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DELEGATED AND IMPLEMENTING ACTS

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I. Introduction

The Lisbon Treaty created the dichotomy between delegated and implementing acts in Articles 290 and 291 TFEU, having taken over the core assumptions in this regard from the Constitutional Treaty.[1] The chapter begins by considering the core assumptions underlying

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[1] P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 *European Law Review* 671; R. Schütze, '"Delegated Legislation" in the (New) European Union: A Constitutional Analysis' (2011) 74 *Modern Law Review* 661; S. Peers and M. Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon' (2012) 18 *European Law Journal* 427; J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU law' (2012) 49 *Common Market Law Review* 885; J. Mendes, 'Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design' (2013) 19 *European Law Journal* 22; T. Christiansen and M. Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts' (2013) 19 *European Law Journal* 42; A. Alemanno and A. Meuwese, 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in "New Comitology"' (2013) 19 *European Law Journal* 76; M. Kaeding and A. Hardacre, 'The European Parliament and the Future of Comitology after Lisbon' (2013) 19 *European Law Journal* 382; C.-F. Bergstrom and D. Ritleng (eds), *Rulemaking by the European Commission, The New System for Delegation of Powers* (Oxford University Press 2016); M. Chamon, 'Institutional Balance and the Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) 53 *Common Market Law Review* 1501.

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the Lisbon model and the rationale for the division between the two species of secondary acts. The subsequent analysis then addresses the tensions and strains in the application of this divide in the years since the Lisbon Treaty was ratified.

There is discussion of the 'analytical and temporal' tension that lies at the heart of the distinction between delegated and implementing acts. It includes analysis of the relative use of the two types of measure, the factors that have driven legislative assignation of secondary measures to the two categories, and judicial attempts to clarify the distinction between the two. The focus then shifts to the 'constitutional' dimension, signifying in this respect the ways in which key constitutional assumptions underlying the Lisbon schema have been undermined by political change in the form of, for example, the Common Understanding, and the impact that this has had on the relative power of the Council, European Parliament, and Commission.

This is followed by the 'institutional' tension, which connotes for these purposes the way in which institutional change, such as establishment of the new European Supervisory Authorities in the financial area, has impacted on the regime for delegated and implementing acts in the Lisbon Treaty. The penultimate tension is 'legal form' and the way in which the relative use of soft law and hard law can affect application of the normative assumptions underlying Article 290 and Article 291. The discussion concludes with the 'conceptual' dimension, which signifies the ways in which administrative choice as to whether to develop policy through rule-making or adjudication can affect the Lisbon dichotomy between the two kinds of act.

II. The Lisbon Model: Core Assumptions

A. Secondary Norms: Their Centrality and Importance

This chapter is concerned with the making and legitimation of secondary norms, which are often legislative in nature. The paradigm in democratic statal systems is for legislation to be enacted by the legislature. The primary legislation is then complemented by secondary norms, which flesh out the principles contained in the enabling statute.

The centrality and importance of such secondary norms to the administrate state is well known. The legislature may not be able to foresee all ramifications of the legislation when the initial statute is made. It may have neither the time nor the expertise to address all the issues in the original legislation. The measures consequential to the original statute may have to be passed expeditiously, which precludes the use of the procedures for primary legislation. These reasons gain added force when viewed in the context of much modern legislation, which is often framed in relatively open-textured terms, thereby necessitating greater specification through subsequent action. The problem of securing the legitimacy of rules is especially significant within the EU, given that it functions in many respects as a regulatory state.[2]

The secondary norms that are enacted will vary depending on the subject matter of the primary legislation and the nature of the issue that requires elucidation. On some occasions the secondary measure will be an individualized decision, made by the person to whom authority has been delegated by the primary legislation. In other instances, the secondary norm will be legislative in nature. It will take the form of a general rule that is intended to apply to all

[2] G. Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; G. Majone, *Regulating Europe* (Routledge 1996); G. Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5.

those falling within a certain factual situation. The terminology used to describe such norms varies as between legal systems. Some employ the language of delegated or secondary legislation. Others prefer the appellation rule-making. Yet others use terminology such as directive.

The method by which such measures are made also varies. The premise in some systems is that norms of a legislative nature should so far as possible be legitimated through some oversight by the legislature itself, even if the procedures through which this is done differ from those used for primary legislation. This legitimation from the 'top' via the legislature may then be complemented by legitimation from the 'bottom' through participation in rule-making by affected parties pursuant to a legal regime providing the framework for such participatory rights. The premise in other regimes is that the executive should have some autonomous power to make secondary rules of a legislative nature, the principal check lying with the courts through judicial review.

It is tempting to think in terms of a simple divide between the primary legislation which captures all points of principle, while secondary norms address insignificant points of detail, with the corollary that the latter can therefore be left to the executive relatively unencumbered by external constraint. This does not represent reality. There is no simple dichotomy between principle and detail. There is no ready equation between detail and absence of political controversy. Secondary norms may deal with uncontroversial detail. They may often address points of principle or involve issues of political choice which are every bit as controversial as those dealt with by the primary legislation.

The preceding considerations are equally applicable in relation to the EU. There is, moreover, a discernible pattern in the inter-relationship between primary and secondary norms within the EU. Regulatory intervention begins with the primary norm, whether a regulation, directive or decision, regulation, which embodies the political choices that shape the regulatory schema. This will then be further fleshed out through the enactment of secondary norms. Problems with the application of the primary regulation become apparent. There may be issues that require more detailed specification; there may be difficulties that were not foreseen when the primary norm was enacted; or there may external factors that have affected the primary norm. Such considerations led to Comitology regulations, which sought to remedy the malaise revealed in the primary regulation. After a period of time the primary regulation is replaced. The new primary regulation embodies lessons learned from the previous regime, and some of the subject matter in the secondary rules may be embodied in the new primary regulation. The process then begins again, with secondary rules being crafted pursuant to the new primary norm. The secondary rules will always outnumber the primary norms by a very significant factor.

B. Comitology: The Pre-Lisbon Model

The Lisbon model is predicated on certain conceptual assumptions as to the categories of EU legal acts, this being most visible in the divide between legislative, delegated, and implementing acts contained in Articles 288–294 TFEU. This schema concerning the hierarchy of norms was taken over, like much else, from the Constitutional Treaty.[3] A brief word

[3] A. von Bogdandy, J. Bast, and F. Arndt, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis' (2004) 23 *Yearbook of European Law* 91; K. Lenaerts and M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11 *European Law Journal* 744; J. Liisberg, 'The EU Constitutional Treaty and its Distinction between Legislative and Non-Legislative Acts' in B. Olsen and K. Sorensen (eds), *Regulation in the EU* (Thomson 2006) 133–68; B. de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S. Griller and J. Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty* (Springer 2008) 79–108; H. Hofmann, 'Legislation, Delegation and Implementation

concerning the position prior to the Lisbon Treaty is, however, helpful in order to put matters into perspective.

Prior to the Lisbon Treaty there was no divide between what are now termed delegated and implementing acts. The standard pattern was for there to be a 'primary' regulation or directive that governed a particular policy area. This was complemented by 'secondary' legal measures that 'implemented' the primary rules in accord with Article 202 EC. This admixture of primary and secondary rules is common in legal systems.

The Council recognized from the outset of the EEC that not everything could be done by primary regulation and that it would need to delegate power to the Commission to make secondary norms. The Council was, however, unwilling to accord the Commission a blank cheque, because it realized that regulatory choices and contentious issues could be resolved through such measures, the devil being in the detail. This was the rationale for the birth of what became known as Comitology, whereby national technocrats would sit with the Commission when it made these secondary measures, with the possibility of sending them to the Council in accord with the management and regulatory committee procedures if the national technocrats disagreed with the Commission proposal.[4]

The European Parliament was not happy with this regime, because although it had some role in the Comitology process, it was very much dominated by Council and Member State interests. The Comitology committees were composed of national representatives with expertise in the relevant area. The 1990s saw increased opposition to Comitology by the European Parliament. It expressed disquiet over Comitology from the very outset, but the European Parliament's opposition grew commensurately with its increased status in the making of primary regulations and directives. The reason for this is not hard to divine. It had been on the side-lines of the legislative process for the first three decades of the Community's existence. This changed with the introduction of the cooperation and co-decision procedures. The significance of these gains was, however, undermined by the European Parliament's exclusion from the making of secondary norms, which would often entail important issues of principle, practical detail, or political choice.

The European Parliament fought the battle against Comitology on the legal and political front.[5] It argued that Article 202 EC could not be regarded as the basis for Comitology where the primary acts were adopted pursuant to co-decision, but only for such acts adopted by the Council alone. The Council rejected this view,[6] and drew comfort from the ECJ which held, albeit without detailed consideration, that acts of the Council covered those undertaken jointly with the European Parliament pursuant to co-decision, as well as acts made by the Council alone.[7]

under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 *European Law Journal* 482; B. Driessen, 'Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU' (2010) *European Law Review* 837; P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press 2010) chs 2, 7.

[4] C.-F. Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (Oxford University Press 2005).

[5] K. Bradley, 'Maintaining the Balance: The Role of the Court of Justice in Defining the Institutional Position of the European Parliament' (1987) 24 *Common Market Law Review* 41; K. Bradley, 'Comitology and the Law: Through a Glass Darkly' (1992) 29 *Common Market Law Review* 693; K. Bradley, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 *European Law Journal* 230.

[6] J.-P. Jacque, 'Implementing Powers and Comitology' in C. Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) ch 4.

[7] Case C-259/95 *European Parliament v Council* [1997] ECR I-5303, [26]; Case C-378/00 *Commission v European Parliament and Council* [2003] ECR I-937, [40].

The ECJ's jurisprudence served to empower the Council and Commission at the expense of the European Parliament by adopting a broad concept of implementation. Thus, while the ECJ insisted that the primary regulation or directive must embody its 'essential elements', it interpreted this loosely, thereby allowing a broad range of implementing measures to be adopted through secondary regulations according to Comitology procedures from which the European Parliament was largely excluded.[8] The European Parliament also contested the committee procedures through the political process.[9] The process of legislative attrition was wearing for all involved and hostilities were temporarily lessened through the *Modus Vivendi* in 1994:[10] the relevant committee of the European Parliament would be sent general draft implementing acts at the same time as the Comitology committee set up by the basic act.

The position of the European Parliament was improved by the revised Comitology Decision, made pursuant to Declaration 31 of the Treaty of Amsterdam. Its passage was difficult,[11] and it was finally adopted in 1999.[12] The management and regulatory committee procedures were simplified to some degree. There were efforts to make the system more accessible to the public. The European Parliament was accorded a greater role than hitherto. It was given power concerning rules made pursuant to the regulatory procedure, and the European Parliament could now indicate by resolution that draft implementing measures, submitted to a committee pursuant to a primary act adopted by co-decision, would exceed the implementing powers in that act. The European Parliament was also given a right to be informed by the Commission of committee proceedings, receive committee agendas, voting records, and draft measures submitted to the committees for implementation of primary law made under the co-decision procedure. In a subsequent agreement between the European Parliament and the Commission,[13] the latter stated that it would also forward to the European Parliament, at its request, specific draft measures for implementing basic instruments even if not adopted under co-decision, where they were of particular importance to the European Parliament. The European Parliament can moreover request access to minutes of committee meetings.[14]

The European Parliament's position was further improved by the 2006 amendment to the 1999 Decision,[15] the catalyst for this being belated acceptance of the European Parliament's objection to the 1999 Comitology Decision where co-decision applied.[16] The Decision introduced a new 'regulatory procedure with scrutiny', which gives the European Parliament greater rights than hitherto.

[8] Case C-156/93 *European Parliament v Commission* [1995] ECR I-2019, [18]–[22]; Case C-417/93 *European Parliament v Council* [1995] ECR I-1185, [30].

[9] R. Corbett, *The European Parliament's Role in Closer EU Integration* (MacMillan 1998) 347–48.

[10] *Modus Vivendi* of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in art 189b of the EC Treaty [1996] OJ C102/1.

[11] Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (n 4) 249–64.

[12] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23; K. Lenaerts and A. Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision' (2000) 37 *Common Market Law Review* 645.

[13] Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 99/468/EC of 28 June 1999 [2000] OJ L256/19, [2].

[14] Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463.

[15] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers by the Commission [2006] OJ L200/11.

[16] 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.

The Commission for its part always chafed at what it regarded as unwarranted Comitology constraints on its executive autonomy. The front line Directorates-General might have been content working with national technocrats, but the higher levels within the Commission were never happy with management and regulatory committees. The Commission strategy was to devise some method whereby it could be freed from these limitations.[17] It advocated a regime of ex ante and ex post constraints on non-legislative acts of the kind that are now contained in Article 290 TFEU.

C. Comitology: The Lisbon Model

The Commission strategy was fulfilled in part through the Constitutional Treaty, which distinguished between secondary measures that were 'legislative'[18] or 'quasi-legislative' in nature, delegated acts, and those that could be regarded as more purely 'executive', implementing acts. This distinction was then embodied in the Lisbon Treaty, which is predicated on certain assumptions as to the way in which these norms are made. This is indeed a defining feature of the Lisbon model.

Thus, in relation to legislative acts it is central to the Lisbon schema in Article 289 TFEU that the ordinary legislative procedure,[19] the successor to co-decision, should truly be regarded the default method for the enactment of legislative acts, subject to limited instances where a special legislative procedure was mandated. This message was further reinforced by Article 14(1) and Article 16(1) TEU, which provide that the European Parliament and the Council jointly exercise legislative authority in the EU.

In relation to delegated acts, Article 290 states that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. A defining feature of the new Lisbon order was the formal exclusion of old style Comitology committees, to be replaced by the ex ante and ex post controls specified in Article 290. The ex ante control requires that the legislative act should specify the essential elements of the area, and that the objectives, content, scope, and duration of the delegation of power must be explicitly defined in the legislative acts. The ex post control consists either of the nuclear option, which is to revoke the delegation, or the less extreme response, whereby it is open to the Council or European Parliament to veto the particular delegated act. The conceptual premise underlying this schema is that subject to these controls the Commission has regulatory authority and autonomy over delegated acts. There are, however, some advisory committees, which operate in an informal world structured by a Common Understanding between the major institutional players.[20] The very fact that some looser form of advisory committees continue to exist in the post-Lisbon world should not mask the change that has occurred. The Commission went to considerable lengths to devise a scheme for delegated acts with the express intent that it would lead to the demise of a regime that it had resisted for many years.

[17] European Governance, COM(2001) 428 final, [20]–[29]; Institutional Architecture, COM(2002) 728 final, [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.

[18] TFEU art 290 states that delegated acts are non-legislative, but this simply reflects the formal position that under the Treaty legislative acts are those made in accordance with a legislative procedure, TFEU art 289. The appellation non-legislative applied to delegated acts should not therefore mask the fact that they are commonly legislative or quasi–legislative in nature, in the sense that they are acts of general application that establish secondary rules, which specify in greater detail the meaning or application of articles within the legislative act itself.

[19] The details of the procedure are set out in TFEU art 294.

[20] Common Understanding on Delegated Acts, Council 8753/1/11, Brussels (14 April 2011).

In relation to implementing acts, Article 291(2) TFEU provides that where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or in limited instances on the Council. Article 291(3) TFEU stipulates that provision should be made for control of the implementing powers by the Member States, which thereby ensured the survival of Comitology in relation to implementing acts, as regulated by the new Comitology Regulation.[21] The conceptual assumptions in this area are that these committees are representatives directly of the Member States, with the consequence that there is no formal recourse to the Council in the event that the committee disagrees with the Commission proposal; there is a very limited role for the Council and European Parliament in formal terms; and the emphasis is squarely on national technocrats as representatives of the Member States.[22]

The constitutional implications of the different regimes for delegated and implementing acts were noted by Advocate General Jääskinen.[23] He stated that the TFEU had introduced a 'sharp conceptual distinction between delegated acts and implementing acts'.[24] Article 290 delegated acts were non-legislative (regulatory) acts of general application adopted by the Commission to amend or supplement non-essential elements of a legislative act. Article 291 TFEU implementing acts could be either regulatory acts or individual administrative decisions, and were adopted by the Commission or the Council to secure uniform implementation of legally binding EU measures. The principal concern in relation to delegated acts pertained, said the Advocate General, to democratic accountability, viz how much legislative power could be delegated and how could the exercise of such power be controlled by the legislature.[25] By way of contrast, the main constitutional focus in relation to implementing acts related to 'respect for the primary competence of the Member States with respect to implementation of EU law, and the institutional balance between the Council and the Commission when they assume implementing roles'.[26]

There are, however, a number of reasons why the assumptions underlying the Lisbon model have been called into question in the years since the Lisbon Treaty was ratified. The remainder of this chapter explores tensions in the Lisbon schema.

III. Analytical and Temporal: The Fragile Divide between Articles 290 and 291 TFEU

A. The Analytical and Temporal Problem

The creation of two types of measure below legislative acts necessarily demands a criterion to distinguish between them. The European Parliament attested to the difficulty of drawing the divide, and the contestation that it provoked in the consideration of legislative dossiers.[27] The nature of the criterion is clear from Article 290 TFEU, which stipulates that an act that

[21] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.

[22] Craig (n 1).

[23] Case C-270/12 *United Kingdom v Council and Parliament* EU:C:2013:562.

[24] Ibid [81].

[25] Ibid [83].

[26] Ibid [83].

[27] Committee on Legal Affairs, Report on follow up on delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, A7-0435/2013, Rapporteur J. Szájer (4 December 2013).

amends or supplements a legislative act must be a delegated act. It is the application of this criterion that has proven problematic from the outset, more especially that part concerning supplementation of a legislative act, since it is very difficult to conceive of any act made pursuant to a legislative act that does not in some manner supplement that legislative act. If a secondary measure does so it must be a delegated act. If it does not, then it can be an implementing act.

All secondary measures, however, involve some addition to the basic or primary act. Many thousands of secondary measures have been enacted since the inception of the EEC. In the paradigm case they are of general application and bring greater exactitude to the meaning of an article of the primary act. Thus, for example, there might be a complex primary act dealing with agriculture, and a secondary measure specifies in greater detail one part of the primary act relating to, for example, the requirements for the independence of agencies that pay money pursuant to the primary regulation. Such measures clearly 'add something' to the primary act. This will be equally true for any measure classified as an implementing act in the post-Lisbon world, since the very specification of uniform conditions of implementation will be 'adding something' to the enabling provision in the legislative act. The Lisbon schema therefore demands the drawing of the following difficult distinction.[28]

It might be considered that the article in the legislative act sufficiently resolved the relevant issues, the conclusion being that the secondary measure, while obviously imbuing the article of the legislative act with greater detail, and hence 'adding something' or 'fleshing it out', did not supplement it so as to trigger recourse to Article 290, and therefore Article 291 could be used.

It might in other instances be considered that the relevant article in the legislative act is less definitive, the conclusion being that while the legislative act provided sufficient guide as to essential principles so as to be lawful under Article 290, the secondary measure nonetheless 'supplemented' it through fleshing out the meaning of the non-essential elements, and therefore Article 290 had to be used.

The difficulty in this respect is exacerbated by the fact that the answer will depend on the degree of abstraction or specificity with which the Court reads the background legislative act. Thus, other things being equal, if the Court of Justice of the European Union (CJEU) takes a relatively abstract view on this issue, the consequence will be to allow much filling in of detail through an implementing act, even if that detail clarifies matters that were not specified in the legislative act itself, provided only that it falls within the general aims of the legislative act. The CJEU might, alternatively, demand greater specificity in this respect, with the consequence that the detailed fleshing out of the legislative act will be regarded as supplementing it and hence a delegated act will be required.

Advocate General Jääskinen acknowledged that the borderline between 'supplementing a legislative act with non-essential elements and providing more detailed implementing rules is not always easy to draw',[29] but contended that the existence of such borderline cases did not imply the absence of clear cases on either side of the line. There is truth in this. The salient issue is, however, the relative ease or difficulty of identifying the clear cases and, by way of corollary, the breadth of the grey area. The reality is in many instances that plausible arguments could be made either way for classification of an act as delegated or implementing.

[28] Craig (n 1).
[29] Case C-270/12 *United Kingdom v Council and Parliament* (n 23) [78] (AG Jääskinen).

The argument advanced by Advocate General Jääskinen that implementing acts are 'quite different' from delegated acts because the former enable 'the promulgation of the normative content of the act that is being implemented, in a more detailed manner, in order to facilitate its application', while the latter obviate the EU legislature from the need to amend or supplement non-essential elements of a legal act, does not with respect withstand examination.[30]

The reality is that both delegated and implementing acts imbue the normative content of the relevant measure with greater specificity. This is indeed exemplified by the instant case. The UK challenged Article 28 of Regulation 236/2012,[31] which was a legislative act empowering ESMA to act where there was a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'. This was then supplemented by Commission Delegated Regulation 918/2012, Article 24 of which defined in greater detail the meaning of the criterion in the legislative act.[32] It supplemented the legislative act by imbuing Article 28 with greater normative specificity.

The distinguishing feature as laid down in Article 290 TFEU is that delegated acts must be used when this occurs through amendment or supplementation of the non-essential elements of a legislative act. Given that all secondary measures entail some addition to the earlier measure this then necessitates inquiry as to when this must be achieved through a delegated act and when it can occur through an implementing act. The answer to that inquiry requires the drawing of the difficult line set out above.

The difficulties in this respect are evident in the four cases analysed below. The first of these, *Biocidal Products*,[33] provided little guidance on the nature of the distinction between delegated and implementing acts, leaving the choice largely to the EU legislature, which is unsatisfactory for the reasons set out below. The second decision, *Visa Reciprocity*,[34] reveals the difficulties in deciding whether a secondary measure amends a legislative act and thus must be made through a delegated act. The third decision, *EURES Network*,[35] reveals the complexities of deciding whether an act supplements a legislative act and hence must be done by a delegated act, while the fourth case, *Connecting Europe Facility*,[36] bears testimony to the need to distinguish carefully between grant of power to amend and to supplement within Article 290.

The CJEU's initial decision on the divide between delegated and implementing acts was *Biocidal Products*.[37] A legislative act had been enacted concerning biocidal products and empowered the Commission to make implementing regulations pursuant to Article 291. The Commission contended that Article 290 should have been used, because the regulation supplemented the legislative act and thus should be regarded as a delegated act.

[30] Ibid [77]. The ECJ did not advert to this particular issue when giving judgment; see Case C-270/12 *United Kingdom v Council and Parliament* (n 23).

[31] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.

[32] Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 (n 31) with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events [2012] OJ L274/1.

[33] Case C-427/12 *Commission v European Parliament and Council* EU:C:2014:170; D. Ritleng, 'The Dividing Line between Delegated and Implementing Acts: The Court of Justice Sidesteps the Difficulty in *Commission* v. *Parliament (Biocides)*' (2015) 52 *Common Market Law Review* 243.

[34] Case C-88/14 *European Commission v European Parliament v Council* EU:C:2015:499.

[35] Case C-65/13 *European Parliament v Commission* EU:C:2014:2289.

[36] Case C-286/14 *European Parliament and Council v Commission* EU:C:2016:183.

[37] Case C-427/12 *Commission v European Parliament and Council* EU:C:2014:170.

The Commission argued that the power conferred by Article 291 TFEU was purely implementing in nature, whereas that contained in Article 290 was a quasi-legislative power. It contended that the choice as between a delegated and an implementing act should be based on objective and clear factors that were amenable to judicial review, a view supported by the European Parliament.[38] The respective scopes of Articles 290 TFEU and 291 TFEU were mutually exclusive and implementing acts could not affect the content of the legislative act. If the purpose was to adopt non-essential rules of general application, which completed the normative framework of the legislative act, then those rules supplemented the legislative act and had to be made through Article 290. If, however, the purpose was merely to give effect to the rules already laid down in the basic act, while ensuring uniform conditions of application within the EU, then Article 291 could be used.[39]

Advocate General Cruz Villalon examined the distinction between delegated and implementing acts at some length, noting the different purposes of the respective provisions, the former being to accord the Commission with some regulatory power to amend or supplement the legislative act, subject to the conditions in Article 290, the latter being to give the Commission implementing powers normally reserved to Member States where this was necessary to ensure uniform conditions for implementation. For the Advocate General, the key difference between the two was the 'fact that delegation allows a measure of discretion which is not mirrored in the case of implementation' in the sense that 'the legislature delegates to the Commission the ability to decide issues that, in principle, it should itself have decided, whereas implementation under Article 291 TFEU operates in relation to provisions the content of which has, as regards the substance, been defined by the legislature'.[40]

This may well be so, but the criterion used by the Advocate General restates the analytical problem. It does not with respect resolve it. Given that all delegated and implementing acts 'add something' to the legislative act, it still must be determined when that should be regarded as supplementing the legislative act so as to trigger Article 290, and when it should not be so regarded so as to justify recourse to Article 291. The answer to that inquiry demands application of the criterion set out above, or something analogous thereto.

In its judgment, the CJEU acknowledged that prior to the Lisbon Treaty the term 'implementing powers' in Article 202 EC covered the entire terrain now divided between delegated and implementing acts. The Court, however, provided little by way of guidance as to the divide between the two species of act, saying merely that delegated acts supplemented or amended non-essential elements of the legislative act, whereas implementing acts enabled the Commission to provide further detail in relation to the content of a legislative act, in order to ensure that it was implemented under uniform conditions in all Member States.[41] The CJEU did not, therefore, sharpen the nature of the analytical divide, but chose rather to leave considerable choice to the EU legislature, as is readily apparent from the following extract.[42]

> It must be noted that the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. Consequently, judicial review is limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 needs only the addition of

[38] Committee on Legal Affairs (n 27).
[39] Ibid [22]–[23].
[40] Case C-427/12 *Commission v European Parliament and Council* EU:C:2013:871, [62].
[41] Case C-427/12 *Commission v European Parliament and Council* (n 33) [37]–[39].
[42] Ibid [40].

> further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.

This approach obviated the need for the Court to give clear guidance on the nature of the dichotomy between delegated and implementing acts. Some may approve this type of approach,[43] but it is problematic. The difficulty resides in the very premise in the extract, viz that the EU legislature has discretion as to whether to confer a delegated or an implementing power on the Commission. This proposition elides two distinct issues, these being the legislature's power to use both delegated and implementing acts, and whether the conditions for the application of the respective types of act have been met.

Thus, it is true that the legislature has 'discretion' as to the former issue, but only in the reductionist sense that the Lisbon Treaty makes provision for both delegated and implementing acts, with the consequence that it is open to the EU legislature in the legislative act to choose whether further rules should be made pursuant to Article 290 or Article 291.

This provides, however, no foundation for the conclusion that the EU legislature has 'discretion' as to the latter issue, which is whether the conditions for the application of Article 290 or Article 291 have been met in any particular instance. Thus, the fact that the EU legislature may take the view that, for example, an implementing act will suffice for rules made pursuant to a particular article of the legislative act because they only add some further detail that does not thereby amend or supplement its non-essential elements does not 'make it so'. This is more especially so given that the analytical problem is compounded by a temporal one. The EU legislature will stipulate the type of secondary act to be used pursuant to different articles of the legislative act. However, the particular delegated or implementing act has by definition not been made at this point. It is only when it is made that it can be determined whether it does in reality conform to the definition of a delegated or implementing act provided in the Treaty. This problem is further compounded by the fact that different procedures are used for the two kinds of act, with the consequence being that once an act is prima facie regarded as being a delegated rather than an implementing act, or vice versa, the institutions will be reluctant to accept that it should be reclassified since it would render the procedure for its enactment ultra vires.

The difficulties of deciding whether a secondary measure amends a legislative act is exemplified by the *Visa Reciprocity* case.[44] The EU operated a system whereby nationals from certain third countries did not have to secure a visa before entering the EU, whereas those from other countries had to do so. However, if a country came in the former category, its exemption from visa requirements could be suspended if it imposed such requirements on nationals from an EU Member State. The legal act through which this decision was made varied depending on the length of time for which the third country persisted with its visa requirements for nationals of an EU Member State.

There were three stages. The first stage involved adoption by the Commission of an implementing act suspending the exemption from the visa requirement for certain categories of nationals of the third country for six months, which could be extended. The second stage became operative where the third country still maintained its visa requirement for nationals of a Member State: the Commission could then issue a delegated act suspending the

[43] Bast (n 1).

[44] Case C-88/14 *European Commission v European Parliament v Council* (n 34); M. Chamon, 'The Dividing Line between Delegated and Implementing Acts: The Court of Justice Settles the Issue in *Commission v Parliament and the Council*' (2015) 52 *Common Market Law Review* 1617.

exemption from the visa obligation for all nationals of that third country for twelve months, and inserted in the Annex to the parent regulation a footnote indicating that the exemption from the visa requirement had been suspended with regard to that third country, specifying the period of the suspension. The third stage related to the permanent reinstatement of the visa obligation, which required the ordinary legislative procedure.

The Commission argued that the requirement for a delegated act at the second stage was inconsistent with Articles 290–291, since the twelve-month suspension did not entail any amendment or supplementation of the parent regulation, and hence an implementing act should suffice. It further argued that the placing of a footnote in the Annex to the parent regulation, signifying that the visa exemption was suspended, was a 'a mere technical tool used abusively in order to disguise the implementing act as a delegated act'.[45]

The CJEU disagreed. It began by reiterating its finding from the previous case that the EU legislature had discretion as to whether to proceed through a delegated or an implementing act.[46] This was, however, qualified by the need to comply with the criteria in the Treaty for the divide between delegated and implementing acts. The Court held that the existence of discretion in relation to the secondary measure was not determinative in this respect. A delegated act would have to be used if the secondary measure amended or supplemented non-essential elements of the legislative act.[47] The CJEU concluded that a delegated act was correctly prescribed for the second stage of the procedure, because it reintroduced, for a period of twelve or eighteen months, a visa obligation for nationals of a third country that had previously been exempt from that requirement, and therefore amended, if only temporarily, the normative content of the legislative act.[48]

The *EURES Network*[49] case exemplifies the difficulty of deciding whether an act supplements a legislative act. It was concerned with implementing measures adopted by the Commission pursuant to Article 38 of Regulation 492/2011 concerning free movement of workers.[50] The contested implementing measure was concerned with the creation and functioning of the EURES Network, which was designed to enhance knowledge of job vacancies in the EU and facilitate the filling of such placements. The European Parliament argued that the Commission implementing decision could not be made pursuant to Article 291, because six aspects thereof supplemented the legislative act. The CJEU accepted that 'in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements'.[51] It nonetheless rejected the claim, after having analysed each aspect of the contested implementing decision that the European Parliament said were problematic. Space precludes further examination of the Court's reasoning in this respect. Suffice it to say that the implementing decision added considerable detail to the legislative act, revealing the inherent difficulty in deciding when this is held to supplement the legislative act, an issue to which we shall return below.

These tensions were cast into sharp relief by the reasoning in *Connecting Europe Facility*,[52] where the focus was on the line between power to amend and power to supplement within

[45] Case C-88/14 *European Commission v European Parliament v Council* (n 34).
[46] Ibid [28].
[47] Ibid [32].
[48] Ibid [42].
[49] Case C-65/13 *European Parliament v Commission* (n 35).
[50] Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers in the European Union [2011] OJ L141/1.
[51] Case C-65/13 *European Parliament v Commission* (n 35) [45].
[52] Case C-286/14 *European Parliament and Council v Commission* (n 36).

Article 290. The European Parliament argued that the Commission had exceeded its power to make a delegated act, because it had added an extra annex to the legislative act, and that it should instead have adopted a separate delegated act. It is the CJEU's discussion of the difference between amend and supplement that is of interest here.

The CJEU held that delegation of a power to 'supplement' a legislative act only authorized the Commission to flesh out that act. It had, when doing so, to comply with the entirety of the legislative act, and its authority was limited to development in detail of non-essential elements of the legislation that the legislature had not specified. By way of contrast, delegation of a power to 'amend' a legislative act authorized the Commission to modify or repeal non-essential elements laid down by the legislature in that act. It was not required to act in compliance with the aspects of the legislation that it intended to amend.[53] It was, moreover, for the legislature to make clear which type of delegated power it was according to the Commission; it was not for the Commission to make that determination for itself.[54] The CJEU concluded that the legislature only intended to give the Commission power to supplement the legislative act, not to amend it, and therefore the contested regulation was invalid, since it could not add provisions to the legislative act.

The following conclusions can be drawn from the preceding cases. First, it was decided in the Lisbon Treaty to differentiate delegated and implementing acts, and to establish different regimes of control to reflect the differences between the two types of measure. These differences were felt to be of constitutional significance. It can be accepted that when reviewing the choice made by the legislature the Court should consider the reasons why it chose to proceed via a delegated act rather than an implementing act, or vice versa. This is, however, to say no more than that, when exercising judicial review, a Court should be properly informed as to the reasoning that underpinned the decision of the body being reviewed. It provides no foundation for the conclusion that the body subject to review has 'discretion' as to whether the conditions for the application of delegated or implementing acts are met, with the consequence that the Court uses only light touch review for manifest error. The EU legislature must perforce exercise interpretive judgment as to the application Articles 290–291, but if the exercise of such judgment by an EU institution in relation to a Treaty provision is to be equated with discretion justifying only light touch review this would have major ramifications across the entirety of EU law.

Secondly, the case law throws into sharp relief the difficulty of distinguishing between delegated and implementing acts, more especially when the issue is whether the contested measure supplemented the legislative act and therefore had to be made through a delegated act. The problem is exemplified by the preceding cases. In the *Visa Reciprocity* case, the CJEU stated that an implementing act was designed to 'provide further detail in relation to the content of a legislative act'.[55] By way of contrast, the CJEU in *Connecting Europe Facility*,[56] when defining a delegated act, stated that to supplement meant to flesh out the detail of the legislative act in relation to its non-essential elements. The difficulty of deciding whether the addition of further detail can be done by way of an implementing act, or whether that addition constitutes supplementation that requires a delegated act, is exemplified by *EURES Network*,[57] where the European Parliament argued that what had

[53] Ibid [41]–[45].
[54] Ibid [46].
[55] Case C-88/14 *European Commission v European Parliament v Council* (n 34) [30].
[56] Case C-286/14 *European Parliament and Council v Commission* (n 36) [41], [44], [45].
[57] Case C-65/13 *European Parliament v Commission* (n 35).

been done in the contested implementing regulation really had supplemented the legislative act and thus should have been done through a delegated act. The CJEU nonetheless concluded that, while such detail had been added, it did not constitute supplementation of the legislative act.

Thirdly, these cases reflect the analytical conundrum set out earlier.[58] The thrust of the case law is to resolve the conundrum by concluding that the addition of further detail can be accomplished through implementing acts, rejecting arguments that a delegated act was required. The CJEU and the General Court (GC) have reasoned as follows: the limits of the Commission's implementing power should be determined by the essential general aims of the legislative act in question; within those limits the Commission is authorized to adopt all measures necessary or appropriate for implementation of that act; and that, provided these conditions are met, the further detail will be accepted as valid implementing measures.[59] This approach risks, however, undermining the very rationale for the divide between delegated and implementing acts. If the addition of further detail is to be accepted as valid through an implementing act, provided only that it is consistent with the essential general aims of the legislation, and necessary or appropriate for its implementation, then this gives considerable latitude to the Commission to shape the legislative act, without the democratic controls built into Article 290. The European Parliament has, by way of contrast, argued strenuously that more secondary measures should be required to be delegated acts, taking a broad view of what constitutes amendment or supplementation for these purposes.[60]

Fourthly, the problems are further compounded by the demands placed on the legislature in the *Connecting Europe Facility* case.[61] It will, therefore, be necessary in the future to decide not only whether an act is properly regarded as delegated or implementing, but whether, even if it is a delegated act, the legislature accorded the Commission power to supplement and amend, or only accorded it power in one of these respects.

Finally, there is a double paradox that besets this area. The distinction between delegated and implementing acts was introduced under the banner of simplification, which it has manifestly failed to achieve. The distinction between delegated and implementing acts was also adopted because it was felt to be important constitutionally and pragmatically. The problematic nature of the divide, coupled with the broad interpretation given to implementing acts, undermine, however, the normative claim that the two types of act should be subject to markedly different forms of control and accountability, and this paradox is further heightened by the fact that, as will be seen below, the committee structure that was excised from Article 290 has partially reappeared.

B. The Relative Use of Article 290 and Article 291: Current Practice

We can now focus on what light post-Lisbon experience sheds on the way in which this analytical divide is applied. It is important to be clear about four fundamentals when considering how delegated and implementing acts are used in the post-Lisbon world.

[58] See p 725 above.

[59] Case C-65/13 *European Parliament v Commission* (n 35) [44]–[46]; Joined Cases T-261/13 and T-86/14 *Netherlands v Commission* EU:T:2015:671, [43]–[45].

[60] European Parliament resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, PA_TA(2014)0127, [2017] OJ C285/2.

[61] Case C-286/14 *European Parliament and Council v Commission* (n 36).

First, the standard practice is for the primary legislative act to make provision for the passage of both delegated and implementing acts. It will specify the articles in relation to which the respective secondary measures must be used and will often specify the period for which any delegation of power is to run. Thus, to take an example, Directive 2013/34[62] deals with the making of annual financial statements and provides in Article 49 that delegated acts must be used when enacting measures pursuant to Article 1(2), Article 3(13) and Article 46(2) of the Directive. Article 49(2) states that the delegation shall be for an indeterminate time, subject to the recognition in Article 49(3) that the Council or European Parliament may, in accord with Article 290 TFEU, revoke the delegation of power at any time. In similar vein, Article 33 of Regulation 610/2013,[63] establishing a Community Code on the rules governing the movement of persons across borders, states that delegated acts should be used for measures made pursuant to Article 12(5) and Article 32. The delegation is once again said to be for an indeterminate period, subject to the proviso that it can be revoked at any time by the European Parliament or the Council.

Secondly, there are relatively rare instances in which the legislative act makes no provision for the enactment of implementing acts, stipulating that every secondary measure must take the form of a delegated act. This is exemplified by Regulation 966/2012, which is the general financial regulation for the EU, replacing that enacted in 2002.[64] All secondary measures must take the form of delegated acts, and the Regulation accords this power to the Commission in relation to measures made in furtherance of 115 articles of the legislative act. The delegation is conferred on the Commission to the end of the first post-2013 multiannual financial framework referred to in Article 312 TFEU.[65]

Thirdly, by way of contrast to the preceding point, there are numerous instances in which an implementing regulation is used to amend an earlier implementing regulation. This may seem strange, but it is in fact lawful within the Lisbon schema. This is because Article 290 TFEU only mandates use of a delegated act where a legislative act is amended or supplemented. Thus, where the relevant act supplements or amends an implementing act this can be done by a later implementing act.[66]

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[62] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance [2013] OJ L182/19.

[63] Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council [2013] OJ L182/1.

[64] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L298/1.

[65] Ibid art 210.

[66] See eg Commission Implementing Regulation (EU) No 17/2013 of 14 January 2013 approving the active substance Trichoderma atroviride strain I-1237, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Implementing Regulation (EU) No 540/2011 Text with EEA relevance [2013] OJ L9/5; Commission Implementing Regulation (EU) No 22/2013 of 15 January 2013 approving the active substance cyflumetofen, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 Text with EEA relevance [2013] OJ L11/8.

Fourthly, implementing acts constitute the principal instrument used for the enactment of secondary measures. There were, at the time of writing,[67] 5,698 Commission implementing regulations, 1,506 Commission implementing decisions, and fifty-three Commission implementing directives. There were, by way of contrast, 493 delegated regulations, thirty-eight delegated directives, and fifteen delegated decisions. It is clear therefore that implementing measures, judged in quantitative terms at least, predominate. This does not tell one anything about the relative importance of the respective measures. It does nonetheless furnish some perspective on the relative use of the respective measures and provides also important empirical information against which to judge the significance of the accountability regimes that operate in the context of Article 290 and Article 291 TFEU, an issue that will be considered in more detail below. The preceding figures should, however, be read in the light of the discussion on transitional issues, since this will increase the number of acts officially recorded as 'delegated acts'.

C. The Choice between Article 290 and Article 291: Limited Legislative Guidance

The very difficulty with the criterion for the divide between delegated and implementing acts poses an interesting academic conundrum, which is how precisely to assess the way in which the division has been used in the post-Lisbon world. Given that the criterion for the distinction is inherently problematic this in turn renders it difficult to determine how far it has been correctly or incorrectly used in subsequent practice. Subject to this caveat, there are nonetheless a number of points relevant to the way in which the analytical divide between delegated and implementing acts is unfolding in the post-Lisbon world. We begin with the extent to which the legislative act provides guidance as to choice between the two forms of secondary measure.

It is common for the preamble to the legislative act to provide some information as to why delegated acts have been chosen for changes to certain articles of the legislative act, while in other instances the secondary measure of choice is an implementing act. How much information is provided, however, varies significantly. There is also considerable variance as to the extent to which the information in the preamble provides adequate explanation as to why change to a certain article of the legislative act is felt to amend or supplement it, thus requiring a delegated act, while in other instances it is felt that the secondary measure can take the form of an implementing act, which is predicated on the assumption that the secondary measure does not amend or supplement the legislative act so as to demand a delegated act. The reality is that in most instances the preamble will simply state that a delegated act is needed or not as the case may be, without providing any indication as to why this should be so.[68]

This does not mean that the drafters of the legislative act were necessarily wrong in this respect. What it does mean is that the way in which the divide between delegated and implementing acts is applied does not immediately strike one as principled. What it also means is that it is very difficult to test the soundness of that divide, given the fragility of the definitional distinction between the two species of act, and given also that it would take a lifetime to test that fragile divide in the many circumstances in which it has been applied.

[67] September 2017 .

[68] See eg Directive 2013/34/EU (n 62) preamble paras 50, 54; Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories Text with EEA relevance [2012] OJ L201/1, preamble para 91; Regulation (EU) No 236/2012 (n 31) preamble paras 43, 46.

D. The Choice between Article 290 and Article 291: Particular Regulatory Schemes

Following from the above, it is clear that when one looks more closely at the choice made between delegated and implementing acts in a particular context it is not self-evident that the choice is correct. Put more directly, what this means is that just because an implementing act is chosen on the assumption that it does not supplement the legislative act does not mean that the assumption is sustainable or correct. The fact that the legislative act says that it is so, does not make it so.

This can be exemplified by consideration of rules drawn from air navigation. Regulation 1070/2009 was a primary regulation concerning the performance of the European aviation system.[69] To attain this end, Article 11 contained rules concerning EU-wide targets on key performance areas of safety, the environment, capacity, and cost-efficiency; national plans for airspace blocks; and periodic review, monitoring, and benchmarking of the performance of air navigation services. These targets were to be adopted using the old-style regulatory procedure, and provision could be made for the establishment of a body that would assist the Commission in assessment. Compliance was to be assessed through, inter alia, validation, examination, evaluation, and dissemination of relevant data related to the performance of air navigation services and network functions from all relevant parties. The list of factors relevant to compliance could be augmented through use of the old-style regulatory procedure with scrutiny, but the detailed rules concerning the workings of the scheme were to be laid down by implementing rules adopted by the Commission under the old-style regulatory procedure, which in the post-Lisbon world translated into implementing acts enacted pursuant to the new Comitology Regulation.[70]

The Commission duly enacted Implementing Regulation 390/2013.[71] It is a long regulation, which specifies in great detail issues that were left at a higher level of abstraction by the earlier primary regulation, including: the powers of the body to assist the Commission with its performance reviews; the duties of national supervisory authorities; the role of the network manager; the meaning of performance indicators; the preparation and adoption of performance plans; monitoring of performance targets; the collection and validation of data relating to performance reviews; and the template for the network strategy plan.

Regulation 390/2013 clearly supplements the earlier primary regulation. It imbues it with very much greater detail on the preceding issues. Nor should use of the word 'detail' be equated with 'unimportant'. The regulatory specificity brought to the performance schema by Regulation 390/2013 covers a plethora of important issues that are central to the efficacy of the overall legislative objective. Regulation 390/2013 can, therefore, only be a valid implementing regulation on the assumption that, although it added to the earlier legislative norm, it did not add any 'new' non-essential element so as to trigger the need for a delegated act. This in turn depends, as seen above, on the level of abstraction with which one poses the inquiry.

It might be argued that the issues dealt with by Regulation 390/2013 can all be related to terms mentioned in the primary regulation. It might then be contended that there is no new

[69] Regulation (EC) No 1070/2009 of the European Parliament and of the Council of 21 October 2009 amending Regulations (EC) No 549/2004, (EC) No 550/2004, (EC) No 551/2004 and (EC) No 552/2004 in order to improve the performance and sustainability of the European aviation system (Text with EEA relevance) [2009] OJ L300/34.

[70] Regulation (EU) No 182/2011 (n 21).

[71] Commission Implementing Regulation (EU) No 390/2013 of 3 May 2013 laying down a performance scheme for air navigation services and network functions Text with EEA relevance [2013] OJ L300/34.

non-essential element such as to warrant recourse to a delegated regulation. This is, however, a dangerously reductionist conclusion, although it is supported by some recent case law.[72] It would mean that provided one could locate some textual touchstone in the legislative act then almost anything done pursuant thereto could be regarded as an implementing act, irrespective of the fact that the very detailed regulatory specificity embodied in the latter was not predetermined by anything in the legislative act. The reality is that this example drawn from air navigation simply exemplifies the difficulty in applying the delegated/implementing divide in a principled manner.

E. The Choice between Article 290 and Article 291: Transitional Issues

It is also important when navigating this area to be aware of transitional issues that affect the assignment of acts to the categories of delegated and implementing. A bare reading of some secondary measures reveals acts that are not labelled as delegated or implementing, and it can, moreover, be confusing as to which category they should be assigned to, adjudged by their substance.

The explanation is that such measures were made post-Lisbon under primary regulations made pre-Lisbon. The typical scenario is that the primary regulation specifies that the secondary measure should be made through the old-style regulatory procedure with scrutiny.[73] The revised Comitology Regulation repealed the previous Comitology Decision, but preserved the regulatory procedure with scrutiny for basic acts that made reference thereto.[74] The rationale for this exception was that acts made under the old regulatory procedure with scrutiny were akin to delegated acts and should not therefore fall within the scope of the new Comitology Regulation that only dealt with implementing acts.

The Commission made a commitment that it would adapt such provisions to the schema for delegated acts under Article 290 TFEU. There were 288 such provisions existing at the end of 2012. To this end, the Commission proposed three framework regulations, which provided that where an instrument made reference to the regulatory procedure with scrutiny the Commission was empowered to adopt a delegated act.[75] The proposals were, however, subject to significant amendment by the European Parliament, and were not approved by the Council. The reason for Council reluctance is interesting and reflective of the tensions that underlie the Lisbon schema.

It appears that the Council withheld consent because it sought in general terms greater control by national experts over delegated acts than that provided for by Article 290. It preferred therefore to retain old-style regulatory procedure with scrutiny, because old-style Comitology committees continued to exist in this area. We shall return to this issue below, but suffice it to say for the present that while the Lisbon schema formally excluded a Comitology-type regime from the sphere of delegated acts, the Council has sought to reverse this de facto. Council opposition led the Commission to withdraw the proposals in March 2015.

[72] Case C-65/13 *European Parliament v Commission* (n 35) [44]–[46]; Joined Cases T-261/13 and T-86/14 *Netherlands v Commission* (n 59) [43]– [45].

[73] Council Decision 99/468 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23, art 5a.

[74] Regulation (EU) No 182/2011 (n 21) art 12.

[75] Proposal for a Regulation of the European Parliament and of the Council adapting to Articles 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny, COM(2013) 451 final, COM(2013) 452 final and COM(2013) 751 final.

IV. Constitutional: Politics and Constitutional Architecture

The discussion thus far has considered the analytical difficulties with the divide between delegated and implementing acts. The focus now shifts to the ways in which practical politics in the post-Lisbon world have impacted on the constitutional architecture in this part of the Lisbon Treaty.

A. Constitutional 'Modification': Decision-making under Article 290 TFEU

A significant development in relation to the way in which Article 290 operates was the reintroduction by the backdoor of what had been excluded from the front, as manifest in the role played by national experts in Council and European Parliament deliberations.[76] The Commission's Communication to the Council concerning Articles 290 and 291 in December 2009 was premised on the demise of management and regulatory committees in relation to Article 290.[77] The Commission, without mentioning the previous committee regime, accepted that it would consult with national experts in the making of delegated acts, but stressed that the experts would have a 'consultative rather institutional role in the decision-making procedure'.[78] When the consultations were concluded the experts would merely be informed of the Commission's conclusions and how it intended to proceed.[79] The Council for its part suddenly woke up to the imminent demise of the old Comitology regime and responded to the Commission document by stressing the importance it attached to consultation with national experts,[80] which should be undertaken in time to allow for meaningful input by such experts.

The rationale for this was not difficult to divine. The *ex ante* control in Article 290(1) TFEU to the effect that the legislative act must define the 'objectives, content, scope and duration of the delegation of power' is not easy to monitor and enforce, since it will often be difficult for the Council and the European Parliament in the legislative act 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. The *ex post* controls in Article 290(2) also have limitations. Revocation of the entire delegation is a nuclear strike option, but inherently ill-suited to more subtle control over particular delegated acts. The ability to veto the particular delegated act is more promising in this respect, but there is no formal power to amend the proposed measure, and more importantly exercise of the veto is crucially dependent on understanding the relevant measure. Neither the Council nor the European Parliament can decide whether to object to the measure unless they understand it. The Member State representatives on the Council clearly have neither the time nor expertise to perform this task unaided. The European Parliament committees might develop such expertise. They have hitherto been able to draw on informational resources from Comitology committees.

This then was the rationale for the 2011 Common Understanding,[81] the result of tough negotiations between the major institutional players. It dealt with a range of issues. Thus,

[76] The Lisbon Treaty, Declaration 39 spoke of continued consultation of national experts in the financial area, when making delegated acts under TFEU art 290. Its significance is considered in section V.C below.

[77] Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final.

[78] Ibid [4.2].

[79] Ibid.

[80] Council 17477/09, Implementation of the Treaty of Lisbon, Article 290, Article 291, Brussels (11 December 2009).

[81] Common Understanding on Delegated Acts, Council 8753/1/11, Brussels (14 April 2011).

a delegation to the Commission that is temporally limited can be tacitly extended by the same period of time as the initial delegation.[82] There are provisions dealing with the period within which objections by the European and Council should be raised.[83] It is, however, the provisions on consultation that are most important. The Commission is charged when preparing delegated acts with ensuring 'a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council and carry out appropriate and transparent consultations well in advance, including at expert level'.[84] The significance of this provision is attested by the fact that the Common Understanding includes an annex containing a standard clause to be included in the recital to legislative acts that delegate power to the Commission, in which the substance of the obligation to transmit documents in a timely fashion and consult the European Parliament and Council, including at expert level, is iterated. This now occurs as a matter of course, and such a clause is included routinely in all legislative acts that delegate power to the Commission.[85]

In 2014 the Council sought to revise the Common Understanding and strengthen the role of experts.[86] Revisions were finally concluded and incorporated in an Annex to the Inter-institutional Agreement on Better Lawmaking in 2016.[87] The revised schema is as follows. When preparing and drawing up delegated acts, the Commission shall ensure a timely and simultaneous transmission of all documents, including the draft acts, to the European Parliament and the Council at the same time as to Member States' experts.[88]

The Commission must consult experts designated by each Member State in the preparation of draft delegated acts. The Member States' experts shall be consulted in a timely manner on each draft delegated act prepared by the Commission services. The draft delegated acts shall be shared with the Member States' experts. The consultations shall take place through existing expert groups, or at ad hoc meetings with experts from the Member States, for which the Commission shall send invitations through the Permanent Representations of all Member States.

It is for the Member States to decide which experts are to participate. Member States' experts shall be provided with the draft delegated acts, the draft agenda, and any other relevant documents in sufficient time to prepare.[89] Where they consider it necessary, the European Parliament and the Council may each send experts to meetings of the Commission expert groups dealing with the preparation of delegated acts to which Member States' experts are invited. To that end, the European Parliament and the Council receive the planning for the following months and invitations for all experts meetings.[90] Preparation and drawing-up of delegated acts may also include consultations with stakeholders.[91]

[82] Ibid [7]–[8].
[83] Ibid [10]–[11].
[84] Ibid [4].
[85] See eg Directive 2013/34/EU (n 62) recital (54), 'In order to take account of future changes to the laws of the Member States and to Union legislation concerning company types, the Commission should be empowered to adopt delegated acts in accordance with art 290 of the TFEU in order to update the lists of undertakings contained in Annexes I and II. The use of delegated acts is also necessary in order to adapt the undertaking size criteria, as with the passage of time inflation will erode their real value. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council'.
[86] Council 7792/14, Brussels (17 March 2014).
[87] Inter-institutional Agreement of 13 April 2016 on Better Lawmaking [2016] OJ L123/1.
[88] Ibid Annex [10].
[89] Ibid Annex [4].
[90] Ibid Annex [11].
[91] Ibid Annex [6].

At the end of any meeting with Member States' experts, or in the follow-up to such meetings, the Commission shall state the conclusions it has drawn from the discussions, including how it will take the experts' views into consideration and how it intends to proceed.[92] Where the material content of a draft delegated act is changed in any way, it is incumbent on the Commission to give Member States' experts the opportunity to react to the amended version of the draft delegated act.[93] There is, moreover, an obligation to include a summary of the consultation process in the explanatory memorandum accompanying the delegated act.[94]

The 2011 Common Understanding was given formal imprimatur by its repeated inclusion in the recitals to legislation. It reinvented the wheel insofar as it brought back some advisory committees to provide the informational resource that is especially useful in deciding whether to exercise a veto power. These committees do not have the formal powers of their management and regulatory Comitology predecessors, although whether their input into Council decision-making is markedly different in substance is difficult to determine. The 2016 version of the Common Understanding is now also customarily referred to in the preambles to delegated regulations. It has strengthened the position of national expert groups, and opened the possibility that existing Comitology expert committees used under Article 291 could be used in relation to Article 290.

The paradox is that the Lisbon reforms were intended to simplify the decision-making process, including the role of committees therein. The political reality is that in the immediate aftermath of the Lisbon Treaty, we had the new Comitology regime within Article 291, where the committees are at least relatively transparent, coupled with the more shadowy world of advisory committees created pursuant to the 2011 Common Understanding operating within Article 290, the membership and proceedings of which were not readily available. The 2016 Common Understanding has improved matters in this respect by mandating the Commission to keep a summaries of the consultations.

There is then the further paradox that the greater the formality introduced for the Article 290 committees by the 2016 Common Understanding, the smaller the difference de facto between the decision-making process for delegated and implementing acts, more especially if the ability to use 'existing expert groups' leads to Article 291 Comitology committees fulfilling the role of expert advisers within Article 290.

B. Constitutional 'Modification': The New Schema and the European Parliament

The constitutional architecture in Articles 289–291 TFEU, and in particular the format of Article 290 TFEU, was the result of pressure from the European Parliament as well as the Commission. The European Parliament had always felt that the old-style Comitology regime was weighted in favour of the Council, as indeed it was even after the changes introduced in 1999[95] and 2006.[96] It therefore favoured reform that would afford it parity with the Council in relation to the controls over delegated acts. The battles waged in the 1990s have been related admirably by Carl-Fredrik Bergstrom.[97] The European Parliament was not aided in this respect by the Council, which felt that its dominance

[92] Ibid Annex [5].
[93] Ibid Annex [7].
[94] Ibid Annex [8].
[95] Council Decision 1999/468/EC (n 12); Lenaerts and Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? (n 12) 645.
[96] Council Decision 2006/512/EC (n 15).
[97] Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (n 4).

over secondary measures was warranted, nor by the Commission, which was opposed to Comitology constraints and had no appetite for according analogous controls to the European Parliament.

Truth to tell, the Commission position was more complex than this, reflective of the fact that the Commission is not a monolithic institution. The reality was that leaders within the Commission disliked Comitology and the constraints that it imposed on what the Commission believed should be its executive autonomy over measures other than primary legislative-type norms. There was nonetheless an element within the Commission that took the line that the European Parliament should be given 'everything' relating to secondary measures, the assumption being that it simply would not be able to cope with the truck loads of documentation. The front line of the Commission working within particular DGs were, by way of contrast, reasonably content with the committee system, since it was the mechanism through which they could liaise with national experts.

Be that as it may, the European Parliament largely achieved its desired parity in Article 290 TFEU. The ex ante controls in Article 290(1) pertain to the European Parliament as well as the Council, while the ex post controls in Article 290(2) TFEU relating to revocation of the delegation and veto of the particular delegated act can be exercised by either the Council or the European Parliament. This parity was reinforced by the argument put forcefully by the European Parliament that old style Comitology committees could not operate within the confines of Article 290 TFEU.[98] There are, however, two aspects of the post-Lisbon schema that have undermined this parity.

There is, on the one hand, the fact that national experts have been reintroduced de facto by the Common Understanding of 2011 and 2016. The fact that such consultation is equally applicable to the European Parliament and Council, and the fact that that the Committee on Legal Affairs placed emphasis on the flow of information from the Commission to the relevant committees of the European Parliament, including information about successive drafts of delegated acts,[99] does not alter the fact that reintroduction of consultation with expert committees benefited the Council more than the European Parliament, and hence upset the hard-won parity achieved though Article 290 in the Lisbon Treaty. This imbalance is perpetuated in the 2016 Common Understanding, since the focal point is still primarily systematic consultation on delegated acts with groups of Member State experts, albeit subject to the possibility that the European Parliament or Council can send observers to attend the meeting of the expert group.

There is, on the other hand, the fact noted above that quantitatively so much more is done by implementing acts than by delegated acts, and that is so even taking account of the fact the number of delegated acts will rise somewhat as a result of the transitional measures. To be sure this figure provides little by way of information as to the relative importance of the measures. It can be accepted that numerous implementing acts are minor changes to, for example, annexes listing regulated substances. This does not alter the fact that the borderline between delegated and implementing acts remains fragile and that many people would be hard pressed to discern which category an act fell within if the labels were removed. The upshot is that the parity achieved by the European Parliament under Article 290 is undermined by the very fact that so much is done under Article 291, where it has considerably less input into the new Comitology procedure than it did under the old. It is not

[98] Committee on Legal Affairs, 'On the Power of Legislative Delegation' A-7 0110/2010, Rapporteur J. Szájer, 11–12.

[99] Ibid 10.

surprising, therefore, that the European Parliament has pressed for a broad reading of the circumstances when delegated acts are required.[100]

It might be argued that the same is true in relation to the Council, and indeed the Commission asseverated that neither the European Parliament nor the Council had formal controls over implementing acts.[101] It is moreover true that the new Comitology Regulation formally disaggregates the representatives of Member States that serve on the committees from those on the Council.

The fact nonetheless remains that the members of Comitology committees are national representatives, and ministers that represent the Member States on the Council may well take a keen interest in the appointees from their respective states that serve on these committees. There is likely to be exchange of views between the two sets of personnel. The Commission's desire to preserve the distinction between input into implementation via Member State representatives on Comitology committees, and Member State interests as vocalized in the Council, may therefore be hard to sustain, more especially because the committee voting rules mirror those of the Council itself. Channels of communication are likely to emerge, which may well be used to effectuate Council objectives indirectly, even if this cannot be done through more direct means.

The European Parliament has nothing analogous to draw on when a matter is dealt with through Article 291. There are only the limited formal powers accorded to it and the Council under Regulation 182/2011.[102] The European Parliament and Council can access information about committee proceedings leading to implementing acts,[103] and they can indicate to the Commission that they consider a draft implementing act to exceed the implementing powers provided for in the basic act. This only applies where the basic act is made under the ordinary legislative procedure,[104] and hence does not apply in relation to implementing acts made pursuant to delegated acts. The Commission has a duty to review the draft act, taking account the views of the European Parliament and Council, but is not obliged to withdraw the act. It must rather inform these institutions whether it intends to maintain, amend, or withdraw the draft implementing act.

C. Constitutional 'Modification': Commission and the 'New' Status Quo

There is also evidence of modification when one considers the position of the Commission in relation to the *modus operandi* of the constitutional architecture post-Lisbon.

In relation to the overall constitutional architecture, the Commission succeeded in excising old-style Comitology from the realm of delegated acts, replacing it with the ex ante and ex post controls found in Article 290 TFEU. It thereby secured its aim of establishing regulatory autonomy over the content of delegated acts, subject to the controls in Article 290. This has, however, been qualified by the return of advisory committees through the Common Understanding, and through the role of agencies discussed below. The Commission succeeded also in formally excluding the European Parliament and Council from the world of implementing acts, insisting that the new committees were

[100] European Parliament resolution of 25 February 2014 (n 60).

[101] Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM(2010) 83 final, 3.

[102] Regulation (EU) No 182/2011 (n 21).

[103] Ibid art 10.

[104] Ibid art 11.

representatives of the Member States, and that there should be no formal recourse to the Council in the event that the committee disagreed with the Commission proposal. The reality is nonetheless that the committees are composed of national representatives, they vote in accord with the criteria for voting in the Council and there will inevitably be close linkages between the national view as expressed in the Council and Coreper, and the national view expressed through the new Comitology committees. The Commission was, moreover, forced to accept an appeal committee within the Comitology regime, which had been absent from the original Commission proposal.[105] There were hard fought battles about the precise role to be played by such a committee within the new Comitology regime, and it is accorded a prominent place in the new schema, in particular in relation to the examination procedure.[106]

Constitutional modification is also apparent in relation to the new Comitology regime for implementing acts, and the role of the Commission therein. The new Comitology Regulation was sold on the basis that it would simplify the status quo ante, through reduction to only the advisory and the examination procedures. The legal and political reality is, however, that there are four procedures operating in Regulation 182/2011. Thus, in addition to the advisory and examination procedures there is also provision for immediately applicable implementing acts that constitute a third kind of Comitology procedure.[107] Less obvious, but of more practical significance, is the fact that within the complex rules relating to the examination procedure there are different regimes that apply depending on whether the committee votes against the measure, or fails to vote in favour of it. Where the committee delivers a negative opinion the default position is that the Commission shall not adopt the draft implementing act, but this is then qualified in four ways.[108] Where the committee delivers no opinion the default position is that the Commission can adopt the draft implementing act, or submit an amended version to the committee, albeit subject to five qualifications.[109] There is therefore much here that replicates the pre-existing divide between the management and regulatory procedure, which is further reinforced by differential provisions that apply within the appeal procedure, depending on whether the appeal committee votes in favour of the measure, against it, or delivers no opinion.[110]

The regime for implementing acts will become more complex yet again if the 2017 Commission proposals are adopted.[111] The problem, as perceived by the Commission, is the case where the examination committee proffers no opinion on a draft measure, and this stance is repeated in the appeal committee. This leaves the Commission with discretion as to whether to adopt the measure. The number of such cases is relatively small, but they tend to be high profile in political terms. The object of the reforms is, therefore, to increase Member State responsibility, so as to render it more likely that they will make the relevant choices, rather than avoid doing so. To this end, the Commission has proposed changes to the voting rules for a qualified majority so as to reduce the likelihood of the result being no opinion. There is also provision for recourse to the Council if the appeal committee continues to express no opinion.

[105] COM(2010) 83 final.

[106] Committee on Legal Affairs (26 November 2010) 2010/0051, Rapporteur József Szájer. See also Council (30 November 2010) 16976/10.

[107] Ibid art 8.

[108] Ibid art 5(3).

[109] Ibid art 5(4).

[110] Ibid art 6(3).

[111] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011, COM(2017) 85 final.

V. Institutional: Agencies, Conferral, Delegated Acts, and Implementing Acts

The constitutional regime embodied in Article 290 and Article 291 has also been affected by institutional change, most markedly through the creation of the new breed of European Supervisory Authorities, ESAs.

A. Agencies: Conferral and Delegation

It is clear from *United Kingdom v Council*[112] that power can be conferred directly on an EU agency independent of the confines of Articles 290–291 TFEU. The European Security Markets Authority, ESMA, had been given power by a legislative act to take action in relation to short selling on stock in certain defined circumstances.[113] The UK argued that this was unlawful on a number of grounds, inter alia, that Articles 290 and 291 circumscribed the circumstances in which powers could be given to the Commission, and that the Council and European Parliament had no authority under the Treaties to delegate powers such as those in the instant case to an EU agency.

The CJEU acknowledged that the contested provision, Article 28 of Regulation 236/2012, delegated power not to the Commission but to an EU agency. This required the CJEU to decide whether Articles 290 and 291 were intended to establish 'a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature'.[114]

The Court noted that while the Treaties contained no express provision allowing this, certain Treaty provisions presumed that such a possibility existed. Agencies were subject to judicial review via Articles 263, 265, and 267 TFEU, which was applicable to EU bodies, offices, and agencies that were given powers to adopt legally binding measures on natural or legal persons.[115]

The power accorded to ESMA in the present case must, said the CJEU, be seen in the context of the overall purpose of the regulatory scheme to deal with integration of financial markets and prevent the risk of financial contagion. This required that ESMA have power to impose temporary restrictions on the short selling of certain stocks, in order to prevent an uncontrolled fall in the price of those instruments.[116] This 'conferral of powers'[117] did not therefore correspond to the situations in Articles 290 and 291, nor did it undermine them.

There is force in this reasoning. The legal reality was that the European Parliament and the Council had directly conferred power on ESMA via Article 28 of the legislative act to take action against short selling of stock in certain defined circumstances. That power was then further refined through a delegated act made pursuant to Article 290, which was expressly authorized by the legislative act.[118] There was then force in the Court's conclusion that the

[112] Case C-270/12 *United Kingdom v Council and Parliament* (n 23).
[113] Regulation (EU) No 236/2012 (n 31) art 28.
[114] Case C-270/12 *United Kingdom v Council and Parliament* (n 23) [78].
[115] Ibid [80]–[81]. The CJEU cited by way of example the European Chemicals Agency, the European Medicines Agency, the Office for Harmonization in the Internal Market, the Community Plant Variety Office, and the European Aviation Safety Agency.
[116] Case C-270/12 *United Kingdom v Council and Parliament* (n 23) [84]–[85].
[117] Ibid [83].
[118] Commission Delegated Regulation (EU) No 918/2012 (n 32).

conferral of power did not correspond to the situations contemplated by Articles 290–291, nor did it undermine them.

It might be argued, as the UK did, that the direct conferral of power in Article 28 of Regulation 236/2012 infringed the *Meroni* principle,[119] which limits the discretion that can be given to agencies. The Court, however, rejected this argument, stating that the powers exercised by ESMA pursuant to Article 28 were sufficiently delineated and precise so as not to offend the *Meroni* principle.[120] Its reasoning in this respect, and the broader implications for agency powers, cannot be examined here.

B. ESAs and Delegated Acts

The old-style Comitology committees may well have gone, but in some areas new 'agencies' have been created and Member States are accorded significant decisional authority on such bodies. This has been the solution adopted for the ESAs, the new financial supervisory authorities: the European Securities and Markets Authority (ESMA);[121] the European Banking Authority (EBA);[122] the European Insurance and Occupational Pensions Authority (EIOPA).[123] The ESAs are technically regarded as Union bodies with legal personality.[124]

They are EU agencies, but Member States dominate their organizational structure. The Board of Supervisors is composed primarily of high-level national representatives, exemplified by the assumption in relation to the EBA that this will be the head of the national central bank of each Member State.[125] It is this Board that adopts the draft regulatory standards and decisions made by the agency.[126] The Board of Supervisors is mandated to act in the interest of the EU, and must not take instructions from national authorities.[127]

Having said this, the legal and political reality is that such agencies are 'institutionally ambivalent'. This is because while the Board of Supervisors is formally required to act in the EU interest, its voting rules on all important issues formally mirror those of the Council.[128] Qualified majority voting in accord with Article 16(4) TEU is the legal norm,[129] thereby embodying the assumption that the rules normally applicable to decision-making by state representatives in the Council should be equally applicable to decisions or recommendations made by Boards of Supervisors on ESAs. The Board of Supervisors can, moreover, establish panels for attainment of the Board's tasks.[130] The panels are chaired by senior

[119] Case 9/56 *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133.

[120] Case C-270/12 *United Kingdom v Council and Parliament* (n 23) [41]–[55].

[121] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84 http://ec.europa.eu/economy_finance/other/index_en.htm.

[122] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/12.

[123] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L331/48.

[124] See eg Regulation (EU) No 1095/2010 (n 121) art 5(1).

[125] See eg Regulation (EU) No 1093/2010 (n 122) art 40.

[126] Ibid art 43.

[127] Ibid art 42.

[128] Ibid art 44, provides as a general rule that voting is by simple majority, with each member having one vote, but this is then subject to the exception in the next paragraph, which provides that for all decisions, recommendations or opinions made pursuant to arts 10–16 a qualified majority determined in accord with TEU art 16(4) is used.

[129] Ibid art 44, recital (53).

[130] Ibid art 41.

representatives of national supervisory authorities and composed of national experts and agency staff.[131]

The ESAs are empowered to draft regulatory technical standards, RTS, many of which have policy implications,[132] notwithstanding the formal requirement that the standards are meant to be technical and not entail policy choices.[133] The schema is that where the primary regulation delegates power to the Commission to make delegated acts pursuant to Article 290 TFEU, it is the agency that drafts these acts, which are then endorsed by the Commission, subject to the possibility of veto by the Council or the European Parliament in accordance with Article 290.[134] The recitals to the Regulation make it clear that the Commission should amend the draft produced by, for example, the EBA only in 'very restricted and extraordinary circumstances', the rationale being that the EBA has the expertise within this area.[135] These sentiments are reflected in the Regulation. The Commission is only able to adopt a draft delegated act itself if the EBA has failed to do so within the time specified in the legislative act.[136] The Commission must also give a reasoned explanation for departure from the EBA draft rule and cannot make any such change without discussion with the EBA.[137] This schema for delegated acts made by ESAs has impacted on the constitutional architecture of Article 290 TFEU in three ways.

First, it has qualified the parity between Council and European Parliament that underlies the Lisbon schema of Article 290. Niamh Moloney has, for example, described ESMA as structurally intergovernmental.[138] It is true, as seen above, that national representatives must be independent and represent the EU rather than national interests. This does not alter the fact that national interests predominate in the formulation of the detailed agency regulatory standards, and the decision-making rules in the Board of Supervisors mirror those for Council decision-making. Thus, while the European Parliament may have the same powers as the Council when the draft regulatory standard is presented by the Commission, this should not mask the fact that national representatives within the agency play a central role in deciding the content of those standards.[139]

Secondly, the schema for delegated acts made by ESAs has impacted on the constitutional assumptions concerning the role of the Commission in Article 290. The premise underlying Article 290 is that the Commission has regulatory autonomy over delegated acts, subject to the ex ante and ex post controls contained therein. This was what the Commission fought for in the years preceding the Lisbon Treaty. It has, however, been undermined de jure and de facto by the schema introduced for delegated acts made by ESAs, since the substance of the regulatory power has been taken out of its hands and its input curtailed.

[131] N. Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market—A Tale of Two Competences: Part (1) Rule-Making' (2011) 12 *European Business Organization Law Review* 41, 63.

[132] Ibid 67–70.

[133] See eg Regulation (EU) No 1093/2010 (n 122) art 10(1).

[134] Ibid arts 10, 13.

[135] Ibid recital (23), although the recital also states that a draft RTS can be amended if it is not compatible with EU law, does not respect proportionality, or runs counter to the fundamental principles of the *acquis* of Union financial services legislation.

[136] Ibid art 10(3).

[137] Ibid art 10(1).

[138] Moloney (n 131) 82.

[139] Ibid 77, where Moloney notes the close relations between ESMA and the European Parliament.

Thirdly, the creation of ESAs reveals more general tensions underlying the Lisbon divide between Article 290 and Article 291. The pre-existing Lamfalussy system[140] was premised on secondary norms that were validated by processes more akin to those used in relation to implementing acts, with a strong role for a special Comitology-type regime. It would have been difficult to fit this within Article 290, given that Comitology committees are not permitted in relation to delegated acts. However, it would also have been difficult to regard the Lamfalussy system as coming within Article 291, since many measures passed pursuant to Lamfalussy 2 or 3 could not be regarded as merely implementing acts in the Article 291 sense, given that they supplemented or amended the legislative act, and would therefore have to be enacted by way of Article 290 in the post-Lisbon world. The system was therefore caught between a rock and a hard place: Comitology-style committees could not be created pursuant to Article 290 because such committees were not legitimate post-Lisbon, but detailed national input into the regulatory process was central to this area, and while such committees continued to have a role in Article 291, not all such secondary measures could be regarded as merely implementing in the Article 291 sense. This tension serves to explain the inclusion of Declaration 39 in the Lisbon Treaty which states the 'Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice'.

The 'genius' solution was to create the new breed of ESAs. These were agencies, which 'by definition' were not Comitology committees. They could be heralded as fulfilling the imperative advocated by the de Larosière report[141] for more effective regulatory mechanisms in the wake of the financial crisis. They could be tolerated under Article 290, because they were not Comitology committees. The reality nonetheless is that high level national representatives make decisions and agree the draft regulatory measures in accord with the rules for Council decision-making under Article 16(4) TEU, albeit with the formal injunction to act in the EU interest.

C. ESAs and Implementing Acts

The ambivalent nature of the ESAs, and their impact on the constitutional fabric in Article 290 and Article 291, is further evidenced in the context of implementing acts. The constitutional paradigm in the Lisbon Treaty is that where uniform conditions for implementation are required the Commission may enact implementing acts, assisted by Comitology committees acting pursuant to Regulation 182/2011.

The regime under the ESA Regulations for implementing acts is subtly different, and echoes that for draft regulatory technical standards. It is the ESA that is charged with developing implementing technical standards, by means of implementing acts pursuant to Article 291 TFEU, in the areas specifically set out in the legislative acts.[142] The implementing technical standards must be technical, and must not imply strategic decisions or policy choices. The Authority submits its draft implementing technical standards to the Commission for endorsement, which decides whether to endorse it within three months. Where the Commission

[140] http://ec.europa.eu/internal_market/securities/lamfalussy/report/index_en.htm. Level 1 consisted of framework Directives or Regulations; Level 2, regulatory Committees assisted the Commission in adopting implementing measures, to ensure that technical provisions were up to date with market developments; Level 3, committees of national supervisors responsible for measures to improve implementation of Level 1 and 2 acts in the Member States; Level 4, Commission strengthening the enforcement of EU law.

[141] J. de Larosière, 'The High Level Group on Financial Supervision in the EU' (Brussels 2009) http://ec.europa.eu/internal_market/finances/committees/index_en.htm#review.

[142] See eg Regulation (EU) No 1093/2010 (n 122) art 15(1).

decides not to endorse the ESA draft implementing act, or decides to amend it, it must provide a reasoned explanation to the ESA. The Commission cannot change the content of a draft implementing technical standard prepared by the ESA without prior coordination with the Authority.[143] It is only where the ESA does not submit a draft implementing technical standard to the Commission within the relevant time limits that the Commission can adopt an implementing technical standard by means of an implementing act without a draft from the ESA.[144]

The ESA regime for implementing acts entails two notable qualifications to the constitutional orthodoxy in Article 291 TFEU. It places the ESA rather than the Commission in the driving seat in drafting the implementing act. The Commission must formally accept the measure, but its room for manoeuvre is limited in the manner adumbrated above. The other qualification is equally important, albeit less obvious. The legal and political reality is that the role played by Comitology committees within Article 291 is played by the national representatives that make up the Board of Supervisors and the Management Board on the ESAs. It is the Supervisory Boards that adopt the drafts that are then sent to the Commission, and they decide once again through using the rules on qualified majority voting in Article 16(4) TEU.[145]

VI. Legal Form: Hard Law, Soft Law, and Articles 290–291 TFEU

The regime embodied in Articles 290–291 TFEU is applicable to delegated and implementing acts that have formal legal force. It does not apply to the making of soft law, which may be used to flesh out the meaning of a delegated act,[146] or be used instead of formal law. This simple proposition has important consequences, more especially because soft law can vary very significantly, from measures that are truly just recommendatory, to those that are imbued with some real force. It follows that if the Commission or an EU agency decides to proceed via soft law, it remains free of the constitutional constraints in Article 290–291.

There remains the long-stop possibility of a legal challenge, the argument being that the institution was seeking to evade the Treaty regime by proceeding in this manner. The claimant would, however, have an uphill battle in any such case, because the defendant institution could almost always put forward plausible reasons for using soft law, and the ECJ would be reluctant to interfere with this choice. Using soft law enhances regulatory autonomy of the creator institution, even if it may entail some net loss of enforceability. The extent of such loss will depend in turn on how 'hard' the soft law actually is.

Consider in this respect an example drawn from the world of ESAs. We have already seen their role in formulating draft technical regulatory and implementing standards. They are also empowered to issue guidelines. The standard formulation is contained in Article 16(1) of the Regulations governing ESAs.[147] It provides that:

[143] Ibid art 15(1).
[144] Ibid art 15(3).
[145] Ibid arts 43, 44.
[146] See eg Guidelines accompanying Commission Delegated Regulation (EU) No 244/2012 of 16 January 2012 supplementing Directive 2010/31/EU of the European Parliament and of the Council on the energy performance of buildings by establishing a comparative methodology framework for calculating cost-optimal levels of minimum energy performance requirements for buildings and building elements [2012] OJ C115/1.
[147] See nn 121, 122, and 123 above.

> The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants.

The guidelines are, however, imbued with some real force. Thus, Article 16(3) states that the competent authorities and financial market participants shall make every effort to comply with those guidelines and recommendations. Within two months of the issuance of a guideline or recommendation, each competent authority must confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it must inform the ESA, stating its reasons. The ESA must then publish the fact that a competent authority does not comply, or does not intend to comply, with that guideline or recommendation. The ESA may also decide, on a case by case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. If so required by a guideline or recommendation, financial market participants must moreover report, in a clear and detailed way, whether they comply with it. Article 16(3) is then further reinforced by Article 16(4), which requires the ESA, when making its annual report, to inform the European Parliament, Council, and Commission of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the ESA intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

None of the above changes the fact that ESA guidelines are still soft law. They are, however, very much at the 'hard end' of soft law, being imbued with force by legal provisions in the ESA Regulations imposing obligations on the national authorities that do not wish to comply.

VII. Conceptual: Rule-making and Adjudication

It is axiomatic that administrative authorities can develop policy in their assigned area through rule-making or adjudication, assuming that they are empowered to do both. They can promulgate secondary rules to effectuate the objectives in the primary legislation, subject to whatever procedural constraints exist for their enactment. They can also develop policy through individualized adjudication, whereby they apply the dictates of the legislation to resolve particular cases. The decision thus made may only apply to the particular party to the case, but it may nonetheless embody a point of principle that is of wider application. This is of course to say no more or less than that adjudication may be de facto constitutive of new policy, even where the adjudicator states that it is de jure merely declaratory of what the policy embedded in the legislation always was.

The factors that impact on the choice between rule-making and adjudication are well known.[148] Rules have the advantage of guiding behaviour for those affected and for others within the administration, thereby fostering efficiency in terms of not having to think out the answer afresh on each occasion, and justice in terms of treating like cases alike. An

[148] See eg D. Shapiro, 'The Choice of Rulemaking or Adjudication in the Development of Administrative Policy' (1965) 78 *Harvard Law Review* 921; G. Robinson, 'The Making of Administrative Policy: Another Look at Rule-Making and Adjudication and Administrative Procedures Reform' (1970) 118 *University of Pennsylvania Law Review*; R. Baldwin and K. Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] *Public Law* 570.

administrative authority, however, may prefer to use adjudication where it does not have yet sufficient experience in the relevant area to promulgate a rule, or where it feels that rule-making would be inappropriate given the range of variables that would have to be taken into account such that it would be difficult to enact anything that could meaningfully be called a rule.

Procedure broadly conceived will also influence the choice between rule-making and adjudication. If the Commission uses rule-making it will have to decide whether the matter can be dealt with under Article 290 or Article 291 and then negotiate the respective decision-making processes. If the Commission is uncertain as to whether it will succeed, it may choose to use soft law, or it may develop the relevant area through greater use of adjudication, where it is not subject to the controls in Articles 290–291. The same is true of those EU agencies or authorities, which have power to draft delegated and implementing standards, and also to punish certain types of violation through an individualized decision directed at a particular firm.[149] Such bodies may use rule-making where there are problems with supervisory power.[150] They may conversely make use of extensive adjudication powers, which in the case of the ESAs allow them, subject to certain conditions, to take enforcement action against a national authority that is not complying with relevant legislative, delegated or implementing acts, and also in certain circumstances against particular financial institutions.[151]

These are early days, but it will be interesting to see how far, consciously or unconsciously, EU administrative authorities use adjudication to develop the law in their area, thereby freeing themselves from the procedural dictates applicable to both Article 290 and Article 291.

VIII. Conclusion

The divide between delegated and implementing acts is at the heart of the Lisbon settlement. The analytical and temporal difficulties that beset this distinction, however, remain. They have not been removed through judicial clarification in the years since the Lisbon Treaty came into effect. It is unclear how far the EU legislature gives systematic considered thought as to whether delegated or implementing acts should be used, and insofar as it does so the choice can be affected as much if not more by political considerations as by the analytical nature of the distinction between the two types of act. The effluxion of time has revealed moreover the constitutional, institutional, and conceptual tensions considered above, and the way in which issues of legal form can impact on the normative assumptions underlying the divide between Article 290 and Article 291. It would be tempting but mistaken to identify a clear institutional winner from the new schema. The truth is that all institutional players have lost out in some respects.

For the European Parliament, the hope was parity with the Council in relation to Article 290, and the excision of Comitology committees on which Member State representatives dominated from this terrain. The reality is that it has formal parity with the Council under Article 290, but the Common Understanding has brought advisory expert committees back into this area on which national representatives are still dominant. There is the additional fact that so much rule-making now occurs via Article 291 and the European Parliament has less input

[149] See eg OHIM, CPVO, EASA, EBA, ESMA, and EIOPA.
[150] Moloney (n 131) 69.
[151] See eg Regulation (EU) No 1093/2010 (n 122) art 17.

into this new Comitology regime than it did in relation to the old one. For the Commission, the ideal was to remove what it felt were unwarranted Comitology constraints from Article 290, thereby reinforcing its executive autonomy over this area, albeit subject to the controls contained therein. The reality is that some Member State input was retained directly through the Common Understanding 2011 and 2016 and indirectly through the provisions for rule-making in the new agency regulations. There is the additional fact that the new Comitology regime under Article 291 places as many constraints on the Commission as did the old, and that is so notwithstanding that in formal terms the national representatives on the committees are separate from those in the Council. From the perspective of the Council, the initial loss was the demise of the Comitology regime from Article 290, although it has since been seeking to recover ground through the Common Understanding 2011 and 2016, which legitimate use of committees under Article 290.

There are inevitably differences of view as to whether the Lisbon schema of distinguishing between legislative, delegated, and implementing acts should be regarded a success or not. It will come as no surprise that I fall into the sceptical camp with regard to the utility of the divide between delegated and implementing acts. What is clear is that any conclusion one way or another in this regard must be based on full assessment of the analytical, constitutional, conceptual, and institutional dimensions that affect the dichotomy between the two types of act. What is clear also is that, whatsoever one's conclusion, it is very difficult to defend the new status quo on the ground that it has simplified the pre-existing regime.