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‘Executive’ and ‘delegated’ acts: The situation after the Lisbon Treaty

I. Distinction between *delegated* and *executive* acts

A basic fact to be borne in mind is that the Lisbon Treaty *introduces important innovations* in relation to the Treaties currently in force. The main innovation is that it makes a *distinction for the first time* between *legislative delegation and executive delegation* (under the present treaties there is no distinction between the two and they have always been subject to the Comitology procedure).

The Treaty of Lisbon breaks new ground by establishing two separate procedures for ‘delegated acts’ and ‘implementing measures’ (in line with the practice in many national systems). In these systems, we have three different legal situations:

a) cases in which the legislator acts in his own field of competence: these are the ‘laws’;
b) cases in which the Executive acts in his own field of competence: these are ‘executives acts’ *stricto sensu* or ‘ministerial decrees’ (“*arrêtés ministériels*”);
c) cases in which the Executive acts in the field of competence of the legislator (either following an explicit delegation of powers or on its own initiative: in French, these acts are named “*ordonnances*” and in Italian “*decreti-legge*” or “*decreti legislativi*”).

Why was it necessary to change the present system? Principally, the need for change arose due to the difference between the ‘ministerial decrees’, which in our Member States fall within the

'exclusive competence' of the Minister responsible (and therefore the executive), and the 'decree laws' adopted by the government in areas which fall within the competence of the *legislature*. For example, how can the granting of financial assistance to NGOs or agricultural export refunds be equated with the *amendment of a law* adopted by the legislative body (such as the addition of some new dangerous products to a list of 30 products already voted on by the European Parliament and the Council)?

Within the European system, we need to make a similar distinction between acts adopted by the Commission in its own field of competence ('executive acts') and acts adopted by the Commission in the field of competence of the European Parliament and/or the Council ('delegated acts'). Some scholars[1] have criticised this new system as being unclear and a source of confusion. However, the same criticism could be applied to the national systems (is an Italian "*decreto-legge*" a law or a decree?)

For a long time the Council has exploited an interpretation of the Treaty which allowed it to remove 'delegated acts' from the competence of the European Parliament on the pretext that execution was the responsibility of the Member States and, at EU level, of the Commission (assisted by Committees made up of Member States' representatives). However, the new Treaty has replaced the comitology system with an arrangement whereby the *Commission takes responsibility for delegated acts* under the *direct control* of the European Parliament and the Council (giving each of them the possibility of opposing the measure or revoking the delegation).

II. How will the Commission exercise its responsibility for delegated acts?

1. Some commentators have [2] expressed the fear that the removal of Committees for the adoption of delegated acts could deprive the Commission of the expertise required for elaborating measures. This, however, is groundless because the Commission will continue to rely on Member States' experts, even in the absence of a formal Committee which should vote by qualified majority and make appeal to the Council if there is no qualified majority.

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1 See for instance *Bergström* (2005).

2 See the contribution of *Paul Craig* to this volume.

In other words, the *same procedure* should be followed for amending a law as *for drafting the law* (for example, if the Commission consulted Scientific Committees and / or Member States' experts when drawing up the list of 30 dangerous products, it will do the same when it wants to add a thirty-first product or amend the annexes to the REACH Regulation, consulting the *same bodies* as for the original act). Therefore, the main difference between the procedure before and the procedure after the Lisbon Treaty will be that a possible negative opinion of Member States' experts will not provoke an appeal to the Council in order to modify the Commission's draft.

2. A special case is that of the *Lamfalussy* acts for *financial services* (where the Commission adds some provisions to the law instead of *amending* the annexes). For this sector, the Intergovernmental Conference adopted a declaration (n. 39) by which the Commission confirmed *its established practice of consulting the competent national experts*. Why this declaration? It is a result of the fact that the Finance Ministers are well aware that the national experts de facto *dictate* several provisions to the *Commission's departments* in the financial services field. However, even in this sector, the Member States *agreed not to request that the existing Committees be retained,* provided that the Commission *maintained the current practice*. Even if this commitment has not been extended to other sectors (where it was not a matter of adding new elements to *an act* but only of amending *the annexes* to a directive to bring them into line with scientific, technical or economic progress), it will clearly be in the interests of the Commission's departments to consult the same experts who helped them to prepare the original proposal before tabling a 'delegated act' amending the annexes. In conclusion, the Commission will continue to request the assistance of an advisory working group of national experts before submitting the delegated acts to the European Parliament and the Council.

It is certainly true – as *Craig* underlines in his contribution to this book – that the Comitology procedure provides the Commission with more expertise on regulatory choices than a mere political control ex-post from the European Parliament and the Council. However, if the Commission's departments play the game correctly, they will dispose of the same expertise on regulatory choices while allowing the legislator to ex-

ercise a political control over the content of an act falling within his field of competence. Moreover, the same problem arises for the British government when it submits a 'delegated act' to the House of Commons in order to get its tacit assent within a very short period of time.

III. The problem of 'supplementing' measures

Some attendees to the Florence Conference wonder why the Member States have accepted to extend the powers of 'delegated acts' to the 'supplementing measures' instead of limiting these ones to the 'amending measures'.

The work of the '*Amato* Group' on simplification can help in providing an answer to this question. The members of the '*Amato* Group' are aware of several cases for which the Commission has been authorised by the legislator to adapt a previous regulation or directive to a technical, scientific or economic progress (by the means of a new proposal amending or supplementing the annexes in the previous acts – see, for instance, the REACH regulation). But the members of the Group are also aware of the new procedure introduced more recently by the Council, the so called "*Lamfalussy procedure*". According to this procedure, the Commission has been delegated the power not only to amend one or more annexes in previous acts, but also to complete (or *supplement*) *the legislative act itself with new provisions. In this way the legislator uses the Commission as a means of speeding up the adoption of these provisions and avoids a new codecision procedure*! These could be measures of a general nature which add new elements to the legal framework of the legislative acts. Some examples of this kind of measure can be found in Directive 2003/6/CE on market abuse (art. 6, par. 10), in Directive 2003/71/CE related to the prospectus (art. 2, par. 4) or in Directive 2004/109/CE on transparency (art. 21, par. 4).[3]

In other words, this delegation of powers does not limit the Commission's ability to *formally modify* the annexes of the concerned regulations / directives, but precisely to complete (or supplement) the legislative act with *other provisions* that the legislator could have adopted at the same time. It is true that the PRAC pro-

3 Examples from *Szapiro* (2006), 573.

cedure[4] attempted to cover this legal situation by using the words "*amending the legislative act by supplementing the instrument or by deleting some elements*", but we can easily check that this expression covers the same legal situation (the *Lamfalussy* procedure) with other words. In fact, the list of priority acts which require an *alignment* of existing acts to the new procedure (PRAC) rightly covers the directives in which the *Lamfalussy* procedure is applied. Therefore, the Member States were aware of the consequences when they added the word "*supplement*" both in the *Comitology decision* of July 2006 and in the Lisbon Treaty.

IV. Implementing measures (or executive acts)

The situation is different for *implementing measures in the strict sense*. In this case, the committees of Member States' representatives *remain due to the fact that the Treaty provides for the monitoring of such measures by the Member States* (and not by the legislator, unlike delegated acts).

However, even the comitology system has to change, firstly because the general decision will be adopted by codecision procedure by the two co-legislators (the European Parliament having a right of veto and the Council acting by qualified majority and no longer by unanimous vote), and secondly because control of the measure *by the Member States* would seem to rule out any appeal to the Council (which would moreover be difficult for Parliament to accept unless it too had a *right of appeal*, which seems to be out of the question for *strictly implementing measures*).

On the other hand, the European Parliament might wish to retain its present *right of scrutiny in cases in which the Commission exceeds its powers* (it has exercised this right of scrutiny only *six times since 2000 in respect of more than 5000* executive measures, and got through in only one case. In all other cases the Parliament challenged de facto the content of the measure and not '*the abuse of power*' of the Commission).

The maintenance of Management and Regulation Committees as such will be problematic because a negative opinion from these Committees (following different procedures) currently provokes an appeal from the European Commission to the Council (while, in the

4 See the new *Comitology decision* adopted by the Council in July 2006.

new system, the European Parliament cannot accept an appeal just to the Council. Therefore, it might be possible that the Commission will propose the maintenance of the current negotiations at the level of the Committees of Member States' representatives and will suggest that it could not adopt a measure without obtaining a favourable opinion from these Committees.[5]

In his contribution to this volume, *Paul Craig* seems to exclude the possibility of recourse to an implementing measure where the legislative act is a regulation or a directive. It is true that most of the 'implementing measures' come from decisions by the legislator (for instance, all the programmes providing financial support from the Union). However, in reality, the legislator delegates a significant amount of powers to introduce implementing measures both through regulations or directives (see the agricultural or fishing regulations as well as the environmental directives for the authorisation of GMO products). Moreover, the implementing measures do not only cover measures of a general nature, but also individual measures (authorisation of individual products, derogation for a Member State, import ban or closure of a fishing zone, etc.).

In his paper, *Paul Craig* also expresses the fear that it could be difficult to draw a border line between *delegated* and *executive* acts (with the subsequent risk that some executive measures of the Commission might be challenged by the European Parliament for *abuse of power*). However, as far as the European Parliament and the Council (as a general rule) make this distinction in the legislative act (for instance: *"the measure covered by art. X will be adopted by the Commission following the procedure of "delegated acts" and the measures covered by art. Y will be adopted by the Commission following the procedure of "executive acts"*), there will not be any legal problem with the Commission submitting implementing measures.

V. Conclusion: the 'anomaly' of the Comitology system

In the past, many commentators have challenged the fact that the European Commission has the power to modify (or complete) a law *without the assent (tacit or explicit) of the legislator*. The Lisbon

5 Another solution could be that, in the absence of a qualified majority within the Committees, the Commission will make appeal to the same Committee meeting at ministerial level.

Treaty has remedied this situation. As far as efficiency is concerned, it would be useful if the Commission could modify (or complete) a law by an *executive* act with the agreement of a Committee of Member States' representatives (for instance, the REACH regulation which has about a thousand pages of annexes). However, as far as the democracy of the Union is concerned, this 'anomaly' in the institutional decision-making process of the European Union had to be modified.[6] It would be a shame if the loss of the previous system is regretted on the basis that it was more efficient the moment the Lisbon Treaty changes the Comitology system making it more transparent and 'democratic'!

In conclusion, we can keep saying that, when the Executive acts in the field of competence of the legislator, the maintenance of the Comitology system would be an *anomaly*, while the *legislative delegation* is the right rule.

References:

Carl-Fredrik Bergström (2005), Comitology, Delegation of Powers in the European Union and the Committee System, Oxford (Oxford University Press) 2005.

Manuel Szapiro (2006), Comitologie: retrospective et prospective après la reforme de 2006, in: La Revue du Droit de l'Union européenne 501 (2006), 545-586.

6 During a hearing in the 1990's within the European Parliament, where I described very deeply the consensual and efficient system of Comitology, the MEP *Voggenhuber* replied: "this is a typical speech of a European official. The problem is not the efficiency of the Comitology system, but its 'non-democratic' nature!"