Policy Brief

Delegated and Implementing Powers after Lisbon: old wine in new bottles?

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The European Union’s system of delegated powers, traditionally known as ‘comitology’, underwent significant changes after the coming into force of the Lisbon Treaty in 2009. Some academic articles and contributions have focused on the changes brought about at the treaty level and in terms of legislative reform. The aim of this policy brief is to look at the implementation and on-going practice by focusing on the key elements of reform and by analyzing the roles played by the three institutions involved in this process (European Parliament, European Commission and Council). By contrasting the new system with the situation before Lisbon, this contribution argues that inter-institutional relations with regard to delegated powers remain dynamic, and that an assessment of the ‘winners’ and ‘losers’ in this area requires analysis of the way in which the formal constitutional provisions in the treaties are being implemented and exercised in practice.

The Lisbon Treaty introduced two new articles, 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), as the treaty base for the new system of conferring delegated and implementing powers to the Commission. A distinction was made between delegated (art. 290 TFEU) and implementing acts (art. 291 TFEU). Under the first category of acts the Council and the European Parliament only have ex post control rights and can either object the act as proposed by the Commission within a given time limit or revoke the delegated powers. The system concerning implementing acts resembles to a large extent the old comitology procedures: a committee composed of Member State representatives exercises control over the implementing powers conferred on the Commission. The new system reduces the number of procedures from five to two and includes trade defense measures, which – under the pre-Lisbon system – were subject to regulations containing a lower voting threshold to prevent such measures from being adopted. The reform also did away with referral to the Council of Ministers for controversial cases. Instead, there is now an appeal committee composed of Member State representatives which is presided by the Commission and which will handle the controversial cases that do not get approval at committee level. By looking at the practical implementation of the two treaty articles through the key elements of reform (the new instrument of delegated acts, the inclusion of trade defense measures and the creation of the appeal committee) a more complete and nuanced assessment will be made on the changes brought about by the Lisbon reforms.

Delegated Acts: new instrument, old battles

Despite article 290 TFEU standing on itself and thus not requiring any additional measure the three institutions adopted a ‘Common Understanding’ with practical arrangements on time limits to voice objection, urgency procedures and model articles (European Parliament, Council of the European Union, European Commission 2011). The introduction of delegated acts entails a reduced role for the Council as compared to the regulatory procedure with scrutiny it replaces. It only gives the Council ex post control rights, namely the right of objection and the right of revocation. In addition, these rights of control are in fact quite drastic as they only entail the nuclear option of voting against with the threshold for the Council to object or revoke, namely finding a qualified majority, being high as well. Member States in the Council therefore have tried to find other ways of influencing the process of the adoption of delegated acts by focusing on the preparation stage. Through the introduction of a

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standard recital in every new regulation and by voicing concerns at a number of occasions on this issue, the Commission has been asked to consult national experts when preparing delegated acts. In principle Member State experts should not have special status over stakeholder expert groups or experts from the European Parliament, but in practice pressure on the Commission is high to consult them separately and keep them fully informed during the preparation phase. In the meantime, the European Parliament has obtained observer status in some expert group meetings, but is struggling in terms of administrative capacity and expertise to make a mark.

The pressure to formalize the preparation phase of delegated acts should be seen as a symptom of a wider problem, namely the mistrust of the Member States in this new instrument. By only having ex post control rights alongside with the Parliament, Member States in the Council often prefer using implementing acts where control is ex ante and formalized. Even though the European Commission (2009, 2011) has declared repeatedly the two instruments do not overlap, in practice there is a grey zone of distinction between delegated and implementing acts. This has created a horizontal problem in negotiations in the ordinary legislative procedure resulting in a narrowing of the scope of delegated acts. The introduction of delegated acts instrument, which was hailed as a victory for the European Parliament, is thus turning out to be more bitter than sweet for the EP.

*The Appeal Committee: the Council in disguise*

One of the main changes in the new system is the formal removal of the Council from the decision-making process in comitology, now the procedures based on article 291 TFEU. The Council only has a non-binding right of scrutiny together with the European Parliament, which entails verifying whether the Commission is respecting the scope of the conferred powers as defined in the basic legal act. There is no longer a referral to the Council for controversial measures which are voted down or fail to rally a qualified majority in the basic committee. However, a new ‘safety net’ was introduced at the request of the Member States, namely a higher body of appeal for controversial measures (European Union 2011). This appeal committee is composed of Member State representatives, meets “at the appropriate level” and is chaired by the Commission – an explicit request of both the European Parliament and the Commission itself.

The chairmanship of the appeal committee is thus an important improvement for the Commission’s position in the new system. It is no longer the rotating presidency chairing the Council that deals with controversial acts that did not pass the committee stage. The decision whether or not to send an act to the appeal committee, as well as the agenda, the date and place of the meeting, the invitations to the meeting and the actual meeting itself are all handled by the Commission’s services now. Finally, even though the Commission is no longer obliged under the new system to adopt an act in the case no qualified majority is found in favour or against the act – something which was presented as an innovation of the new system – it thus far has opted to adopt all acts going through the appeal committee, even though there was no qualified majority in favour.

Current practice therefore shows, that even though it is presided by the Commission, the distinction between the appeal committee and the role the Council used to play in the pre-Lisbon system is mainly formal. In addition, meetings of the appeal committee almost mirror meetings of Coreper I with a majority of Member States represented by their deputy permanent representative. Also, as mentioned above and similar to the situation before Lisbon, the outcome compared to the basic committee did not change. The difference with the

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2A The meetings that have taken place so far however show a declining presence of deputy-ambassadors with 24 out of 27 for the meeting in which the rules of procedure were adopted, 19 and 14 for the second and third meeting, 0 for the fourth meeting as it was scheduled at the same time as a ministerial Council meeting on Transport and 22 for the fifth meeting. The high number in the last meeting was reportedly due to the measure being GMO-related, traditionally politically sensitive.
old system and the referral to the Council is therefore hard to discern, leaving some Member States wondering what the true innovation and added value of the appeal committee is.

*Trade Defense Measures: a mini-revolution*

Taking account of the more limited role conferred upon the Council by the treaties and with the European Parliament still struggling to find its place in the new system, the conclusion seems to be that (for the moment), that the Commission is the institution that won most with the recent reforms. Even though substantial changes were made to its proposal on the regulation for implementing acts, the overall result of the negotiations should not disappoint the European Commission. After intense negotiations with the Council, it managed to include trade defense measures such as anti-dumping and countervailing measures in the new regulation. Under the previous system, the procedures to adopt trade defense measures were set out in separate regulations, outside the scope of the comitology system. One of the defining characteristics of the old system was that a simple majority could prevent such a measure from being adopted, rendering Member States vulnerable to lobbying or even blackmailing by third countries against which such measures were to be taken. By integrating trade defense into the new system, the threshold to prevent a measure from being adopted, qualified majority, became much higher. As of September 2012 all new regulations setting out procedures to adopt trade defense measures have to comply with this rule and in the meantime all existing regulations are being aligned to the new system.

The reform thus constitutes something of a mini-revolution in the governance of the common commercial policy, one that former Commissioner Mandelson had already tried to push through in the past, and one that gives considerably more power to DG Trade in trade defense policy.

*Concluding remarks*

Even though the Council’s formal role has been diminished by the new system, Member States have been pushing to regain control over both the process on implementing acts – by introducing the appeal committee – and the process on delegated acts – by demanding privileged status in the consultation phase on the preparation of delegated acts by the Commission. Even though the instrument of delegated acts is still problematic in terms implementation, it is fair to argue that the Commission’s role in the new system is still stronger than that in the previous one. With the fundamental change in trade defense policy and its dominance of the appeal stage it has an even firmer grip than before on the system of unified implementation.

The problem which remains is indeed that of delegated acts. Mistrust in the new system on the part of the Member States narrows its scope and puts pressure on the Commission to formalize the preparation phase, leaving the European Parliament struggling to have an impact on the delegation of powers. If the latter wants to capitalize on the reforms brought by the Treaty it not only needs to work on its own capacity to follow-up on delegated acts, exercise its ex post control rights and sensitize and inform its members on the new system, but it will also need to push the Commission in building trust with Member States by recognizing their special interest in the implementation of EU law and involving them in a more transparent and more cooperative way without going against the spirit of the treaty.
References


