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Executive functions and cooperation between the European Commission and Member States

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1. The executive functions of the European Commission and Comitology.

The European order envisages a system for the implementation of its law through the Member States, according to a mechanism that brings together the precedence of European law – as construed by case law of the European Court of Justice[1] – and executive federalism[2].

The model of executive federalism – typical of many federal States – is characterized mainly by the fact that the implementation of the legislation produced at the centre (*rectius*: by the Federation) is above all devolved to the administrations of the Member States, which, of course, constitutes fertile ground for intergovernmental relations. As has been pointed out, indeed «the concept of "executive federalism" (...) refers to the processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system»[3].

[1] The most important decision here is judgment no 14/1964, "Costa vs. Enel"; see also judgment "Granital" (C. 106/77) where the Court of Justice stated that "furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions". On this see S. MANGIAMELI, *Integrazione europea e diritto costituzionale*, in Id., *L'esperienza costituzionale europea*, Aracne, Roma, 2008, pp. 11-93.

[2] See for instance, R. SCHÜTZE, *From Rome to Lisbon: "executive federalism" in the (new) European Union*, in 47 Common Market L. Rev., 2010, pp. 1385-1427, and also P. DANN, *Looking through the federal lens: the Semi-parliamentary Democracy of the EU*, Jean Monnet Working Papers, www.jeanmonnetprogram.org/archive/papers/02/020501.rtf.

[3] R. L. WATTS, *Executive federalism: a comparative analysis*, in Research Paper 26. Kingston: Institute of Intergovernmental Relations, Queen's University, 1989, p. 3.

Article 291 TFEU states "Member States shall adopt all measures of national law necessary to implement legally binding Union acts".

However, with reference to the idea that it may be necessary to ensure uniform implementation conditions among Member States, the same article envisages that "those acts shall confer implementing powers on the Commission".

However, the conferral of this power on the Commission is offset by the power granted to Member States to control the exercise of implementation powers attributed to the Commission, as laid down in a regulation of the European Parliament and the Council, adopted under the ordinary legislative procedure. In particular, it is precisely this regulation that, by preventively providing for the rules and general principles concerning how Member States control the implementation powers of the Commission, directly regulates the intergovernmental relations addressed to the implementation of European law. The acts adopted by the Commission for these purposes contain the term "implementation" in their titles thus specifying the exact nature of the act of the Commission[4].

The duty that Member States have of respecting the loyalty and cooperation requirement in the process of implementing community policies that configures the European model as a form of "executive federalism" linked to "cooperative" [5] federalism, has the peculiar feature according to which it is the State that determines the Commission's capacity to act[6].

The classical paradigm of execution federalism, in the case of the European Union, is completed in a non hierarchical manner, with a prevalence of the central institutions but with a network of intergovernmental relations thanks to which the States are the true authors of the implementation of the binding legal acts providing for the implementation of European law[7].

The paragraphs below analyse the intergovernmental relations in the implementation of European law on the basis of the long evolution – initially regulated more by practice than by actual legal rules – whose origins can be found in the earliest years of the European Economic Community.

As it will immediately be seen, the Commission issues implementing acts with the prior assistance of Committees, whose members are representatives of the EU Member States, which have constituted an organic way of operation of the European system known as

[4] ... and distinguish them from the delegation acts provided for by Article 290 TFEU (see further on this point).

[5] Article 4.3 TFEU states: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. // The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. // The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

[6] S. GOZI, *La Commissione europea. Processi decisionali e poteri esecutivi*, Il Mulino, Bologna, 2005, pp. 145-146.

[7] R. BARATTA, *Art. 291*, in A. Tizzano (edited by), *Trattati dell'Unione europea*, Giuffrè, Milano, second edition, pp. 2283 *et seq.*, speaks about a "*decentralised or indirect model* for Member States" (p. 2286).

"comitology" (set of procedures through which EU countries control how the European Commission implements EU law).

These committees are not an institutional body of the European Union but an organizational element of the intergovernmental relations between the European Commission and the administrations of the Member States.

1.1. Birth and growth of Comitology

According to a part of the literature, «European comitology is the most important form of the "new" *governance*. It came about when a complex type of government, that included European and national players, became necessary»[8], in particular, in some sensitive sectors of the nascent European policies as, for instance, the common agricultural policy (CAP). In addition, it was "precisely by having recourse to a cooperative mode of proceeding, typical of community dynamics that Member States were offered the opportunity to take part in the decision-making process of the governing organs of the Union to reconquer spaces of power that had previously been surrendered"[9].

Nevertheless, according to many observers, in spite of the adoption of some European regulatory acts[10], the committees of the European Union still represent «a particularly thick and intricate administrative "undergrowth" that discourages anyone who seeks to approach it and deceives anyone who merely looks at it from the outside»[11].

Proceeding with order, we need to recall first of all that the Treaty that established the European Economic Community (EEC) contained many pragmatic and/or targeted provisions. The need was therefore felt to adopt mechanisms that would enable the Institutions to produce rules aimed at achieving the objectives set forth in the provisions of the Treaty.

However, "contrary to the mechanisms usually adopted by democratic States, the system was organized in such a way as to reserve legislative initiative, and the very formulation of the proposal of a binding act, to a permanent Institution (the Commission) that was substantially the extension of the Member States, even if it was engaged in being independent and autonomous from them"[12].

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[8] C. JOERGES, *Integrazione attraverso la de-giuricizzazione? Un evento interolocutorio*, in *European Journal of Legal Studies*, n. 3/2008, p. 11.

[9] L. CHIEFFI, *Integrazione tra autorità governanti con speciale riguardo al ruolo della Commissione, dei Governi e delle amministrazioni nazionali e regionali*, in www.rivistaaic.it, p. 16.

[10] Finally, see Regulation (EU) no 182 of 2011.

[11] M. SAVINO, *Il "terzo" carattere della sovranazionalità europea: i comitati europei e il* procedural supranationalism, in S. Battini, G. Vesperini (edited by), *Lezioni di diritto amministrativo europeo,* Milano, Giuffrè, 2006, p. 31.

[12] L. COSTATO, *La nuova competenza legislativa dopo Lisbona; limiti all'attività della Commissione o ampliamento dei suoi poteri di fatto? Riflessi sul diritto agrario*, in http://www.gipur.org/journals/index.php/LandAS/article/view/25, p. 1.

It must further be added that, in the institutional design of the European Community, even Article 155 TEC attributed to the Commission (also) the task to "exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter "[13].

In such a situation there was not (nor could there have been) a clear distinction between legislation acts and implementing acts; furthermore, with the birth of the CAP (the first common policy) in 1962, the Member States claimed a share of participation in the implementing activity that, in line of principle, belonged to the Commission[14]. This claim was met with a "compensatory" measure, namely "comitology: the Commission exercised the powers assigned to it by the Council by submitting proposals (regulatory or administrative) to the approval of specialized committees, composed of officials from the same national administrations that are those that, ultimately, are called upon to implement the acts"[15].

In particular, in spite of the fact that the Treaties had attributed this competence – in the execution of the acts of the Council – to the Commission, it was preferred to mitigate this power by establishing the management committees, consisting of officials of Member States, agents who were not European officials, but representatives of the administrations they came from[16], and whose function was essentially to issue opinions on acts concerning the sectors they belonged to[17].

These committees (which reflected the attribution of votes as was done for the Council and envisaged in Article 148 TEC), had to be consulted by the Commission before that adoption of most acts: indeed, only the acts that were strictly implementing acts were exempt.

In this way, the participation of Member States in the Community's legislative-implementation procedure was two-fold: not only when the legislative act was adopted, through their representatives in the Council (whose distinguishing feature was precisely the ministerial composition of each Member State), but also, subsequently, in the implementation of European law, through the influence exercised by the committees (in particular the so-called management committees) on the Commission[18].

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[13] Art. 155 TEC, par. 1, point n. 4. In this framework, the exercise of legislative power in the broad sense was conferred on the Council-Commission tandem, while the Parliamentary Institution only had the residual power of issuing a compulsory but not binding opinion.

[14] At least for the portion to which the Member States were entitled.

[15] M SAVINO, *La comitologia dopo Lisbona: alla ricerca dell'equilibrio perduto*, in *Giornale di diritto amministrativo*, n. 10/2011, p. 1042.

[16] According to M. Savino, *Il "terzo" carattere della sovranazionalità europea*, *op. cit.*, pag. 32, on one hand "the committees (...) are bodies auxiliary to the Commission or Council, regulated by the European Law", but, on the other hand, "derive from the States, because the member of almost all the committees are national officials (who) (...) participate to the implementation of some CE-Institutions' activities; nevertheless they are not detached, but are part of the respective administrations, they are paid by, and depend from, both functionally and organizationally.

[17] See Article 2 of Council Decision 87/373/EC.

[18] See E. GIANFRANCESCO, *La Commissione nel quadro istituzionale dell'Unione: una ricognizione*, in *www.forumcostituzionale.it*.

Nevertheless, their participation could not be considered to be a full participation in that the Commission was obliged to accept the opinion only if it was adopted with a qualified majority (and always with the exception of the cases where the opinion was merely consultative)[19]; and when the opinion was not adopted within the deadline set by the President in dependence of how urgent the matter being examined was, or if the opinion were not expressed, the Commission was free to communicate to the Council its proposal on the decisions to be adopted or it could directly adopt the measure that was immediately applicable, promptly informing the Council[20].

In this framework, the substantial exclusion of the Assembly – representation of national parliaments (which, for its composition, did not yet represent the European peoples in that its members were not elected directly) – from the community regulatory procedure was quite evident. Consequently, the legislation-implementation circuit appeared to be a direct prerogative of national governments, through the Council and through the Commission and the national administrations.

This approach concerning the interrelationship between the role of the Council and the tasks of the Committees was seen by some as the result of the "*interaction of low decisional and high normative supranationalism*"[21].

Furthermore, the weight of the committees was bound to grow both in quantitative and qualitative terms[22]. In particular, with reference to the former aspect, alongside the management committees also regulatory committees (that expressed a different type of opinion, such that if the act were not approved with a qualified majority, it would nevertheless be put before the Council) and consultative committees (whose opinion, instead, was not binding[23]) were introduced.

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[19]Furthermore, in case the opinion was negative, the Commission had to put the act to the Council. The decision would return to the Commission only if the Council did not adopt a decision within a certain lapse of time. However the Council could modify the act with a qualified majority, which "constituted (...) an unmotivated derogation to the rule that the Council could modify a proposal of the Commission if it did not come under the application of the co-decision procedure (now ordinary legislative procedure), only by adopting it unanimously; but no objections have never been made to this perhaps because there were very few such cases in practice since the Commission always tried to negotiate the approval of the Member States in due time so as to submit proposals to be Committees on which there already was approval" (L. COSTATO, *Poteri delegati e poteri di esecuzione della Commissione UE: dalla PAC al TFUE*, in www.rivistadirittoalimentare.it, n. 1/2010, p. 5).

[20] The difference depended, essentially, on the type of procedure chosen among those provided for in Decision no 83.

[21] J.H.H. WEILER, *The Community System: the Dual Character of Supranationalism*, in *Yearbook of European Law*, 1982, vol. 1, p. 304.

[22] See G.J. BRANDSMA, *Accountability deficits in European "Comitology" decision-making*, in EIOP, eiop.or.at/eiop/pdf/2007-004.pdf, nonché G.J. BRANDSMA, J. BLOM-HANSEN, *The EU Comitology system: what role for the Commission*, in *Public Administration, see* 88/2010, pp. 496 *et seq.*

[23] Indeed, in this case, the Commission limited itself to taking "the utmost account of the opinion delivered by the committee", informing it of how it would take its opinion into account (Article 2, decision 87/373/EEC).

As regards, instead, the quality of their work, as early as the 1980s of last century, "the growing decision-making difficulties of the Council, caused by the hard-and-fast unanimity rule, induced the Council to confer increasingly broader powers to the Commission and provide organic rules to comitology. The Commission and the committees not only dealt with the implementation but also with the integration and even amendments of arbitration rules approved by the Council: in practice they carried out a legislative activity"[24].

There was no concrete reaction by the Court of Justice to this progressive transfer of powers from the Council to the Commission which, on the contrary, deemed that the task of distinguishing what was or was not an essential element of a policy (namely the necessary content of primary laws, which as such could not be delegated) – a task that was attributed to the European legislator, namely to the Council – was not questionable[25].

Therefore, over a fairly short time, the Council transferred parts of its powers to the Commission, and such transfer occurred – as could easily be predicted – without excessively destabilizing effects in that the Commission was assisted by the committees, which, as pointed out, were a governmental extension of Member States.

2. Intergovernmental relations and the implementation measures of European law: comitology procedures in the 1987, 1999 and 2006 decisions

2.1. The first regulation on Comitology through a binding Community regulatory act however was made only in 1987[26] and was consolidated by the many a time amended decision 1999/468/EC[27], that replaced the first regulation.

As pointed out, the 1987 decision identified the committee prototype and some procedures. Indeed, all the procedures had in common the composition of the committee that always consisted of the representatives of Member States and was chaired by a representative of the Commission. Moreover, the representative of the Commission always had the power to set a deadline for the submission of the opinion which, as pointed out, could be merely consultative ("consultative procedure") or binding (*rectius*: almost binding). In

[24] M SAVINO, *La comitologia dopo Lisbona*, *op. cit.*, pp. 1042-1043.

[25] In a similar way to what had been established also in the case law produced after the entry into force of the Lisbon Treaty.

[26] Decision 87/373.

[27] The so-called "comitology decision", on which refer to, for instance, K. LENAERTS, A. VERHOEVEN, *Towards a legal framework for executive rule-making in the EU? The contribution of the new comitology decision*, in CMLR, vol. 37/2000, p. 645 *et seq*. Mention must also be made of the new version of Article 202 TEC (ex Art. 145), that set forth that the Council would "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament", thus expanding the veto power of Member States on these modalities.

this latter case the Commission could, depending on the procedure, adopt measures that could be immediately enforceable, informing the Council (second procedure provided for in Article 2, that in the 1999 decision was to be called "management procedure"), or submit "without delay" a proposal to the Council on the measures to be taken (third procedure provided for in Article 2, the future "regulating procedure").

2.2. The 1999 decision, whose greater articulation was a symptom of a higher perception and the need to regulate the procedures of the committee, was adopted when the existence of the European Parliament and its role, alongside the Council, as co-legislator had already been consolidated in the European treaties[28]. Nevertheless, in a manner that was not very different from the previous one, this decision set forth the criteria for choosing committee procedures that were not binding – as expressly stated in the fifth recital – "it being understood that such criteria are of a non-binding nature", so that the choice of the type of committee is (or rather should be restricted to being only) more consistent and predictable. The subsequent recitals restrict themselves to merely "suggesting" ("should be followed…") what type of procedure could be more adequate for which measures.

Indeed, it has been observed that "the attribution to Parliament of the role of co-legislator undermines the symmetry between primary and secondary decision-making. Comitology had been an extension of the Council (national officials who participate in meetings of the committees were accountable to their ministers who sat on the Council), but not of Parliament." And when Parliament directly took on legislative tasks, it was "unwilling to delegate legislative powers to the Commission-Committees duo"[29].

The 1999 decision, therefore, to some extent reflected the previous 1987 decision. For instance, Article 3 regulated the consultative procedure in a similar way (i.e. traditional composition, non-binding opinion, information to the Commission on how it should consider the opinion), Article 4 regulated the management procedure, similarly to the previous model (possibility of putting a deadline, weighted vote, adoption of immediately applicable measures by the Commission, communicated to the Council if they diverge from the opinion) and, finally, Article 5 that regulated the procedures, added nothing new.

However, the latter procedure envisaged the involvement of Parliament that could object that the Commission had exceeded its implementation powers by informing the Council, which in turn, through a resolution, could have the Commission re-examine the draft implementing act.

Moreover, Article 7 of the 1999 decision envisaged that "The European Parliament shall be informed by the Commission of committee proceedings on a regular basis. To that end, it

[28] On the evolution of Parliament as co-legislator, there are many contributions in the literature. By way of example, see P. PIRODDI, *Il Parlamento europeo nel Trattato di Lisbona tra democrazia rappresentativa e democrazia partecipativa*, in *Rivista italiana di diritto pubblico comunitario* n.3-4/2011, pp.801-838.

[29] M SAVINO, *La comitologia dopo Lisbona*, *op. cit.*, p. 1043.

shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the procedure provided for by Article 251 of the Treaty, and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong. The European Parliament shall also be kept informed whenever the Commission transmits to the Council measures or proposals for measures to be taken"[30].

In addition, Article 7 of the 1999 decision envisaged that the European Parliament with a reasoned resolution, could ask the Commission to re-examine the "draft implementing measures, the adoption of which is contemplated and which have been submitted to a committee pursuant to a basic instrument adopted under Article 251 of the Treaty". The fault that the European Parliament could point out was the excess of implementation powers[31].

The Commission was to inform the European Parliament and the committee, motivating its decision, on the follow up it intended to give the resolution of the European Parliament (Article 8).

Finally, another novelty of the 1999 decision, compared to the 1987 decision, was the duty for the committees to adopt their own rules of procedure based on a model published in the Official Journal, and for those that were already endowed with this instrument, adapt it to the model.

2.3. The first real concrete reaction to the renewed role of the EP on the European institutional stage, came only recently, with Decision 2006/512/EC that brought substantial amendments to the 1999 decision[32].

The 2006 decision envisaged that "it should be ensured that the European Parliament receives better information on the work of the committees".

The decision furthermore intended to "improve information to the European Parliament", by providing that the Commission would periodically inform the European Parliament on the work of the committees, it would send documents on the work of the committees and inform Parliament when it sent to the Council measures or proposals to be adopted and finally that "particular attention will be paid to the provision of information to the European Parliament on the proceedings of committees in the framework of the regulatory procedure with scrutiny, so as to ensure that the European Parliament takes a decision within the stipulated deadline" (new *recital* n. 10).

[30] The Commission could submit an amended proposal, submit the proposal again or submit a legislative proposal under the treaty. If, upon expiry of this term, the Council did not adopt the proposed implementing act or did not oppose the proposal on the implementing measures, the Commission could adopt the proposed implementing act.

[31] Taking into account the mentioned resolution, the Commission, in compliance with the deadlines of the ongoing procedure, could present to the committee a new proposal, continue with the procedure under way, or submit to the European Parliament and to the Council a proposal in accordance with the treaty.

[32] See also D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law, cit.* pp. 117 *et seq.*

Finally, this act introduced a fourth comitology procedure (alongside the consultative, management and regulatory procedure), namely the "regulatory procedure with scrutiny"[33].

This new procedure would allow the legislator (i.e. the EP and the Council) to oppose the adoption of a proposal if it went beyond the implementation powers envisaged in the basic act, or if it were not compatible with the aim or content of the act or if it did not comply with the principles of subsidiarity or proportionality (*second recital*).

Moreover, considering it possible that the implementing act could amend non essential elements of a legislative act adopted in accordance with the procedure envisaged in Article 251 of the treaty, or that it could delete some of these elements, or integrate them with the addition of new non essential elements, the regulatory procedure had to make provision for the two branches of the legislative authority to control the act before the adoption of such measures (new *recital* 7-bis of the 1999 decision).

In practice, this new procedure was to ensure the European legislator that the essential elements of a legislative act could be modified only by the legislator himself [34]. Indeed, once the committee issued its opinion, the Commission was to submit the proposal to the two "co-legislators" (the Council and the European Parliament). If the implementation measures proposed by the Commission were accepted by the two Institutions the implementing act could be adopted. The two institutions, however, could, within three months, oppose the adoption of the proposal if, in their opinion it exceeded the implementation powers envisaged in the basic act, or if it were not considered to be compatible with the purpose or content of the basic act, or if it did not comply with the subsidiarity or proportionality principles. The Council could adopt a resolution with a qualified majority and the EP with the majority of its members. It was evident, therefore, that, alongside the powers already conferred on the Council, there was an increase in the powers of Parliament who had the power of "veto" on proposals of a general nature that had an impact on legislative acts.

In case of opposition, therefore, the Commission could not adopt the implementing measure; nevertheless, it could submit to the committee a modified proposal or submit a legislative proposal in accordance with the treaty. The Commission however, could adopt implementing measures that were not consistent with the opinion of the committee or in the absence of an opinion, the regulatory procedure with scrutiny would occur differently.

The Commission would, without delay, submit to the Council a proposal on the measures to be adopted, transmitting it at the same time to the European Parliament, and the Council, deciding with a qualified majority on the proposal within two months from submission, could

[33] On this see A. PIETROBON, *Art. 291*, in F. Pocar, M.C. Baruffi (edited by), *Commentario breve ai Trattati dell'Unione europea*, Cedam, Padova, Second edition, pp. 1421 et seq.

[34] As stated in Article 2, as amended by the 2006 decision, "Where a basic instrument, adopted in accordance with the procedure referred to in Article 251 of the Treaty, provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be adopted in accordance with the regulatory procedure with scrutiny".

oppose it with a qualified majority. In this case, the implementing measures would not be adopted by the Commission and the latter would have to submit to the Council an amended proposal for the implementing act or a legislative proposal in accordance with the treaty.

If the Council envisaged to approve the proposed implementing measures, it would put them to the European Parliament without delay. Furthermore, the Commission could put the measures without delay to the European Parliament if the Council were not to issue a resolution within the deadline of two months.

The European Parliament, deciding with a majority of its members, within four months from the transmission of the proposal could, in turn, oppose the adoption of the measures by claiming that such measures fall outside the scope of the implementing powers envisaged by the basic act, or that the measures are not compatible with the purpose or contents of the basic act, or they do not comply with the principles of subsidiarity and proportionality. Obviously, the opposition of the European Parliament to the measures proposed would not allow them to be adopted. In such case, the Commission could submit to the committee an amended implementation proposal or submit a legislative proposal in compliance with the treaty. If, upon expiry of the deadline, the European Parliament did not express any opposition to the measures proposed, the latter would be adopted by the Council or by the Commission, as the case may be.

2.4. The overview of the types of comitology procedures is completed by the *Lamfalussy* procedure. This procedure, introduced in 2001, "was designed to facilitate and streamline the adoption of community regulations in the services and financial markets sector, enabling it to adjust to the rapid developments in commercial practices": The four levels of this procedure were intended to "increase efficiency and transparency of the Community regulation process in the area of financial services:

– Level I – Framework legislation: legislative acts adopted by the European Parliament and by the Council through a co-decision procedure, containing the framework principles defined by the Commission;

– Level II – Detailed implementing measures: legislative acts adopted by the Commission with the support of the "level 2 committees" (consisting of the representatives of Member States), containing the measures required to make the level 1 principles operational;

– level III – Cooperation: transposition of directives by Member States. Adoption of Level 2 technical measures prepared by the Commission with the support of the "Level 3 Committee" (consisting of the high level representatives of the national supervisory authorities and facilitate the consistent and uniform application of the regulations in all Member States;

– level IV – Control: measures of the Commission to check compliance of Member States with Community law, also through the infringement procedure"[35].

This procedure is of special importance above all because it represented a form of more intense cooperation between the Commission and the Member States in the pre-Lisbon phase.

3. *Continued*: The comitology procedures in the Lisbon Treaty and in Regulation no 182 of 2011.

With the 2007 Lisbon Treaty, which entered into force in 2009, the situation changed thoroughly, also with regard to the constant and no longer postponable need to attribute a more decisive weight to the European Parliament in the decision-making process.

In particular, the articles regarding the role of the Commission in implementation[36] were replaced by Article 291 TFEU, and by Article 290 TFEU on delegated acts which was to incorporate the **regulatory procedure with scrutiny**.

This intervention was received positively by the literature. Indeed, before the entry into force of the Lisbon Treaty, it had been pointed out that "the current system of the Union, as everyone knows, is based on (...) the fragmentation of the institutional and regulatory system, it has several categories of sources that are not arranged according to hierarchical criteria, several institutional systems and micro-systems described only in general terms in the pillar-based structure. It is generally believed to be a system where the criterion of competence predominates while the hierarchical criterion is virtually absent"[37].

Vice versa, this Treaty delineates "with greater clarity a hierarchy of derived sources articulated at various levels which accommodates the categories of implementing acts and delegated acts, both subordinate to the legislative acts provided for in Article 289 TFEU" [38]. It is thanks to the Lisbon Treaty that a sufficient level of differentiation was reached among the various acts even though, in order to achieve this distinction, special importance was attached to the procedural aspect.

In particular only the act adopted with the procedure provided for in Article 290 TFEU can integrate or modify "certain non-essential elements of the legislative act"[39], while that adopted under Article 291 TFEU is an implementing act; moreover, between the delegated

[35] R. RAZZANTE, *Tratti essenziali del quadro normativo di riferimento*, in R. Razzante (edited by), Il contenzioso finanziario nell'era MiFID, Giappichelli, Torino, p. 7.

[36] On this see also P. TOSIEK, *Comitology Implementation of EU Policies – Democratic Intergovernmentalism?*, in www.jhubc.it/ecpr-porto/virtualpaperroom/026.pdf , p. 2 *et seq.*

[37] E. CANNIZZARO, *Gerarchia e competenza nel sistema delle fonti dell'Unione europea*, in *Il diritto dell'Unione europea*, n. 4/2005, p. 652.

[38] C. RIVADOSSI, *Il TFUE e le nuove fonti del diritto dell'unione europea. Atti delegati e atti di esecuzione a confronto*, in www.forumcostituzionale.it, p. 2.

[39] Furthermore, "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".

act and the implementing act there is a mutually excluding relationship; as clarified by the Commission, "the same act cannot have a double connotation[40].

An act that is regulated by Article 290 is excluded from the scope of article 291 and vice versa. It is evident that for the drafters of the new treaty these two articles mutually excluded each other. It is no coincidence that the acts deriving from them have different legal names"[41].

As regards the analysis of the regulatory aspect, "the Treaty formally separates for the first time all comitology measures into delegated (Article 290) and implementing acts (Article 291)"[42]. Indeed, this distinction had the effect of attributing Comitology to the sphere of implementation.

The exclusion of committees from the sphere of delegated acts is justified by the control exercised by Parliament, on an equal standing with the Council as "delegating legislators" (thus reducing – at least in this area – the democratic deficit that was quite considerable in the area of comitology).

Vice versa, the comitology procedures come under Article 291 TFEU[43] only when the uniform implementation criteria required are such that the attribution to the Member States is not sufficient.

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[40] The provision of the Court of Justice must be recalled briefly (Case C-427/12 of 13 March 2014, *European Commission vs. European Parliament and Council of the European Union*) regarding the distinction between the acts provided for in Articles 290 and 291 TFEU. In this decision, the European judge pointed out that "Article 291 TFEU does not provide a definition of the concept of an implementing act, but simply refers, in paragraph 2 thereof, to the need for such an act to be adopted by the Commission or, in certain specific cases, by the Council, in order to ensure that a legally binding EU act is implemented under uniform conditions in the European Union" (Para. 33). Furthermore the EUCJ adds that, "When the EU legislature confers, in a legislative act, a delegated power on the Commission pursuant to Article 290(1) TFEU, the Commission is called on to adopt rules which supplement or amend certain non-essential elements of that act. In accordance with the second subparagraph of Article 290(1) TFEU, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting such a delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act" (par. 38). Vice versa, "when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States". Finally, with reference to the important alternative among the instruments provided for in Articles 290 and 291 TFEU, the Court of Justice stated 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" (para. 40), with the consequence that the jurisdictional union must limit itself to the clear evaluation errors, leaving, for all other matters, the legislator free to choose this attribution and, especially the ensuing involvement or not of the committees in a way that is not different from what had already been established prior to the entry into force of the 2009 Treaty.

[41] Communication of the Commission to the European Parliament and to the Council. Implementation of Article 290 of the Treaty on the Functioning of the European Union – COM (2009) 673.

[42] C. STRATULAT, E. MOLINO, *Implementing Lisbon: what's new in comitology?*, available on http://www.epc.eu/documents/uploads/pub_1258_implementing_lisbon_-what_s_new_in_comitology.pdf, p. 1.

[43] Article 291 TFEU states: "1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts. // 2. Where uniform conditions for implementing legally binding Union acts are

Implementation competences are attributed to the Commission, that is assisted by a committee, chaired by one of its representatives who does not participate in the votes of the committee, "composed of officials of the state administrations of the sector. Through these delegates, the Member States express (with a qualified or simple majority) an opinion on the measure proposed by the Commission according to the classical scheme of comitology"[44].

3.1. Furthermore, under the new Article 291 TFEU a new regulatory act on comitology has been adopted issued also by the parliamentary institution: Regulation no 182/2011 of the European Parliament and of the Council[45].

This regulation reduces the number of comitology procedures, maintaining only the advisory procedure, whose regulation remains unchanged compared to the past, and the examination procedure, that comprises the regulation and management procedure[46], with some amendments to the latter (for a quantitative examination of the relevant data, refer to the next paragraph).

A first important novelty is that compliance with the criteria for assigning the examination procedure is compulsory, whereas previously it was not. In particular, the **examination procedure** is applied for the adoption of (a) implementing acts of general scope; (b) other implementing acts relating to: (i) programmes with substantial implications; (ii) the common agricultural and common fisheries policies; (iii) the environment, security and safety, or protection of the health or safety, of humans, animals or plants; (iv) the common commercial policy; (v) taxation.

Residually, the **consultative procedure** is applied to all other cases; moreover, the latter can be used for adopting the above listed acts, in duly motivated cases.

The **consultative procedure** of the committee is reconstructed along the lines of the previous procedure, but this time establishing the simple majority rule and the rule that the Commission must give the highest consideration to the opinion.

Vice versa, in the **examination procedure**, the rule on weighted votes is reasserted.

Also in the system regulated by the 2011 regulation, "where a basic act is adopted under the ordinary legislative procedure", the European Parliament and the Council preserve the power to communicate, at any time, to the Commission that "in its view, a draft

needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. // 3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. // 4. The word "implementing" shall be inserted in the title of implementing acts.".

[44] M SAVINO, *La comitologia dopo Lisbona, op. cit.*, p. 1045.

[45] At the time of writing this paper, this regulation is the subject of an amendment proposal available on, url http://eur-lex.europa.eu/procedure/EN/2017_35?qid=1487300621344&rid=1.

[46] As pointed out earlier, the regulatory procedure with scrutiny is similar, now, to the acts provided for in 290 TFEU.

implementing act exceeds the implementing powers provided for in the basic act". In such case, "the Commission shall review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act" (Article 11).

3.2. The regulation provides, first of all, some common rules, that do not differ from those already envisaged in the acts that regulated the subject, including the obligation to adopt internal rules of procedure based on a model to be published in the Official Journal.

In particular, it is envisaged that it is the president who submits to the committee the draft implementing proposal that is to be adopted by the Commission, convening a meeting within a period of not less than fourteen days from the presentation of the implementing act and of the draft agenda to the committee.

The committee expresses its opinion on the draft implementing act within a deadline that the president can set in dependence of how urgent the matter is. The Committee members have the opportunity to examine the draft implementing act and express their position. Until the committee expresses its opinion, each member of the committee can propose amendments and the chairman can present amended versions of the draft implementing act. The chairman takes action to find solutions that are agreeable to the committee and informs the committee of the way in which due account was given to the discussions and amendments proposed, in particular with regard to the proposals that are widely supported by the committee.

Alongside this procedure with which the committee expresses its opinion, in duly justified cases, the chairman can obtain the opinion of the committee through a written procedure. In this case, the chairman communicates to the Committee members the draft implementing act and sets a deadline for the presentation of an opinion depending on the urgency of the issue being examined. It is presumed that any member of the committee who does not oppose the draft implementing act or who does not explicitly abstain from the vote by the expiry of the deadline tacitly approves the draft implementing act.

The written procedure is concluded without a positive outcome when, by the deadline set by the chairman, the chairman himself or a member of the committee asks that the opinion not be formalised in this way. In such case, the chairman convenes a meeting of the committee within a reasonable lapse of time.

The opinion of the committee is entered into the minutes. The members of the committee have the right to ask that their position be reported in the minutes. The chairman sends the minutes to the members of the committee in the shortest delay.

3.3. Finally, the control mechanism may envisage an appeal procedure. Indeed, if the Commission cannot adopt the implementation measures proposed (in particular if the committee expressed a negative opinion), it may refer the case to the appeal committee. This committee, introduced by the 2011 regulation, has *de facto* replaced the Council in case of

conflict between the Commission and the committee.

Also this committee is chaired by a representative of the Commission and consists of officials from the state administrations; its organization is regulated by internal rules of procedure adopted with a simple majority of its members upon proposal by the Commission.

The appeal committee is not a permanent body but rather a procedural forum that offers the Member States the opportunity to have the issue discussed again by representatives of an even higher level.

If, however, also the appeal committee expresses a negative opinion on the measures proposed by the Commission, the latter cannot implement them.

When an issue is submitted to an appeal committee, it meets not before fourteen days, except for duly justified cases, and not beyond six weeks from the date of referral. Without prejudice to the terms defined by its chairman, the appeal committee expresses its opinion within two months from the date of referral.

The chairman sets the date of the meeting of the appeal committee in close cooperation with the members of the committee so as to enable Member States and the Commission to be represented at an appropriate level.

3.4. In case of a positive opinion, the Commission will simply adopt the act. If the opinion is not expressed, ordinarily the Commission can adopt the draft implementing act. Instead, if the committee expresses a negative opinion, the Commission cannot proceed with the draft implementing act: this opinion therefore is binding.

In this latter case, if the chairman deems that an implementing act is necessary, the chairman may submit an amended version of the draft implementing act to the same committee within two months from the presentation of the negative opinion, or present the draft implementing act within one month from the above presentation to the appeal committee for a new resolution.

An exception needs to be pointed out in the case when the opinion is not forthcoming. If the implementing act concerns given sectors such as, taxation, financial services or the protection of health, or the safety of humans, animals or plants, even in the case of no opinion being produced, the Commission cannot adopt the act.

In these cases, if it is deemed that an implementing act is necessary, the chairman can submit an amended version of the act to the same committee within two months from the vote or he can submit the draft implementing act within one month to the appeal committee for a new resolution.

Finally, two urgency procedures are envisaged: the first allows the Commission to adopt implementing acts in exceptional cases[47] and they can be submitted to the appeal committee later and, if the latter expresses a negative opinion on the adopted implementing act, the

[47] "...in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU" (Article 7, para. 1)

Commission immediately repeals the act; on the other hand, if the appeal committee expresses a positive opinion or doe not express any opinion, the implementing act remains in force.

The second urgency procedure, based "on duly justified imperative grounds of urgency"[48], authorizes the Commission to adopt an implementing act that is immediately applicable that remains in force for a period of not more than six months (unless otherwise provided for by the act itself), which is submitted – within fourteen days – to the competent committee for an opinion. If the opinion is negative, the Commission is obliged to immediately repeal the act.

4. *Continued*: quantitative analysis of the data on comitology.

As regards the quantitative analysis of the data relative to the implementation phase of European legislative acts, two documents are particularly important: the report of the Commission to the European Parliament and to the Council on the implementation of EU Regulation no 182/2011 (hereinafter Report (1)), and the report of the Commission on the work of the committees in 2015 (report (2)).

Table 1 of Report (1) appears to be quite significant. It provides some data for the year: the high number of Committees, the number of opinions (positive, negative or no opinion) and the adopted measures.

Year	Committees	Opinions	Measures adopted	Positive opinions	No opinion	Negative opinion
2009	266	2.091	1.808 (131 RPS)	2.003	78	10
2010	259	1.904	1.812 (164 RPS)	1.783	121	0
2011	268	1.868	1.788 (163 RPS)	1.789	75	4
2012	270	1.923	1.824 (167 RPS)	1.845	78	0
2013	302	1.916	1.887 (171 RPS)	1.845	50	0
2014	287	1.889	1.728 (165 RPS)	1.838	51	0

Table 1 – Number of opinions issued.

[48] Indicated in Article 8 as "Immediately applicable implementing acts".

The table shows that there was substantial continuity before and after 2011 (when regulation 182 of 2011 came into force)[49]. But above all the high number of opinions requested which, with the exception of 2012, declined in recent years, in a way that was not always in line with the number of measures adopted which, in any case were numerically the same over the time period considered. Moreover the figure relative to the number of negative opinions issued is significant, which suggests that only rarely was there an irremediable contrast between the European legislator and the committees.

Still with regard to the cases of disagreement, another table is of interest (Report (1)), which shows the data relative to the referrals to the appeal committee:

Year	Total referrals to the appeal committee	DG/sectors involved	Positive opinion of the appeal committee	Negative opinion of the appeal committee	No opinion of the appeal committee	Measures taken in the absence of an opinion
2011	8	Phytosanitary and medical products	2	1	5	5
2012	6	Genetically modified foods and feeds	0	0	6	6
2013	9	Genetically modified foods and feeds, phytosanitary products, biocide products, community customs code	0	0	9	8
2014	13	Genetically modified foods and feeds, provisions and rules on the inspection of sea vessels.	2	0	11	11
Total	36		4	1	31	30

Table 2 – Data taken from the register of Comitology and from the annual reports.

The table shows that the appeal committee was addressed mainly for the sector of genetically modified foods and feeds and, with one exception, no measure was ever adopted if an opinion was not issued since the committee started operating.

[49] Report (2), updates the figure on the total number of committees that, in 2015, decreased by 7 and were therefore 280.

Moreover, it can be observed that, "on the whole, the cases of referral to the appeal committee had the same frequency as those referred previously to the Council, which is no longer required under the new institutional framework. Furthermore, the referrals involved similar sectors with similar results. From the practical standpoint, experience shows that Member States were represented in almost all cases by permanent representatives"[50].

As regards the examination procedure, this was by far more used than the consultative procedure: the table below contained in Report (1) shows, indeed, that more than 90% of the acts were adopted using the former procedure and the trend remained the same from 2011 to 2014:

Year	Acts adopted according to the examination procedure	Acts adopted according to the consultative procedure
2011	1 311	77
2012	1 591	121
2013	1 579	143
2014	1 437	122

Table 3 – Data taken from the comitology register.

Finally, it may be useful to provide an overview of the type of committees that operated in 2014 and 2015 (table 4) and, subordinately the type of procedure adopted in 2015, including the appeal committee (table 5):

Sector of activity	2014	2015
AGRI (Agriculture and rural development)	18	18
BUDG (Budget)	2	2
CLIMA (Actions on climate)	5	5
CNECT (Communications, content and technology networks)	6	5
DEVCO (International and development cooperation)	5	5
DIGIT (IT)	1	2
EAC (Education and culture)	5	5

[50] Report (1), p. 5. A reading of Report (2), offers a comparison of the data with 2015. In particular, the Appeal Committee met 4 times and discussed 11 draft implementing acts. Of these, on 10 no opinion was issued and therefore the relevant acts were adopted by the Commission.

ECFIN (Economic and financial affairs)	1	1
ECHO (Humanitarian acts and civil protection)	2	2
EMPL (Employment, social affairs and inclusion)	4	4
ENER (Energy)	15	14
ENV (Environment)	31	31
ESTAT (Eurostat)	7	6
FISMA (Financial stability, financial services and Union capital markets)	9	8
FPI (Foreign policy instruments)	4	4
GROW (Internal market, industry, entrepreneurship and SMEs)	44	43
HOME (Migration and internal affairs)	14	11
JUST (Justice and consumers)	20	21
MARE (Fisheries and Maritime affairs)	4	4
MOVE (Mobility and transportation)	30	30
NEAR (Neighbourhood policy and widening negotiations)	3	3
OLAF (European antifraud office)	1	1
REGIO (Regional and urban policy)	1	1
RTD (Research and innovation)	5	5
SANTE (Health and food safety)	21	21
SG (Secretary general)	3*	3*
TAXUD (Taxation and customs union)	11	11
TRADE (Trade)	15	14
TOTAL:	287	280

Table 4 – Total number of committees.

Type of procedure					
	Consultative	Examination	Regulation with control	Committees that apply several	TOTAL

				procedures	
AGRI	0	12	0	6	18
BUDG	1	1	0	0	2
CLIMA	0	1	0	4	5
CNECT	0	1	0	4	5
DEVCO	0	2	0	3	5
DIGIT	0	2	0	0	2
EAC	0	1	0	4	5
ECFIN	0	0	0	1	1
ECHO	0	1	0	1	2
EMPL	0	0	0	4	4
ENER	2	4	2	6	14
ENV	0	6	5	20	31
ESTAT	0	2	0	4	6
FISMA	0	1	2	5	8
FPI	0	3	0	1	4
GROW	6	9	5	23	43
HOME	2	6	0	3	11
JUST	5	5	5	6	21
MARE	0	2	0	2	4
MOVE	3	7	3	17	30
NEAR	1	1	0	1	3
OLAF	0	1	0	0	1
REGIO	0	0	0	1	1
RTD	0	4	0	1	5
SANTE	0	9	0	12	21
SG	0	2	0	1	3
TAXUD	1	9	0	1	11
TRADE	2	6	0	6	14
TOTAL:	23	98	22	137	280

Table 5 Number of committees broken down by procedure (2015).

An analysis of the last two tables, contained in Report (2), shows that the highest number of committees coincide with some more sensitive and more important business areas within the framework of the European Union such as the internal market, industry, entrepreneurship and the small and medium sized enterprises, the environment and mobility and transportation.

Moreover, the data analysed suggest that also in 2015, the examination procedure was the procedure mostly used versus the regulatory procedure with scrutiny (98 vs. 22). Also the figure on the committees that use several procedures, namely 137, is quite important.