



Delegated and Implementing Acts: *the New Worlds of Comitology – Implications for European and National Public Administrations*

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Introduction

The Treaty of Lisbon (TFEU) significantly changes the theory and practice of the delegation of executive powers to the European Commission, powers which resulted in 14,522 legally binding implementing measures during the sixth legislature under the Barroso I Commission (2004-2009) (in comparison to only 454 legislative acts). The Treaty of Lisbon fundamentally alters the way this system works, and in turn the way everyone works with it, especially European and national public administrations. From obscure and informal beginnings in the field of purely technical agricultural markets in the 1960s, the Lisbon Treaty has in fact made the so-called 'comitology' system (and the name) partially redundant. Following the entry into force of the Treaty of Lisbon on 1 December 2009, there are now two new legal bases; Delegated Acts (Article 290) and Implementing Acts (Article 291). This means that the 'comitology' world has been split into two.

The new system makes a clear separation between tasks delegated to the Commission that only require pure implementation, Implementing Acts, and those that allow the Commission to amend, supplement or delete non-essential elements of the legislative act, Delegated Acts. The main changes in the Lisbon system are related to this new category of Delegated Acts, where committees cease to exist and the legislators have equal rights to object to individual Delegated Acts or even to revoke the delegation to the Commission altogether. Under this new situation the Parliament thus stands on an equal footing with the Council. The implications of these changes are considerable, in both practical and political terms, and therefore require serious attention from the EU institutions, Member States, and outside stakeholders.

This short article attempts to address the key changes and questions. Based on the institutions' Common Understanding on Delegated Acts and the new 'Comitology' Regulation 182/2011/EU, which entered into force on 1 March 2011, we present the two new avenues and highlight all the important changes. We conclude with our considerations of the practical implications of the new Lisbon system for European and national public administrations.

Two new avenues of delegation of powers to the European Commission

Delegated Acts (Article 290 TFEU)

The first category created, under Article 290 TFEU, is that of Delegated Acts. The Commission is delegated the power to supplement or amend the non-essential elements of the basic legislative act and in return the legislators are granted control over the individual Delegated Acts, and the Commission itself. Table 1 displays the new procedure for Delegated Acts.

This procedure is a sharp deviation from past practice – namely the regulatory procedure with scrutiny (RPS) (Hardacre and Damen, 2009). In fact it is simplified because the Commission now presents its Delegated Act directly to both legislators at the same time without first passing *via* a committee. The legislators will then both have a time determined by the basic act (usually two+two months) to oppose the act on any grounds. There is also the possibility that the legislators can give their early approbation to a Delegated Act so that the Commission can adopt it much faster.

Compared to the pre-Lisbon situation a number of innovations need to be highlighted (see also Hardacre and Kaeding, 2011):

1. **No horizontal framework:** The first major innovation is that there is no horizontal framework to cover Delegated Acts so the legislators will be free to set the objectives, scope, duration and the conditions to which the delegation is subject in each and every legislative act.
2. **Absence of committee:** The next noticeable innovation is the absence of comitology committees and the requirement of the Commission to get the approval of Member State representatives.
3. **Right of opposition on any grounds:** In addition, Council or Parliament now has the power to oppose an individual Delegated Act on any grounds.
4. **Right of revocation:** The legislators are also granted the ultimate control mechanism for Delegated Acts – the right to revoke the delegation altogether. Again if either legislator became so dissatisfied with how the Commission was using its power to adopt Delegated Acts it could vote to revoke the delegation.

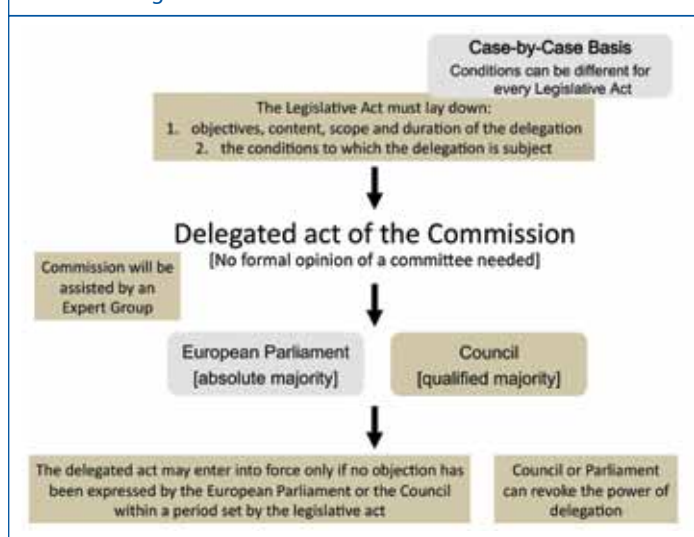
All in all, it is becoming clear that working with Delegated Acts will have to start in earnest at the legislative drafting phase because the objectives, scope, duration and the conditions to which the delegation is subject can change in every legislative act. This is already leading to longer negotiations of basic acts under the ordinary legislative procedure. Thereafter, the process will involve identifying the relevant expert group(s) assisting the Commission in drafting the Delegated Acts. Once the Delegated Acts have been forwarded to the legislators it is likely that there will be an increased amount of opposition as they can oppose anything they do not like in the Delegated Act (see also Hardacre and Damen, 2009; Kaeding and Hardacre, 2011).

Implementing Acts (Article 291 TFEU)

Article 291 designates Implementing Acts as the second category of tasks that can be delegated to the Commission. Here we find the ‘traditional comitology system’ and procedures that were in operation before Lisbon, although with some important changes in the newly adopted Implementing Acts Regulation 182/2011/EU. Whilst the ‘comitology’ committees remain in place, they now only operate under two main procedures.

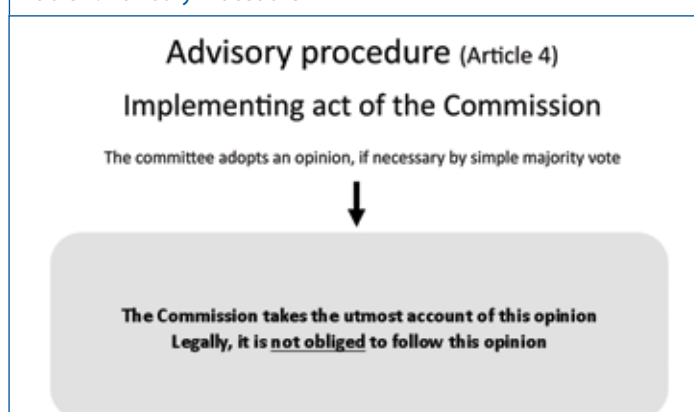
The first procedure according to Article 4 of Regulation 182/2011/EU (advisory procedure) is maintained and is used, as before, to deal with measures such as grant and funding approvals.

Table 1: Delegated Acts: The Procedure



Source: EIPA

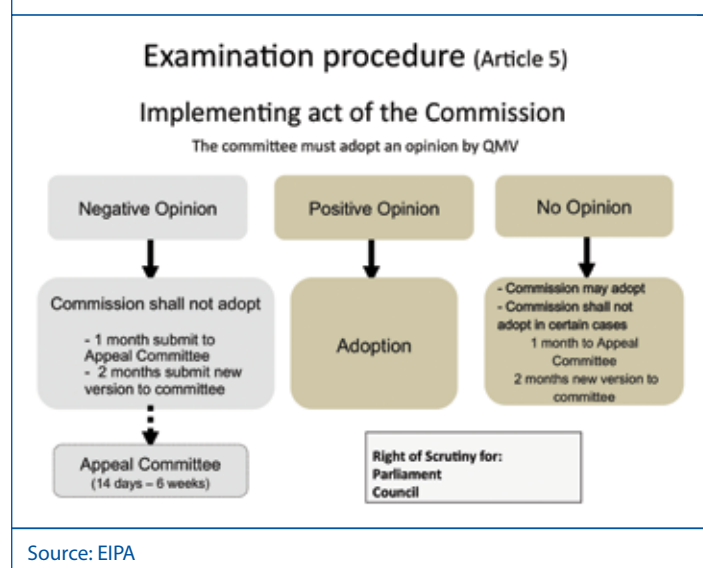
Table 2: Advisory Procedure



Source: EIPA

The second procedure, according to Article 5 of Regulation 182/2011.EU (examination procedure), is used for (amongst others) implementing acts of general scope, programmes with substantial budgetary implications, acts related to the Common Agricultural Policy (CAP) and fisheries, taxation and the Common Commercial Policy (CCP) (for more details on the new regime on Common Commercial Policy please consult Hardacre, 2011: Rule changes expose tension over trade policy, European Voice, 13 January 2011, p. 17).

Table 3: The Examination Procedure



The new examination procedure maintains the same voting system as the old regulatory procedure, such that the Commission needs to get a qualified majority in favour to be able to adopt an Implementing Act. If, on the other hand, the committee vote falls into the two other categories, things differ from past practice.

If the Committee is unable to find a qualified majority for or against, and hence issues 'no opinion' then the Commission will no longer ultimately be obliged to adopt the Implementing Act (something that was happening in the past with GMO authorisations and thus putting the Commission in a difficult position). Now the Commission may reconsider and resubmit the act to the committee. The Commission is also constrained in certain cases where there is no opinion. Firstly the Commission shall not adopt the Implementing Act if it is related to taxation, financial services, health and safety, or to safeguard measures; and secondly the Commission shall not adopt the Implementing Act if a simple majority opposes.

If the committee votes by qualified majority against the Implementing Act then the Commission will no longer forward it to the Council to take the final decision (as it did in the past) – although almost. The Commission will now forward the act to the Appeal Committee which is a new creation in the Implementing Acts Regulation. This committee will have one representative from each Member State (at the appropriate level – which will be that of Director-General of a Ministry or above *i.e.* political level) and will be chaired by the Commission. It will have the power to vote changes to the text, to adopt the text or to reject it. This committee can be equated to a political Comitology committee.

In addition to these two main procedures there are also two further possibilities:

1. **Exceptional Cases (Article 7):** In certain exceptional circumstances the Commission can adopt an act that has received a negative, or no, opinion from an examination committee but it must submit it immediately to the Appeal Committee. The Appeal Committee must find a qualified majority against to repeal the measure. This procedure can be used by the Commission to avoid significant disruption in agricultural and/or financial markets.
2. **Immediately Applicable Measures (Article 8):** The Commission can adopt an act that applies immediately (it cannot remain in force for longer than six months). The Commission must submit it to a Committee within 14 days and the Committee must find a qualified majority against to repeal the measure.

Implications for European and national public administrations

Working with 'comitology' now means working with two separate regimes: Delegated and Implementing Acts.

Delegated Acts are an entirely new world, notably with the abolition of comitology committees – although it is clear that the Commission simply uses other forms of groups for discussions, notably expert groups. The powers of the legislators are now considerable, with the discretionary right to object to an individual act or to revoke the delegation altogether. Whilst the opposition to an individual act remains an important decision to take, the fact that the legislators can now oppose on any grounds will likely open the door to an increased number of opposition – more likely from the Parliament. The Parliament will certainly be more lobbied on Delegated Acts – more than it was for RPS measures (Kaeding and Hardacre, 2011). Note that existing RPS procedures have not been automatically

aligned to Delegated Acts, so the RPS will continue to be used in committees until the basic act is revised – a process which should be finalised by mid-2014.

Implementing Acts remain subject to 'comitology' committees and the process of the Commission submitting draft acts for discussion and vote. The newly co-decided Implementing Acts Regulation 182/2011/EU entered into force on 1 March 2011 and provides the binding framework. For Implementing Acts the substantive changes are that there are now only two full procedures: advisory and examination. The Commission retains its right of initiative and the chairing of the committees, and the Parliament, now joined by Council, still only has the limited (but not to be neglected) right of scrutiny. Finally, the referral to Council has been replaced by referral to an Appeal Committee, which is the Member States in everything but name.

Conclusion

The key issues of Delegated Acts for European and national public administrations are:

1. There will be increased discussions of Delegated Acts in the legislative decision-making phase of the EU policy cycle, meaning that understanding Delegated Acts will be very important at this level. Delegated Acts are optional, so the Council does not have to delegate;
2. Member States will have to monitor how the Commission consults experts, with the possibility of making this compulsory by putting such a provision in the legislative act;
3. Impact Assessments: How many Delegated Acts will require proportionate impact assessments? Or perhaps they will have specific requirements in the legislative act like the Directive (2010/30/EU) on labelling and standard product information of the consumption of energy and other resources by energy-related products, which states in Article 10(3b) that, 'In preparation of a draft Delegated Act, the Commission shall assess the impact of the act on the environment, end-users and manufacturers, including small and medium-sized enterprises (SMEs), in terms of competitiveness including on markets outside the Union, innovation, market access and costs and benefits';
4. There will be more motivation to oppose Delegated Acts in both the Council and Parliament because the procedure is simpler and opposition does not require justification. This will increase lobbying of public administrations by external stakeholders.

In sum, national public administrations in the EU will have to develop a thorough understanding of what Delegated Acts are and where/when they can be used. Furthermore, they will find themselves required to interact more with stakeholders.

The key issues of Implementing Acts for European and national public administrations are the following:

1. The main challenge for national administrations here is to understand the new procedures and the role of the Appeal Committee;
2. There is also one outstanding issue of legal certainty: what happens in the case of no opinion under the examination procedure and then no opinion under the Appeal Committee; who has the final responsibility – the Commission or the Member States?

Overall, these two sets of challenges for national administrations are not without importance given the volume and significance of Delegated and Implementing Acts. In this sense there is one final set of challenges – the new areas that have to be aligned to these two new systems. The fields of agriculture, fisheries and the common commercial policy are all being aligned with Delegated and Implementing Acts in 2011; so national administrations do not have any time to waste in getting to grips with these challenges.