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THE EU AND THE WORLD: NEW CHALLENGES AND TRENDS

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Delegated Legislation and the Implications for European Integration.



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List of Abbreviations

CJEU	The Court of Justice of the European Union
Council	Council of Ministers
EC	Treaty Establishing the European Community
EP	European Parliament
RPS	Regulatory Procedure with Scrutiny
TEU	Treaty European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

The Lisbon Treaty, in an attempt to provide *inter alia* for more efficient lawmaking balanced with a democratic process¹, introduced a new typology of acts. Secondary legislation can now be grouped in three categories: legislative, delegated and implementing acts.² This paper however will only focus on Delegated acts and the implication for European integration. Delegated acts, as defined in Article 290 TFEU, seem to draw heavily on the pre-Lisbon RPS³. In this light, the question that rises is: what has actually changed to make it more efficient and democratic? And, how does it affect the wider process of European integration? To answer these questions we will first explain the scope and content of Article 290 TFEU in section 2. In Section 3 we will explore what actually has changed in respect to the pre-Lisbon RPS. Finally in section 4 we will discuss the implications for delegated legislation and draw a conclusion on how it affects the wider process of European integration.

2.1 The scope of Article 290 TFEU

The power of the Union to act is limited under the *principle of conferral*⁴. In other words all actions must depend on a prior legal basis⁵ in the Treaty.⁶ For that reason the adoption of delegated acts provided for in Article 290 is conferred only on the Commission.⁷ Subject to the conditions and exceptions specified, it includes the right to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of legislative acts. These two sentences summarize the general scope (*ratione personae* and *ratione materiae*) of delegated acts. First we will deal with the scope *ratione personae* (the beneficiaries), subsequently with its *scope ratione materiae* (the substantive scope).

2.2 Scope Ratione Personae

The on Roman law based principle of *Delegata potestas non potest delegari*⁸ forbids delegation on other bodies. In fact, the Court of Justice acknowledged that principle when it stated that “[a] delegating authority cannot confer upon the authority receiving the delegation powers different from

¹ Press release European Parliament, 23-03-2010.

² See Hofmann, H. 2009. 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', *European Law Journal*, 15, (4), p. 483.

³ See Article 202 EC and also 2006 amendment of Council Decision 1999/468/EC.

⁴ See Article 5 (2) TEU.

⁵ This legal basis defines the competence *ratione materiae*.

⁶ See Case C-26/62 [1963] ECR 1.

⁷ See Voermans, W. 2011. "Delegation is a Matter of Confidence," *European Public Law* 17, no. 2, p. 320 and Peers, S. & Costa, M. 2012. Accountability for Delegated and Implementing Acts after the Treaty of Lisbon, *European Law Journal*, Vol. 18, No. 3, May 2012, pp. 427–460.

⁸ One to whom something is delegated cannot (further) delegate; own translation and more specific see D. 50.17.54 (Ulpianus) < <http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Corpus/d-50.htm#17>>.

those which it has itself received under the Treaty”.⁹ However, when looking more closely at the *Meroni II* case, it becomes clear that it is not quite impossible to delegate powers on other bodies. The Court held in the latter case that delegation to institutions or organizations other than the Commission is allowed.¹⁰ The only requirement, is that such a delegation must be explicitly defined. However if Article 290 TFEU is to be interpreted as its predecessor (Article 202 EC) was, then only the Commission has the power to adopt delegated acts.¹¹

2.3 *Scope Ratione Materiae*

Article 290 TFEU, as said, allows for a legislative act to 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. Below we will more closely look at various issues involving the scope *ratione materiae*.

Article 290 (1) TFEU reads as follows:

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.

A Delegated act may therefore delegate to the Commission the power to: (1) adopt non-legislative acts of general application or (2) supplement or amend certain non-essential elements of the legislative act. Successively, they will be dealt with, in subsections a and b. In subsection c then, the administrative requirements of Article 290 TFEU in the light of the Common Understanding¹² will be examined. Subsection d, finally, deals with the conditions to which the delegation is subject.

a. *non-legislative acts of general application.*

Non-legislative acts of general application are defined as those not enacted via the ordinary (Article 289 (2) TFEU) or special (Article 294 TFEU) legislative procedure. The procedure by which the Commission prepares and adopts non-legislative acts however is not specified in Article 290 TFEU. As a result, this procedure needs to be explicitly specified in every legislative act. Such procedure could conceivably be at odds with the general principle of legal certainty. This principle requires, in

⁹ See Case C-9/56 [1958] ECR 133 (*Meroni I*) and Case C- 10/56 [1958] ECR 157 (*Meroni II*).

¹⁰ See Case C- 10/56 [1958] ECR 157 (*Meroni II*) and more precise see Voermans, W. 2004. *Toedeling van bevoegdheid*. The Hague: Boom Legal Publishers, p. 46 et seq.

¹¹ See Voermans (2011), pp. 324-325.

¹² See Common Understanding on delegated acts (Article 290 TFEU), Council of the European Union, 4 April 2011.

particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and, may take steps accordingly.¹³

b. *supplement or amend certain non-essential elements of the legislative act*

According to Article 290 TFEU the Commission can either supplement or amend certain non-essential elements of the legislative act. But what are non-essential elements of the legislative act?

First, the definition of the verbs “supplement” and “amend” needs to be established. In this regard it must be noted that there does not seem to be much discussion about the verb “amend”. Apparently the verb “amend” entails the power to insert or retire non-essential elements in legislative acts. The verb “supplement” however evokes much more debate and discussion.¹⁴ The reason for this debate and discussion about the verb “supplement” must be sought in the fact that it determines the limits in respect to Article 291 TFEU (implementing acts). Moreover it comprehends the scope of the EP in regard to a certain mechanism of control as provided for in Article 290 TFEU.¹⁵

In this connection, the Commission remarks, that:

the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, *leaving a margin of discretion to the Commission*. If it does, the measure could be deemed to "supplement" the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures.¹⁶ (emphasis added).

Subsequently Biondi *et al.* (2012), in directives 2010/40¹⁷ and 2010/30¹⁸, observed:

[that] ‘to supplement’ should be interpreted as granting the power to adopt legally binding provisions which complement legislative provision, by their nature often abstract, requiring more detailed specification to become operational.¹⁹

The limits of Article 290 TFEU in regard to Article 291 TFEU, so it could be argued in conclusion, are still determined by the EU legislator. However this does not imply that the term “supplement” is

¹³ See Case C-110/03 [2005] ECR I-2801, para 30 and Case C-308/06 [2008] ECR I-4057, para 69.

¹⁴ See COM(2009), 673 final, p.5 and Biondi, A., Eeckhout, P. & Riply, S. 2012. EU Law After Lisbon, New York: Oxford University Press, p.75 et seq.

¹⁵ Article 291 TFEU allows for “implementing” certain acts without providing the European Parliament a mechanism of control. See in this regard Biondi, *et al.* (2012), p.75 et seq.

¹⁶ See COM(2009), p4.

¹⁷ See Article 7 of Directive 2010/40 of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport [2010] OJ L207/1.

¹⁸ See Article 10 of Directive 2010/30 on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products [2010] OJ L153/1.

¹⁹ See Biondi, *et al.* (2012), p.75.

actually imperative. The verb “amend” could easily be used to cover addition as well as deletion.²⁰ Moreover, in the light of the remark of the Commission, it seems that the verb “supplement” entitles the Commission a certain margin of discretion.

This being so, the question remains, however, what non-essential elements of the legislative act are. First the judgment in *Rey Soda*²¹ will be discussed, as on the basis of this judgment it has been argued in the literature what constitutes essential elements. In *Rey Soda*, the Court held, at paragraph 9:

Since the objective of Article 155 of the Treaty (later, Article 211 EC Treaty) is the preservation of the balance between the powers of the council and the commission, *the powers conferred on the commission* by Article 37 (2) (now Article 31 EU Treaty) *must be interpreted strictly*. (emphasis added).

Finally, the Court noted at paragraph 10:

When Article 155 of the Treaty (later Article 211, EC Treaty) provides that ‘the commission shall exercise *the powers conferred* on it by the council for the implementation of the rules laid down by the latter’, it follows from the context of the Treaty in which it must be placed and also from practical requirements that the concept of implementation *must be given a wide interpretation*. (emphasis added).

To summarize the above: the delegation mandate must be interpreted strictly. Therefore, and as required by Article 290 TFEU, the legislative act must specify the essential elements of the area. What remains, the non-essential elements, can be delegated to the Commission. However these non-essential elements must be given a wide interpretation. In this connection, Craig aptly remarks, that:

it will however 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. They may lack the knowledge and time to delineate in the legislative act precise parameters for the exercise of regulatory choices.²²

In short, the court simply did not develop a clear set of principles on the basis of which can be determined what constitutes as certain non-essential elements.²³ Thus, it seems justified to conclude again that article 290 TFEU could possibly be at odds with the general principle of legal certainty.

²⁰ Craig, P.P. 2010. *The Lisbon Treaty: Law, Politics and Treaty Reform*. New York: Oxford University Press p. 276.

²¹ Case C-23/75 [1975] ECR 1289 (*Rey Soda*), para 10.

²² Craig (2010), p. 128.

²³ See Hofmann, H.C.H., Rowe, G.C. & Türk A.H. 2011. *Administrative Law and Policy of the European Union*. New York: Oxford University Press, p. 525.

Moreover, it seems that such flexible ‘standards’ could contradict the democratic values as embodied in the TFEU.

c. The administrative requirements of Article 290 TFEU

The next element to be discussed concerns the administrative requirements of Article 290 TFEU. Article 290 TFEU or, to be precise, Article 290 (1), paragraph 2 and (3) TFEU provides:

[1] 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.

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

The Council subsequently, *inter alia*, notes that delegated acts shall be published in the *Official Journal of the European Union*. Furthermore the Council introduced an *urgency procedure* for exceptional cases such as security and safety matters. A delegated act adopted under the latter procedure shall enter into force without delay and apply as long as no objection is expressed. Moreover they introduced several rules in regard to the use of delegated acts, to promote closer cooperation among the EP, the Council and the Commission.²⁴

d. The conditions to which delegation is subject

The final element of Article 290 TFEU to be discussed is that of the conditions to which the delegation is subject. Article 290 TFEU gives the EP (by a majority of its component members) or the Council (by qualified majority) the right to attach conditions to the delegation of powers. These conditions, as laid down in Article 290 (2) TFEU, *may be*:

- (1) The right to revoke the delegation; and
- (2) The right of tacit approval.

These conditions (*ex-post facto*) do not apply automatically and must therefore be explicitly laid down in the legislative act.²⁵ Moreover, it must be noted that the Council and EP only have *ex-post facto* control. The question remains, considering the wording of Article 290 (2) TFEU (“*may be*”), whether the conditions listed above are non-exhaustive. In this light, the wording “*may be*” could well imply that the EU legislator can impose not expressly anticipated conditions.²⁶

²⁴ See Common Understanding on delegated acts (Article 290 TFEU), Council of the European Union, 4 April 2011.

²⁵ See Voermans (2011), p. 322.

²⁶ See Hofmann *et al.* (2011), p. 529.

3. From RPS to Delegated acts

In many ways, the procedure for the adoption of delegated acts is the same as the pre-Lisbon RPS. In the first place when comparing RPS and delegated acts it becomes clear that the latter does not include a binding framework on the scope, content, duration and other important modalities for the delegation of powers, but these are decided on a case-to-case manner (as provided for in the Common Understanding²⁷).²⁸

A second important change is the departure from the obligation to run proposals through systems of ‘comitology’, in which national administrators functioned as representatives and extension of the Council.²⁹ Now the Commission consults expert groups and stakeholder, but these are no longer eligible to have a say (vote) in the eventual design of the proposal.

Thirdly, after the entry into force of the treaty of Lisbon the EP was purportedly placed ‘on equal footing as’ the Council. This means that the EU legislator, has the right to object proposals and revoke the delegated power at any time.³⁰ However there also seems to arise a certain inequality between the EP and the Council. Under RPS the EP needed only *simple majority* for control. At present they must have *majority of its component members* for control. This could result in a certain benefit for the Council, causing the latter being restraint more and the EP to start lobbying more during codecision procedure.³¹

Furthermore, the grounds on which these objections against delegated acts can be made are widened to any possible ground. Under RPS the EU legislator could only object legislation on one of these three bases: 1) [when the proposal exceeds] *the implementing powers provided for in the basic instrument* or 2) *that the draft is not compatible with the aim or the content of the basic instrument* or 3) *does not respect the principles of subsidiarity or proportionality*.³² Another big departure from the RPS is the

²⁷ See Common Understanding on delegated acts (Article 290 TFEU), Council of the European Union, 4 April 2011.

²⁸ See Kaeding, M. & A. Hardacre 2010. ‘The Execution of Delegated Powers after Lisbon. A timely analysis of the Regulatory Procedure with Scrutiny and its lessons for Delegated Acts’, EUI Working Paper RSCAS 2010/85, p. 13.

²⁹ See Brandsma, G. J. 2012. ‘The effect of information on oversight: the European Parliament’s response to increasing information on comitology decision-making’, *International Review of Administrative Sciences*, 78, (1), pp. 74-92.

³⁰ See Peers, S. & M. Costa. 2012. ‘Accountability for Delegated and Implementing Acts after the Treaty of Lisbon’, *European Law Journal*, 18, (3), p. 447.

³¹ Kaeding, M. & A. Hardacre (2011), *Delegated & Implementing Acts The New Comitology*, EIPA Essential Guide 4th edition, p. 14.

³² 2006 amendment of Council Decision 1999/468/EC, art. 5a (3b).

possibility for the EU legislator to withdraw its delegated powers altogether by employing the ‘right of revocation’.³³

To conclude on the differences between RPS and delegated acts, figure 1 briefly summarizes all changes.

RPS	Delegated Acts
A framework	No binding framework Case-by-case basis
Necessity to obtain an opinion from a comitology committee	No compulsory consultation of committees
EP and Council are completely on an equal footing	Perfect equal footing between EP and Council
Limited grounds for the right of opposition	No limited grounds for the right of objection
	Right of revocation
Ex-ante control	Ex-post facto control

Figure 1

The differences between RPS and delegated acts briefly summarized. Adapted from “Delegated & Implementing Acts. The New Comitology” by Hardacre & Kaeding (2011).³⁴

4. Conclusions and discussion.

In this paper, we have firstly examined the scope of Article 290 TFEU. Secondly, we have attempted to outline the difference between its predecessor (RPS). In this light, we have identified the following key aspects. First, Article 290 TFEU does not explicitly prohibit delegation on other bodies apart from the Commission. This is entirely at odds with its predecessor (Article 202 EC), which in turn explicitly did not allow for delegation on other bodies apart from the Commission. This could open the door to less democratic aspects of the delegation procedure. Secondly, the verb “supplement” does not seem to be imperative for Article 290 TFEU. By using the verb “supplement” the Commission seems to entitle itself a larger margin of discretion. Thirdly, there is no clear set of principles on the basis of which can be determined what constitutes as certain non-essential elements. Such an amorphous definition is in flat contradiction to the general principle of legal certainty and therefore does not enhance the notion of democratic values. A similar problem arises with the non-exhaustive conditions (i.e. by using the wording “*may be*” and therefore allowing not expressly anticipated conditions), as provided for in Article 290 (2) TFEU. Finally, even though the EP would purportedly be placed on the same equal footing as the Council, by requiring the EP to attach conditions (provided in Article 290

³³ See Kaeding & Hardacre (2010), p. 14.

³⁴ See Hardacre & Kaeding (2011).

(2) TFEU) with a *majority of its component members* it will lead to a more ‘ambitious’ EP. It must be noted in this light, that both institutions control ex post facto.

Shortly summarized it seems that the changes resulting from the adoption of Article 290 probably allow for a more efficient adoption of delegated acts. However this efficiency comes at a high price: because it probably will not be balanced with important aspects of the democratic process (as summed up above). Looking at this development in the wider context of European Integration, and to be more specific around the adoption of the Lisbon Treaty, we fear that this will erode the safeguarding and strengthening process of European integration.