of the political vision of the Council and European Council.

Thirdly, the absence of a developed party system at the EU level also serves to limit the extent to which the gap between politics and policy can be narrowed within the EU. A coherent political agenda will normally emerge at national level, precisely because it is developed by rival parties, which formulate the contending political packages to voters who then choose between them. The absence of a developed party system at the EU level, means that elections to the EP are, as is well known, fought by national political parties in which national political issues often predominate, with the result that there is little by way of a clear political agenda on EU issues that is proffered to the voters to choose from. The MEPs will then sit within cross-national political groupings of left, centre, right wing and the like, but they will not come to the EP with a coherent left wing or right wing agenda.

A further factor that has reduced the linkage between policy and party politics in the EU concerns the very nature of the issues that the EU regulates. It is true that the scope of the EU's competence has been expanded by successive Treaty amendments. It is true also that certain of the issues which have more recently fallen within the EU's competence are by their nature highly political, such as many of the matters covered by the area of freedom, security and justice. It nonetheless remains the case that many of the most 'political' issues at national level, or matters that cause the most pronounced tensions between the left and right wing, are issues over which the EU either has no competence, or only limited competence. These issues include direct taxation, the reach and nature of the welfare state, education, crime, health and the like.

VI. The EP and the Budget

Money matters, it always has. This is a trite proposition, but it is true nonetheless. This is especially so in relation to parliaments, since they properly regard power over financial disbursements as significant in itself, and as a powerful lever through which to secure further concessions from other institutions within the polity.

The decision-making regime under Article 272 TEC was complex, but in effect gave the EP the final say over non-compulsory expenditure, with the Council having the final word over compulsory expenditure. This dichotomy led to repeated battles and skirmishes over the divide between compulsory and non-compulsory expenditure.

The decision-making regime under the Lisbon Treaty marks a significant change in this respect. Article 14(1) TEU-L provides that the EP jointly with the Council, exercises legislative and budgetary functions, and this is reiterated in Article 16(1) TEU-L from the perspective of the Council.

The detailed rules as to this joint exercise of budgetary authority are then found in the TFEU. Article 310 TFEU provides that the Union's annual budget shall be established by the EP and the Council in accordance with Article 314. The annual budget must however comply with the multiannual financial framework, which is established for five years, Article 312 TFEU. The Council, acting in accordance with a special legislative procedure, adopts a regulation laying down the multiannual financial framework. The Council acts unanimously after obtaining the consent of the European Parliament, which must be given by a majority of its component members.[37] The financial framework determines the amounts of the annual ceilings on commitment appropriations by category of expenditure and the annual ceiling on payment appropriations.

The detailed rules concerning passage of the annual budget are then set out in Article 314 TFEU. It is for the EP and the Council, acting in accordance with a special legislative procedure, to establish the Union's annual budget. This legislative procedure is close to the ordinary legislative procedure, but there are a number of differences.

In essence, the Commission produces a draft budget based on estimates submitted to it by the different institutions. This is then submitted to the EP and the Council not later than 1 September of the year preceding that in which the budget is to be implemented. The Council then adopts its position on the draft budget, giving reasons for its position, and forwards this to the EP not later than 1

37 The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation of the Council, Art 312(2) TFEU.

October of the year preceding that in which the budget is to be implemented.

The EP can then within 42 days of this communication: approve the Council's position, in which case the budget is adopted; not take a decision, in which case the budget is deemed to have been adopted; adopt amendments by a majority of its component members, in which case the amended draft is forwarded to the Council and to the Commission. This then triggers a meeting of the Conciliation Committee, unless the Council signifies within ten days of receiving the amended draft that it approves all such amendments. If the Conciliation Committee meets then its task is to broker agreement between the Council and EP, in much the same way as under the ordinary legislative procedure. If the Conciliation Committee is able to agree on a joint text then this must be approved by the EP and Council, and there are detailed rules as to what should occur if either the Council or EP rejects the joint text.

Time will tell exactly how the decision-making regime under Article 314 operates. The statement of principle contained in Article 14 TEU-L that the EP exercises budgetary functions jointly with the Council, and the abolition of the distinction between compulsory and non-compulsory expenditure, both serve to increase the EP's power over the budget as compared to the pre-existing situation. It should however be recognised that the special legislative procedure set out in Article 314 contains a number of distinctive features as compared to the ordinary legislative procedure, which could serve to constrain the EP. Thus under the procedure in Article 314 it is the Council that initially communicates its position to the EP, there is nothing equivalent to the first reading by the EP under the ordinary legislative procedure. When the EP does respond to the Council's position it has no power of outright rejection at that stage, which is once again different from the position under the ordinary legislative procedure. These differences reflect the central importance of the annual budget for the EU. Having said this, the *de jure* powers accorded to the EP under Article 314 are still very significant, more especially given that they apply to all expenditure, and de facto one can expect all players, Council, EP and Commission, to be keen to reach agreement in order to secure passage of the budget and financial order within the EU.

VII. The EP and Amendment

The EP's power has also been increased by the Lisbon Treaty in relation to the amendment procedure. The position under Article 48 TEU prior to the Lisbon Treaty was that the government of any Member State or the Commission could make a proposal for Treaty amendment. It was then for the Council, after consultation with the EP, to decide whether to call for an IGC. The EP might be invited to take part in the IGC, and indeed was invited to participate in the IGC that led to the Lisbon Treaty, but the EP had no right to participate, nor did it have any formal right to propose Treaty amendments.

Article 48 TEU-L establishes an ordinary and simplified method of revising the Treaties. The details of the differences between these methods for Treaty amendment are not of immediate concern here. What is of direct relevance is the fact that under the ordinary revision procedure Member States, the Commission *and* the EP are accorded the power to propose Treaty amendments to the Council. It is then for the Council to submit such proposals to the European Council, which decides by simple majority, after consulting the Commission and EP, whether to press forward with examination of the proposed Treaty amendments. If it decides in favour of doing so, then a Convention is convened. This is composed of representatives of the national Parliaments, Member States, European Parliament and Commission. Thus under the ordinary revision procedure the EP is given the right to propose amendments and the right to participate in the Convention that discusses such amendments. It is open to the European Council to decide not to establish a Convention, because this is not warranted by the extent of the proposed amendments, and to proceed instead via an IGC, but this can only be done if the EP consents.

The EP is also included in the list of those who can submit proposals under the simplified legislative procedure for amendment of all or part of the provisions of Part Three of the TFEU relating to the internal policies and action of the Union. The decision with regard to such amendments is made by the European Council by unanimity after consulting the EP and the Commission. It must then be ratified by the Member States, as of course must any amendments made pursuant to the ordinary revision procedure.

There is little doubt that the Member States will continue to be the key players during major constitutional moments involving

Treaty amendments. Notwithstanding this, the very fact that the EP has now been included in the list of those who can propose Treaty amendment is of symbolic significance, insofar as it places the EP in parity in this respect with the Commission and Member States. It might also be of some real practical significance, since the EP might well seek to make use of this power to place an issue on the agenda for EU reform.

The fact that the EP is granted the right to participate in a Convention established pursuant to the ordinary revision procedure concretises *de jure* the *de facto* gains made by the EP through its participation in the Convention that drafted the Charter and the Convention on the Future of Europe. The EP is not granted any formal right to participate in an IGC, should this be established in lieu of a Convention. However the very decision whether to opt for an IGC rather than a Convention, on the ground that the scale of the Treaty amendments does not warrant a Convention, is dependent on the consent of the EP. The EP might well use the need for its consent as leverage to press for its inclusion within the formal IGC deliberations.

VIII. Conclusion

The EP is most certainly a net beneficiary of the changes introduced by the Lisbon Treaty. This is especially so in relation to its increased powers over the passage of legislative acts and the budget. The implications of the new Treaty provisions relating to delegated and implementing acts are more equivocal. Much will depend on how such provisions are interpreted and used. The positive reading of these provisions is that the EP is also a winner in this regard, being given a clear veto power over delegated acts that it does not approve of. It has however been argued in the preceding discussion that we may need to be more cautious about the implications of these new provisions.

We should moreover not forget that the EP's overall role in the development of EU policy will also be affected by the subsequent development of new forms of governance, such as the open method of co-ordination, OMC. This has been applied to an increasingly wide range of areas, and the EP has justly expressed concern about its exclusion from such processes, or the limited involvement that it has been allowed within OMC.

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