Introduction

Eljalill Tauschinsky and Wolfgang Weiß

1. CONTEXT AND BACKGROUND

EU administrative law scholarship and practice remain confused about the reach and interrelation of arts 290 and 291 TFEU, which created the categories of delegated and implementing Commission acts.¹ The introduction of these two different instruments of executive rule-making by the Lisbon Treaty has prompted attempts in delineating them, based on constitutional theories of separation of powers or functional differentiation. These attempts have failed to a large extent, all the more since the CJEU's relevant case law has not been helpful in constructing a proper distinction.

Both arts 290 and 291 TFEU mainly describe rule-making procedures for rules authored by the Commission. Both provide for procedures but hardly for a substantive mandate, and instead create a blue-print for empowering the Commission through secondary Union law. Delegated and implementing acts conform to a 'transmission belt' approach² in that their normative framework is derived from a legislative act and the public interests encoded therein, causing arts 290 and 291 to be described as providing for 'administrative' rule-making.³

¹ To be precise, when referring to implementing acts under art. 291, the reference to art. 291 TFEU only relates to its paras 2–4.

² For an explanation of this term cf. Richard B. Steward, 'The Reformation of American Administrative Law' (1975) 88 (8) *Harvard Law Review* 1667, 1675 ff. Steward himself was critical of the model. For a critical view in the context of the EU, cf. Rob van Gestel, 'Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory' (2014) 2(1) *Theory and Practice of Legislation* 33.

³ Joana Mendes, 'The Making of Delegated and Implementing Acts: Legitimacy Beyond Inter-Institutional Balances' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Law-Making by the EU Commission: The New System* (OUP 2016) 233. See, generally, also Herwig Hofmann, Gerard Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* (OUP

The two articles differ in terms of the specific procedures they describe, and they likewise differ in their description of the function of the respective acts. While delegated acts, provided for in art. 290 TFEU, are intended to empower the Commission to adopt non-legislative acts of general application that specify ('supplement or amend') certain non-essential elements of legislative acts,⁴ implementing acts as described in art. 291 TFEU regulate implementing powers of the Commission that are intended to enable uniform conditions of implementation. Furthermore, the two provisions differ in their specification of substantive requirements of the Commission mandate. The transfer of delegated authority requires the legislative act to state the objectives, scope and duration of the delegation of power, and the legislator to rule on the essential aspects itself, whereas art. 291 TFEU does not specify the required or prohibited content of the mandate further, apart from prescribing that (only) implementing powers are to be conferred. Lastly, while art. 290 TFEU applies to the adoption of general acts only, art. 291 TFEU mandates can be used to enable the adoption of individual acts as well.⁵ Yet, while these provisions determine situations in which either only art. 290 or 291 TFEU applies (art. 290 only for textual changes of the normative part of a legislative act; art. 291 only for individual decisions), none of these differences amount to mutually exclusive scopes.

Today, recourse to arts 290 and 291 TFEU by the legislator takes place in the tension created between the fact that the Treaties, informed by an abstract constitutional distinction between legislation and execution, appear to have created categorically different acts, and the fact that delegated and implementing rule-making procedures in practice have become increasingly similar to each other. In simplified terms, the problem is that delegated and implementing acts appear – in terms of

2011), even though, when specifically dealing with delegated and implementing acts, they are described as 'subordinate legislation': *ibid*, Ch. 15.

⁴ This can be achieved either by amending or supplementing the legislative acts in question, whereby the former relates to a change to the text of the basic legislative act. Cf. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art. 290. Case C-88/14 *European Commission v European Parliament* [2015] ECLI:EU:C:2015:499 and Case C-286/14 *European Parliament v European Commission* [2016] ECLI:EU:C:2016:183.

⁵ In contrast to this prevailing view, Ulrich Stelkens constrains the scope of the Commission mandate under art. 291 to general implementing rule-making: Ulrich Stelken, 'Rechtsetzung der europäischen und nationalen Verwaltungen', in *Grundsatzfragen der Rechtsetzung und Rechtsfindung, Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer* (VVDStRL) 71 (Walter de Gruyter 2012) 367, 384–386, 400 ff.

their foundation in primary law – as fundamentally different acts that are, however, adopted in practice through similar procedures, at the same time as their content and legal effects are indistinguishable in many or even in most cases. Yet, if we accept that the creation of two forms of Commission acts was prompted by some form of legal necessity or legitimate political will, then understanding the difference between delegating and implementing acts remains paramount.

Indeed, irrespective of this difficult state of affairs, the necessity of the empowering bodies to choose between one or the other kind of acts remains pertinent. While it might be tempting to conclude that there is no real difference between delegated and implementing acts (apart from a few ‘hard facts’ such as that only delegated acts have their prescribed base in legislative acts, whereas the basis for implementing acts can be more varied), the fact remains that arts 290 and 291 cannot be relied upon simultaneously for adopting one and the same act. There is a choice to be made that lies moreover squarely within the discretion of the legislating bodies.⁶ Further, rule of law considerations require the choice between them not to be arbitrary but based on objective reasons.

2. THE DEVELOPMENT OF DELEGATED AND IMPLEMENTING ACTS

The introduction of two separate categories of Commission acts was at its inception seen as a significant and relevant innovation of executive rule-making in the EU (‘revolutionary re-ordering of the regulatory process’⁷), and a reform of ‘comitology’.⁸ Moreover, this differentiation was originally understood as a simplification of the existing system of

⁶ Case C-427/12 *European Commission v European Parliament, Council of the European Union* [2014] ECLI:EU:C:2014:170, para 40.

⁷ Robert Schütze, “‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 (5) MLR 661, 692 ff.

⁸ Herwig Hofmann, ‘Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality’ (2009) 15 (4) *European Law Journal* 482; Steve Peers and Marios Costa, ‘Accountability for Delegated and Implementing Acts after the Treaty of Lisbon’ (2012) 18 (3) *European Law Journal* 427; Joana Mendes, ‘Delegated and Implementing Rule-Making: Proceduralisation and Constitutional Design’ (2013) 19 (1) *European Law Journal* 22, 22 ff; Robert Schütze, “‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 (5) MLR 661, 669, 684 ff.

Commission rule-making.⁹ Simplification implies that a rational principle be introduced into the system and thus requires not only that different categories of acts are only created where they are necessary to take account of differences in fact (including intended legal consequences), but also that manifestly different facts and regulatory intentions are treated by different categories of acts. In this vein, the differentiation between delegated and implementing acts was thought to correspond to manifestly different functions of Commission acts, namely ‘quasi-legislative’ functions juxtaposing administrative ‘implementing functions’ or (pure) application.¹⁰

The reasoning of the working group on simplification for separating these two categories of acts relied heavily on a separation of powers logic. This logic was visible throughout the Treaty Establishing a Constitution for Europe (TeCE), and immediately explains why the separation between ‘quasi-legislative’ delegation and ‘executive’ implementation was thought so fundamental as to be necessary in a simplified system. In this logic, legislative and executive functions are so different that they cannot legitimately be covered by the same procedural and legal basis. Articles 290 and 291 were seen to serve fundamentally different constitutional rationales.¹¹ This separation of powers logic is reflected in the different accountability arrangements provided for in arts 290 and 291 TFEU respectively. The former places the Commission under the scrutiny of the legislator, whereas the latter provides for scrutiny by the Member States and their administrative bodies, in the form of comitology structures.

At the same time, this differentiation chimed well with the political dynamic according to which it was desirable that the European Parliament (EP) be given more powers. This was not only a desire of the EP

⁹ Thus, these two categories were created by the working group on simplification during the Convention for a Constitution for Europe: The Secretariat, ‘Note from the Secretariat to the Convention on Working Groups: Second Wave’ CONV (2002) 206/02. The provisions proposed there were used verbatim in the Lisbon Treaty. Articles I-36 and I-37 of the Draft Constitutional Treaty correspond to arts 290 and 291 TFEU.

¹⁰ Chairman of the Working Group IX on Simplification, ‘Report to the Members of the Convention: Final Report of the Working Group IX on Simplification’ CONV (2002) 424/02 and Working Group on Simplification, Point No 7: Main points of the report of the Working Group on Simplification, presented to the plenary session of the European Convention on 5 and 6 December 2002.

¹¹ See Robert Schütze, ‘“Delegated” Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 (5) MLR 661, 690 ff: protection of democratic versus federal values.

itself, which sought to get more influence in highly relevant post-legislation stage of policy formation, it was also a demand of the hour. More power for the EP was argued to be equivalent to ‘more democracy’,¹² and the creation of democratic credentials was after all one of the most important reasons for establishing the Convention and subsequently the Constitution for Europe.¹³ This was also the reason why the 2006 comitology reforms had expanded the role of the EP, in an endeavour to enhance democratic legitimacy of comitology rule-making.¹⁴

Even though Commission rule-making has been a staple of EU policy-making for several decades,¹⁵ and even though (part of) the Lisbon reform was anticipated through the introduction of the Regulatory Procedure with Scrutiny in 2006,¹⁶ which implemented parts of the reform discussions in the European Convention,¹⁷ the practical consequences of arts 290 and 291 TFEU were not immediately clear. The EU – when the Lisbon Treaty finally entered into force in December 2009 – had already practiced a rule-making procedure, which differed only in details from what is now art. 290 TFEU (the most decisive difference regarding the control powers enjoyed by the Parliament being that under the Scrutiny Procedure, it did not have a full political control but was limited to express its veto on grounds of the Commission going beyond

¹² Jürgen Habermas, ‘Why Europe needs a Constitution’ in Erik Oddvar Eriksen, John Erik Fossum and Augustin Menendez (eds), *Developing a Constitution for Europe* (Routledge 2004) 17, 26; Poaires Maduro, ‘Europe and the Constitution: What if this is as good as it gets’ in J.H.H. Weiler and M. Winds (eds), *European Constitutionalism beyond the State* (CUP 2000) 74.

¹³ Presidency Conclusions of the European Council Meeting in Laeken, 14 and 15 December 2001, 22.

¹⁴ Robert Schütze, ‘“Delegated” Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 (5) MLR 661, 663, 678 ff; Daniela Corona, ‘The Adoption of Secondary Legislation through Comitology in the EU: Some Reflections on the Regulation (EU) 182/2011 in comparison with the Pre-Lisbon Reform’ (2014) 2 (1) The Theory and Practice of Legislation 85, 91.

¹⁵ For a historical recount of Commission rule-making see Adrienne Héretier, Catherine Moury, Carina Bischoff and Carl Fredrik Bergström, *Changing Rules of Delegation: A Contest for Power in Comitology* (OUP 2013) 4 ff.

¹⁶ Cf. Commission, ‘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 and Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006 [2006] OJ L 200/11, art. 5a.

¹⁷ Robert Schütze, ‘“Delegated” Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 (5) MLR 661, 681.

the mandate provided in the basis instrument, lack of compatibility with its aim or content, or lack of respect for the principles of subsidiarity or proportionality).¹⁸ As a result, it seems fair to say that art. 290 TFEU can be seen as a Treaty-level recognition of a procedure previously established by secondary law.¹⁹ Nevertheless, it was consensus that the system required further elaboration not only by institutional practice and inter-institutional agreements, but also by the Court.

Yet, in its case law, the Court treats Commission rule-making after Lisbon as a continuation of the system before Lisbon. This might be a reason for the Court's reluctance to pronounce on the differentiation of Commission acts, a differentiation which, however, is expected by most EU law scholarship as well as the pronounced legal opinion of the institutions.²⁰ More specifically, it appears that in the findings of the Court, delegated and implementing acts are generally treated as a direct development of, instead of breaking away from, the pre-Lisbon of transferring power to the Commission based on art. 202 TEC. This is very pronounced with regards to the scope of the delegated or conferred powers, which the Court develops on the basis of its pre-established

¹⁸ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006 [2006] OJ L 200/11, art. 5a.

¹⁹ Even though the Commission denies a strict analogy between the two procedures (Commission, 'Communication from the Commission to the European Parliament and the Council Implementation of Article 290 of the Treaty on the Functioning of the European Union' COM(2009) 673 final), virtual uniformity not only in substance but also in wording is hard to overlook. On this parallelism see also Deirdre Curtin, *Executive Power of the European Union* (OUP 2009) 122 ff; and Matthias Ruffert, 'European Union Law: The Many Faces of Rulemaking in the EU' in Elaine Fahey (ed.), *The Actors of Postnational Rule-Making* (Taylor & Francis 2015) 56 and Wolfgang Weiß, *Der Europäische Verwaltungsverbund* (Duncker & Humblot 2010) 57–58.

²⁰ Commission, 'Communication from the Commission to the European Parliament and the Council Implementation of Article 290 of the Treaty on the Functioning of the European Union' COM(2009) 673 final and European Parliament, '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 (2012/2323(INI))' P7_TA(2014)0127.

essential elements doctrine,²¹ but also concerns the scope of the Council's implementing activities²² and the legislative context for the review of the Commission's use of delegated powers.²³ Of course, the Court will make reference to established doctrines on the interpretation of EU law,²⁴ and the institutional balance, including as a safeguard for individual interests,²⁵ as it would be neither efficient nor desirable to start the development of the EU legal order from scratch with every Treaty revision. Yet, just as there is reliance on prior doctrinal development for aspects of EU law that arguably have not changed, there should also be a sense of innovation for those areas that have been subject to reform. The more the Court relies on its pre-established case law regarding its understanding of concepts such as implementation, empowerment and review of powers, without discussing the basis of the continued applicability of this doctrine, the less the Court will be able to give form to the changes that the Lisbon Treaty brought about.

Regarding the differentiation between delegated and implementing acts – a question that simply could not be approached using established case law – the Court essentially held that the concrete choice between empowering the Commission under art. 290 or 291 TFEU was one for the legislating institutions to make.²⁶ This stance could be criticised as effectively withdrawing from the debate on delegated and implementing acts and as denying any effective legal control in the matter. Yet, it needs to be recognised that the provisions of arts 290 and 291 and their simple

²¹ Cf., e.g. Case C-355/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:516, paras 65 ff; Case C-65/13 *European Parliament v European Commission* [2014] ECLI:EU:C:2014:2289, para. 45. See also the Opinion of Advocate General Mengozzi delivered on 17 April 2012 in Case C-355/10 *Parliament v Council* [2012] ECLI:EU:C:2012:207, paras 26 ff.

²² Case C-440/14 P *National Iranian Oil Company v Council of the European Union* [2016] ECLI:EU:C:2016:128, para. 49 and Case C-124/13 *European Parliament, European Commission v Council of the European Union* [2015] ECLI:EU:C:2015:790, para. 53.

²³ Case C-696/15 P *Czech Republic v European Commission* [2017] ECLI:EU:C:2017:595, para. 49.

²⁴ Such as in Case C-286/14 *European Parliament v European Commission* [2016] ECLI:EU:C:2016:183, para. 43.

²⁵ Case C-147/13 *Kingdom of Spain v Council of the European Union* [2015] ECLI:EU:C:2015:299, para. 54.

²⁶ At the same time, the Court maintains that implementing acts must not break into the domain of delegated acts by holding that implementing acts must not supplement or amend legislative acts, even with regards to their non-essential elements. Cf. Case C-65/13 *European Parliament v European Commission* [2014] ECLI:EU:C:2014:2289, para. 45.

text provided for in the Treaties give little guidance to the Court, even though some guidance could have been developed from their context. Given that both articles refer to the necessity for an express legal basis, it appears reasonable to focus on this fact in putting the choice at the door of those adopting this legal basis. The Court has a history of deferring to the rule-making institutions in matters of post-legislative acts, as it has always understood the scope of post-legislative regulation (traditionally encompassed in the term of ‘implementation’) as being broad.²⁷

3. INSTITUTIONAL DYNAMICS

Research in the legislative negotiations between the EU institutions suggests that this choice is a matter of relevance for the institutions. The institutions started formulating their positions soon after the entry into force of the Lisbon Treaty, with Parliament²⁸ and Commission²⁹ both already expressing their arguments on delegated acts in 2010. This culminated in the references to delegated and implementing acts in the 2010 Framework Agreement,³⁰ which, however, was an agreement only between Parliament and Commission. Consequently, many important aspects that go beyond the relationship between Parliament and Commission were not included – such as the modalities for empowerment of the Commission under art. 290 TFEU.

The Council was a party to the Common Understanding on Delegated Acts, which was established in spring 2011, six months after the Framework Agreement.³¹ This Common Understanding lays out default

²⁷ Case C-23/75 *Rey Soda v Cassa Conguaglio Zuccheri* [1975] ECLI:EU:C:1975:142, para. 10. Cf. also the Opinion of Advocate General Mengozzi delivered on 17 April 2012 in Case C-355/10 *Parliament v Council* [2012] ECLI:EU:C:2012:207, para. 26.

²⁸ European Parliament, ‘European Parliament Resolution of 5 May 2010 on the power of legislative delegation (2010/2021(INI))’ P7_TA(2010)0127.

²⁹ Commission, ‘Communication from the Commission to the European Parliament and the Council Implementation of Article 290 of the Treaty on the Functioning of the European Union’ COM(2009) 673 final.

³⁰ Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/47.

³¹ Council of the European Union, ‘Note from Presidency to Delegations. Common understanding on Delegated Acts’ (2011) 8753/11 of 10 April 2011. The Council document mentions 3 March 2011 as the date of approval by the Parliament.

terms of empowerment of the Commission and specifies the procedures for transmitting information between the institutions.

At the same time, the institutions started negotiating on the procedures for implementing acts, with the Commission publishing its proposal three months after the entry into force of the Lisbon Treaty.³² It took the institutions about a year to adopt the regulation laying out the procedures for implementing acts as foreseen in art. 291(3) TFEU, which is not a long time-span, considering the object under discussion. The regulation of implementing acts (Regulation 2011/182/2011³³) thus predates the Common Understanding on delegated acts by about a month, no more.

Yet, the debate was not settled with the adoption of Regulation 2011/182/2011. Instead, in the time following its adoption, the institutions, and in particular the Commission, brought a number of cases before the Court in order to settle the question of choice between delegated and implementing acts. These cases are discussed in detail in the contributions to this book,³⁴ so that it will suffice here to summarise that the Court did little to establish clearer rules for distinguishing delegated from implementing acts and to help the institutions police the boundaries of Commission empowerment.

The procedures for the adoption of delegated and implementing acts remained the subject of interinstitutional bargaining, and are specified and amended further in the 2016 Interinstitutional Agreement on Better Lawmaking,³⁵ which is also presented in more detail in this book.³⁶ In any event, this agreement did not succeed in making a better differentiation between delegated and implementing acts and providing for a more coherent system of Commission rule-making – and it might not even have attempted this task.

³² The Commission proposal (Commission, ‘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) was published on 9 March 2010.

³³ 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 L 55/13.

³⁴ In particular see the contribution by Dmitri Zdobnõh in Ch. 2 in this book.

³⁵ The European Parliament, the Council of the European Union and the European Commission, ‘Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making’ [2016] OJ L 123/1.

³⁶ See the contribution by François Lafarge in Ch. 3 in this book.

The institutional bargain over art. 290 or 291 from the very beginning was coined by a diverse allocation of negotiating interest. Parliament can be observed to favour the broad use of delegated acts and to argue for a strong position of the co-legislators in the adoption procedure, whereas the Member States (and thus the Council) favour the use of implementing acts and defend their prerogatives in the ambit of art. 291 TFEU.³⁷ Even though the Commission agreed initially that arts 290 and 291 TFEU serve fundamentally different logics,³⁸ it did not transpose this into initiatives that clearly distinguished two categories of acts.³⁹

Despite some agreement having been reached early on,⁴⁰ important questions remain unsolved, and the institutions remain engaged. Among these is the question of the differentiation between delegated and implementing acts. In spring 2017 the Commission published a legislative initiative through which it intended to reform comitology, specifically the examination procedure.⁴¹ This reform aims at breaking political stalemates in the procedure with changing voting procedures in the appeals committee, and in creating the possibility of referring a matter to the Council so that in politically sensitive implementing issues the Commission need not take all of the responsibility, and hence the blame, for deciding a much contested issue (as, for example, in the case of the authorisation of glyphosate).

³⁷ Gijs Jan Brandsma and Jens Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (OUP 2017).

³⁸ Commission, 'Communication from the Commission to the European Parliament and the Council Implementation of Article 290 of the Treaty on the Functioning of the European Union' COM(2009) 673 final, 3.

³⁹ It is also unclear whether the Commission had an institutional interest in this distinction. While it had argued for it during the Convention negotiations (Gijs Jan Brandsma and Jens Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (OUP 2017) 65), it is not clear that this differentiation aids the work of the Commission, and it does not appear to have been a consistent case for the Commission (*ibid.*, 71). One might even speculate whether the lack of precision in the distinction might pay off for the Commission as it may increase the room for manoeuvre for the Commission and hence its capacity of playing the two institutions off against each other.

⁴⁰ Brandsma and Blom-Hansen compare these agreements to a ceasefire: Gijs Jan Brandsma and Jens Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (OUP 2017) 75.

⁴¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers' COM (2017) 85 final.

The EP has appointed a rapporteur,⁴² but the opinion of the responsible committee is still pending. Two national parliaments have submitted observations,⁴³ although the Council has not yet published its opinion either. At the same time, the Parliament has started an own-initiative-procedure regarding the adoption procedures of delegated and implementing acts,⁴⁴ as a result of which Parliament will call for improved informal cooperation in the drafting of such acts, as well as to respect deadlines and other legislative requirements. This initiative is likewise awaiting committee decisions.

4. LEGISLATIVE CHOICE

It is an interesting situation that we need to now understand the distinction between arts 290 and 291 TFEU as a matter of legislative choice. Articles 290 and 291 TFEU certainly do not phrase the matter as one of choice; they do not stipulate that the legislating institutions are free to choose between these two rule-making mandates. While a certain element of choice is visible in art. 290 TFEU, in that the legislating body may choose to delegate or not to delegate certain matters to the Commission, this is a choice between providing for a specific rule or definition in a legislative or a non-legislative act, not between delegated and implementing rule-making. Conversely, art. 291 TFEU is phrased in a language that makes it appear as if the mandate to adopt implementing acts was the necessary consequence of certain conditions being met.⁴⁵ In

⁴² Jozsef Szajer (EPP), who also acted as rapporteur for the original Comitology Regulation (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 L 55/13).

⁴³ These are the Czech Parliament and the Polish Senate.

⁴⁴ Parliamentary Fiche 2016/2018 (INI).

⁴⁵ These being that there is the necessity of uniform conditions for implementation. Cf. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art. 291(2). Yet, these conditions are hardly determined in substance by the Court, see e.g. Case C-440/14 P *National Iranian Oil Company v Council of the European Union* [2016] ECLI:EU:C:2016:128, paras 25–41 and Case C-146/13 *Kingdom of Spain v European Parliament and Council of the European Union* [2015] ECLI:EU:C:2015:298, paras 77–82. For a critique of the above argument see Mirjam Liebmann, *Zulässigkeit und Bedeutung von delegierten Rechtsakten und Durchführungsrechtsakten am Beispiel der Lebensmittelinformationsverordnung* (Behr Verlag 2016) 401 ff.

neither article are the two Commission acts presented as alternatives to each other.⁴⁶

However, it was clear from the beginning that in practice the legislating bodies would, having decided to empower the Commission, then choose between the legal bases of arts 290 and 291 TFEU. In the first case brought before it on the matter, the Court also recognised this choice.⁴⁷ In the *Biocides* case, the Court stated that art. 291 TFEU needs to be interpreted in relation to art. 290 TFEU, thereby affirming the parallelism of these two provisions.

This situation is not formally changed by the fact that the adoption procedures for delegated and implementing acts, which would appear to differ substantially on the basis of the Treaties, have been made more similar through subsequent developments in law and practice. Today, there is Member State involvement in delegated acts, through the consultation of Member State experts,⁴⁸ as well as the potential for Parliamentary disagreement with implementing acts.⁴⁹ Even as differences persist, these appear more and more as a matter of degree than as creating fundamentally different categories of acts.

The Court depicted the choice between delegated and implementing mandates as one subject to legislative discretion. In other words, the Court did not pronounce objective, legal criteria for choosing delegated

⁴⁶ This is a curious situation as the fact that they could be seen as alternatives would become apparent from their both developing from comitology procedure. Cf. Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006 [2006] OJ L 200/11.

⁴⁷ Case C-427/12 *European Commission v European Parliament, Council of the European Union* [2014] ECLI:EU:C:2014:170, paras 32 ff.

⁴⁸ Commission, 'Communication from the Commission to the European Parliament and the Council Implementation of Article 290 of the Treaty on the Functioning of the European Union' COM(2009) 673 final; the European Parliament, the Council of the European Union and the European Commission, 'Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making' [2016] OJ L 123/1; see also the contribution by François Lafarge in Ch. 3 in this book.

⁴⁹ 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 L 55/13, arts 10 and 11.

or implementing Commission mandates, which would determine the legislative decision. Instead, it declared that it was for the legislating institutions to choose between delegated and implementing mandates. As a consequence, the legislating institutions are responsible for constructing the concrete criteria for differentiating between delegated and implementing acts.

As the legislating institutions exercise public authority, their decisions, even those that fall squarely inside their discretion, must follow the fundamental principles of EU law. Most relevant for our case are the principles of the rule of law and the institutional balance, as well as subsidiarity. The principle of the rule of law has particular significance. It prescribes not how the choice between delegated and implementing acts must be made in substantive terms, but rather that this choice must not be arbitrary and must follow comprehensible, public⁵⁰ reasons.

The fact that the choice between delegated and implementing acts is one for the legislating bodies to make⁵¹ and subject to their discretion does not mean that it is taken outside the realm of law, even though it is made by bodies that are often described as ‘political’ institutions.⁵² Instead, as the Court has not formulated objective and determinative criteria for this choice, it is for the legislating institutions to form these criteria in their interaction. This is why research into delegated and implementing acts now needs to acquire insights into the legislative practice of delegated or implementing Commission empowerment.

5. THE PURPOSE OF THIS BOOK

Given the apparent relevance of deciding between a delegated or implementing mandate in the face of great unclarity of what this choice amounts to in the face of the great similarities between the adoption procedures for delegated and implementing acts, it is first necessary to

⁵⁰ On the relevance of recourse to public, instead of private reasons, see Jürgen Habermas, *Between Facts and Norms* (MIT Press 1992) 192.

⁵¹ There are some rare cases in which a delegated act provides the mandate for an implementing act. However, this is clearly not the norm. See about this also the contribution by Jens Karsten in Ch. 4 in this book.

⁵² Snyder explains that the juxtaposition of ‘political’ institutions and ‘legal’ Court is derived from implicit assumptions in the case law of the Court. Cf. Francis Snyder, ‘New Directions in European Community Law’ (1987) 14 (1) *Journal of Law and Society* 167, 177.

deconstruct the theoretical accounts and propositions on the classification that differentiates between delegated and implementing rule-making.

The proposed volume deconstructs and reconstructs the categorisation of delegated and implementing acts. Considering the historical, the institutional and the case law account, it appears that the original assumptions on what differentiates arts 290 and 291 TFEU has not stood the test of institutional and judicial practice post-Lisbon.

Neither a categorisation based on the separation of powers, nor a reference to the level of discretion exercised by the Commission, nor recourse to a federal division between central and disbursed powers⁵³ has been able to explain the use of delegated and implementing acts by the institutions or the Court's pronouncements on them. Indeed, the continuity visible between pre-Lisbon comitology and post-Lisbon Commission rule-making has been hard to explain by any constitutional theory.

It is therefore necessary to combine the theoretical perspective with an inductive, more empirical approach, searching for the use of delegated and implementing rule-making made by the EU legislator. From this analysis of the legislative practice, conclusions on distinguishing criteria may be derived. Comparing these findings, certain trends on how arts 290 and 291 TFEU are used in practice can be identified, even though caution is necessary when generalising these trends to universally applicable (and legally enforceable) criteria. Even though the institutions arguably are engaged in the formation of a system of Commission empowerments, it is also clear that this system is still in the making and not yet complete.

This book takes up the argument where the most recent case law as well as institutional development (including the 2016 interinstitutional agreement and the newest Commission proposal for a reform of comitology mentioned above) have left it: against the general expectations when the Treaty of Lisbon entered into force, the choice between delegated and implementing acts lies squarely within the discretion of the legislator, and the procedures for delegated and implementing rule-making have almost become interchangeable.⁵⁴

⁵³ For this suggestion see Robert Schütze, "Delegated" Legislation in the (new) European Union: A Constitutional Analysis' (2011) 74 (5) MLR 661, 687 ff.

⁵⁴ For the remaining differences see G. Brandsma and J. Blom-Hansen, *Controlling the EU Executive?* (OUP 2017) 12–13. For a criticism of this situation see Constantin Fabricius, 'Das Kontrollrecht von Rat und Parlament nach der Komitologie-Durchführungsverordnung' (2014) Europäische Zeitschrift für Wirtschaftsrecht 453, 454 ff, who in 2014 argued that the comitology regulation contravenes the Treaties. In addition, there is a discussion about the

In turning to legislative practice this book approaches the topic from the view point of the bodies engaged in making the choice between delegated and implementing acts – namely the legislating institutions. It presents empirical findings on how the institutions construct the difference between delegated and implementing acts when acting together in their legislative capacity. Although these do not (yet) deliver a new constitutional theory on executive rule-making, they do sustain several conclusions on the use of delegated versus implementing rule-making.

6. OUTLINE OF THIS BOOK

In this book, we tackle in three parts the central question of how delegated and implementing acts are to be used respectively. The first part engages with the theoretical, institutional and case law background to the current debate. It is largely a de-constructive exercise that has as a subject the failure of legal theory, the courts and institutional specifications to clarify the relationship between delegated and implementing acts. This failure necessitates engaging in case studies so as to come to a better understanding of arts 290 and 291 TFEU building on sector-specific experiences.

Before this task can be attempted, it is first necessary to free the question of the difference between delegated and implementing acts from the doctrinal ballast it has so far collected. To this end, the system of Commission rule-making needs to be deconstructed. Chapter 1 by Attila Vincze shows that the very assumptions on which we base this question are problematic. A sensible categorical differentiation between delegated and implementing acts requires that there be a doctrine of EU legal activities more generally, and an accepted, common conceptualisation of what the adoption of legislative acts amounts to, in and of itself and in juxtaposition with non-legislative acts including, but not limited to, delegated and implementing acts. The categorisation of delegated and implementing rule-making instantiates fundamental concepts of a constitutional order, related to poles such as ‘legislation’ and ‘execution’, representative structures and consensus of who can speak in whose name – and validate which claims. Absent such an agreed constitutional theory of EU legal rule-making, we cannot evaluate the relevance of any

lawfulness of introducing additional control mechanisms in art. 290 that go beyond the possibilities provided therein: see Wolfgang Weiß, ‘Dezentrale Agenturen in der EU-Rechtsetzung’ [2016] *Europarecht* 631, 646.

theoretical categorisation of delegated and implementing acts, and it will be impossible to sustain coherent corresponding practice.

Dmitri Zdobnõh's contribution in Chapter 2 is in line with this when he shows that there is no doctrine of categorisation to which the CJEU consistently adheres. Instead, the CJEU's difficulties in justifying any categorisation has led it to minimise the differences and to reject any responsibility for creating consistent practice. Zdobnõh's conclusion that the doctrinal difference between delegated and implementing acts amounts to no more than their objective procedural differences is a logical conclusion of this situation.

At the same time, there are already some first building blocks for the reconstruction of a system of Commission rule-making in this conclusion. This is contained in the focus on procedure and the fact that the choice between different adoption procedures, and connected accountability regimes, remains.

These first building blocks are then further refined by turning to a procedural perspective and focusing more closely on the details of the adoption procedures for delegated and implementing acts. François Lafarge in Chapter 3 provides a comprehensive description of these procedures and their shaping through the Better Regulation Agenda.

On the basis of this description we can state that Better Regulation leads only incidentally to a better categorisation of Commission acts. Categorisation is supported in as much as it maps onto the criteria provided for by the Better Regulation instruments, which mostly follow a logic of salience (cf. the categories of 'major' or 'other' initiatives) and functionality (i.e. the question whether an initiative 'needs' a certain Better Regulation instrument). The differences that remain between delegated and implementing acts are those already established by the Treaties. Subsequent legislation and guidance does not seem to add to this categorisation.

This presentation of the theoretical, jurisprudential and practical context of the adoption of delegated and implementing acts opens the floor to more empirical contributions. These empirical contributions provide an overview of the use of delegated and implementing acts in different regimes. Each provides a first step towards reconstruction of the categorisation of delegated and implementing acts. However, each does so from a different perspective and each comes to diverging conclusions.

The groundwork for the reconstruction of arts 290 and 291 TFEU is laid by Jens Karsten's contribution in Chapter 4. This case study is a report from the machine room of EU 'tertiary' rule-making in the area of food law. It shows that when presented in a neutral manner and without preconceptions of the use of delegated versus implementing acts, tertiary

rule-making is characterised by the great diversity of form and content as well, unfortunately, as by little consistency in the choice of art. 290 or 291 TFEU. This situation can be explained by the fact that this choice has become an arena for institutional power struggles: the missing overall consistency might be caused by the fact that the involved institutions had differing views on the categorisation of delegated and implementing acts. However, despite anticipation of the Lisbon reform by the introduction of the regulatory procedure with scrutiny, this overview also suggests a deficit in familiarity with the regime by the Commission.

Sabrina Röttger-Wirtz in Chapter 5 considers the rule-making practice pertaining to trade in pharmaceuticals from the perspective of subsidiarity. She reconstructs delegated and implementing acts as partly following this logic. There is little evidence that questions with high relevance for Member States would be settled more often using implementing acts than questions that implicate the Union as a whole. Yet, she finds some evidence that questions of substance are more often settled by delegated act than questions of procedure, for which the institutions usually resort to implementing acts. The categorisation between delegated and implementing acts then would roughly follow the line between substance and procedure.

Matteo Ortino in Chapter 6 approaches the situation from another direction entirely in showing that in the field of financial regulation the absence of strict categories also has advantages. Even though we might be able to find some trends, his arguments persuade us that flexibility instead might also be an important characteristic of the regime of tertiary rule-making. In his reconstruction the room for manoeuvre and creative solutions is crucial for the success of any system built around arts 290 and 291 TFEU. Only with flexible handling can the system of delegated and implementing acts contribute to problem solving on the ground, especially in new and unforeseen situations.

Whichever categorisation of delegated and implementing acts one adopts or finds, it is important to remember that this system by no means stands alone. Instead, it is framed by the provisions regarding the adoption of legislative acts as well as by the relevant rules on rule-making by EU agencies and the setting of norms on the international arena. It is these latter parts that are most relevant here, and most in need of exploration.

In Chapter 7 Merijn Chamon provides this framing in constructing a demarcation between Commission and agency rule-making. He points out that arts 290 and 291 TFEU can be circumvented by empowering agencies to set rules instead of the Commission. It is thus not only necessary to delimit arts 290 and 291 TFEU in respect to each other, but

also to distinguish rule-setting by the Commission from rule-setting by agencies. Chamon advocates for establishing this delimitation more clearly by updating and enforcing the Meroni doctrine, which sets limits on the possibility of empowering agencies. Most importantly, while arts 290 and 291 TFEU award significant discretion to the Commission, the legislating institutions must not do the same with agencies.

Extending the picture also to external relations, Andrea Ott in Chapter 8 presents the similarities and differences between internal and external Commission acts. This chapter addresses the practice of delegated treaty-making through, for instance, financial agreements or cooperation agreements concluded especially by the European Commission but also agencies such as Europol with third countries and international organisations. This delegated treaty-making power is a deviation from the classical treaty-making procedure under art. 218 TFEU and needs to be analysed against the backdrop of the constitutional framework of the EU for delegated (or implementing) acts. Even though the secondary law base draws on arts 290 and 291 TFEU, these provisions do not fit with the legal nature of delegated treaty-making despite demonstrating related features. Consequently, the question needs to be addressed how far and under what conditions delegated treaty-making operates in line with institutional balance and the non-delegation doctrine developed by the CJEU.

Finally, our conclusions will draw together the findings of the individual chapters, and strengthen the case for deconstructing as well as reconstructing the distinction between arts 290 and 291 TFEU. Beyond this, we will deliberate about the consequences of the jurisprudential deference to the legislators' discretion in this choice, and we will point to the new questions that come out of this research.