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**CRITICAL ANALYSIS OF THE CONCEPT OF LEGISLATIVE ACT OF
THE EUROPEAN UNION**

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1. Introduction

The concept of legislative act was first formally introduced into EU law by the Lisbon Treaty. It has thus formed part of EU law for no more than some 10 years. Prior to that, representatives of various branches of the legal profession used “the language of legislation” when speaking of EC law, but terms such as “legislative acts” were used descriptively. Nothing hinged as a matter of positive EC law on whether an act was legislative or not. The language of legislation was used essentially for reasons of convenience when speaking of instruments of EC law.

Legislative acts started gaining more prominence in professional literature with the development of interest in the rule of law and democratic deficit in the EC.¹ That seems to have coincided with the adoption of the Maastricht Treaty and the debates surrounding it² as well as the early attempts to have the EC become a party to the European Convention of Human Rights and Fundamental Freedoms.³ Rule of law and democracy became prominent subjects of EC scholarship – both in the realms of law and of political science. These matters brought into focus the role which legislation played in the EC. It was noticed that the acts existing in EC law – regulating ever larger area of everyday life of citizens of the EC member states – eluded classification into existing and well-understood groups known from national law; classification which was directly relevant for hierarchy of norms and typology of acts which are commonly understood as the hard core of constitutional law.

The first constitutive treaty which contained an express reference to legislation of the EC (as opposed to legislation of member states) was the Treaty of Amsterdam adopted in 1997. Its Article 207(3) tasked the Council with determining when it was acting in legislative capacity. It also had annexed to it a protocol on the role of national parliaments⁴ future incarnations of which would, in time, come to accord national parliaments a certain role in the adoption of legislative acts of the EU.

The next attempt to “rectify” the situation was the Constitutional Treaty. Legislative acts were the subject of not inconsiderable discussion in the work of the Convention on the Future of Europe which was tasked with the drafting of the Constitutional Treaty. The task was to increase the democratic legitimacy and transparency of the EC and simplify the instruments employed by it when exercising public authority all while having a keen eye on ensuring the

¹ There is a vast literature on both these topics. For relatively early examples see Joseph Weiler, *European Democracy and its Critique. Five Uneasy Pieces* (1995 EUI); Giandomenico Majone, *Europe’s “Democratic Deficit”: The Question of Standards*, (1998) 4 *European Law Journal* 5; Maria Luisa Fernandez Esteban, *The rule of law in the European constitution* (1999 Kluwer). For a good overview see Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European constitutional law* (2nd ed., 2009 Hart).

² See, for instance, the judgment of the Bundesverfassungsgericht in *Maastricht-Urteil* (BVerfGE 89, 155) (commonly known as the Maastricht Treaty judgment).

³ Opinion 2/94 of the ECJ *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*

⁴ Protocol (No 9) on the role of national parliaments in the European Union (1997)

rule of law.⁵ The result – the Constitutional Treaty – purported to be the first constitutive treaty which would fully introduce the language of legislation into EC law. It would offer typology of acts and set forth the interaction of various institutions (which was also in constant development at the time) as far as those acts were concerned. From the Constitutional Treaty onwards there would be legislative acts in EC law allaying concerns about legitimacy⁶ and democratic deficit as well as safeguarding the interests of the citizen. The system would also be easier to understand for the citizens thus finally dealing with the dissatisfaction of the citizens at having some ill-understood Brussels authority impose rules on them.

As is well known, the Constitutional Treaty never came into force. Its provisions on legislative acts were, however, reworked finding their way into the Lisbon Treaty. The Lisbon Treaty became the first constitutive treaty which makes legal consequences hinge on whether something is or is not a legislative act. The term was no longer descriptive. That is essentially the position currently obtaining in EU law.

The crucial provisions of the constitutive treaties in this respect are Articles 289 – 291 and 294 TFEU. Much of this thesis is dedicated to their analysis. Article 289 TFEU sets forth two legislative procedures and explains the meaning of legislative acts by reference to those procedures. Article 294 TFEU details one of the legislative procedures. Articles 290 and 291 TFEU deal, respectively, with delegated acts and implementing acts. The latter two are instruments of law which are not adopted directly on the basis of the constitutive treaties, but on the basis of some “secondary” instruments of EU law;⁷ they form part of the same system as legislative acts.

The present thesis seeks to answer two questions.

1. What concept of legislative act obtains in EU law?
2. Have the objectives which were sought to be achieved by means of introduction of “language of legislation” (legislative acts) into EU law been met?

⁵ See Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001), especially pages 22 and 23 (the so-called “Laeken Declaration”), SN 300/1/01 REV 1.

⁶ For a good overview of the issues which have been raised in this respect see Andreas Føllesdal, *Legitimacy Theories of the European Union*, Working Paper 04/15 (Centre for European Studies of University of Oslo; ARENA Working Papers).

⁷ This classification (if one may use that word) runs parallel with that set forth in Article 288 TFEU. According to Article 288 TFEU acts of the EU are divided into regulations, directives, decisions, recommendations and opinions. Thus, any act of the EU would necessarily need to find a place in both of these classifications (*e.g.* be a regulation which is a legislative act or a decision which is a delegated act).

It should be noted that Article 288 TFEU is by no means a complete catalogue. There exist a number of other acts. On the one hand there are acts which have never been expressly provided for in the constitutive treaties, such as communications and notices. Some areas of law are widely regulated by such acts; competition law could be an example here. See Andrew Macnab (ed.), *Bellamy & Child materials on European Union law of competition* (8th ed., 2015 OUP). On the other hand there are “legacy acts”, *i.e.* acts which were provided for by some previous version of the constitutive treaties, but are no longer provided for by the current constitutive treaties. Framework decisions could be examples of such acts. Their role now is regulated by Title VII of Protocol (No 6) on Transitional Provisions annexed to the Lisbon Treaty.

The answer to the first question is needed for essentially three reasons. First, unlike prior constitutive treaties the Lisbon Treaty makes certain consequences hinge on whether a particular instrument is a legislative act or not. A paradigm example here could be the national parliaments' supervision over compliance of legislative acts of the EU with the principles of subsidiarity and proportionality. Such supervision exists only in relation to legislative acts.⁸ One, therefore, needs to know which acts are legislative. In such situations where the consequence hinges on an act being legislative it is imperative to have the necessary criteria for making that determination. The clearer the criteria are, the better – the fewer there are disputes. Without such criteria it would simply be impossible to go about everyday activities where those activities are what hinges on an act being legislative.

Second, and seemingly in more theoretical vein (although in reality no less importantly for the purposes of everyday life), knowing what sets legislative acts apart from all others is important for “constitutional” purposes of any polity. Legislation is the usual means of prescribing general rules applying in a polity, specifically the highest ranking rules bar those contained in the constitutive instrument. Without understanding how one determines legislative acts it is virtually impossible to determine whether the polity is democratic or not, or subject to the rule of law or not; whether the general rules are duly legitimated or not (ultimately by the citizens of that polity); whether fundamental rights are respected or not (considering that virtually any secondary rule of law is a restriction of some right of some person).

Third, the existing academic commentary, while praising introduction of legislative acts into EU law, is mostly critical of concepts of legislative acts of the EU most frequently put forward.⁹ However, no commonly accepted treatment of legislative acts in EU law has thus far been offered: various (frequently contradictory) approaches abound without any one being dominant.¹⁰

The answer to the second question is desirable to evaluate the “worth” of introducing the “language of legislation” into EU law. That could, in turn, give indications for future action: are some changes needed or does the current system function as desired?

It is submitted that 2017 is a very suitable moment for undertaking this analysis. The system has been in operation for some ten years. A not inconsiderable amount of practice has therefore been generated offering the source material necessary for an analysis. Importantly this practice includes case law: the CJEU has in recent years handed down several judgments addressing typology of acts in EU law.¹¹ The scholarship dealing with legislative acts in EU law, which has developed over the last ten years, is also detailed enough to provide a good grounding for the analysis to be undertaken in this thesis. However, neither the system nor the scholarship has not yet reached maturity: while certain aspects of the system have been

⁸ Protocol (No 1) on the Role of National Parliaments in the European Union and in Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality

⁹ See section 4.2 of this thesis.

¹⁰ See, *inter alia*, section 4.2 of this thesis.

¹¹ See, for instance, sections 3.2.1 – 3.2.8 and 4.3 below.

considered in detail, the system itself has not yet been perfectly understood.¹² Nor has the system been in existence for so long as to become inflexible: there is room for developments and changes in response to criticism; certain questions seem not yet to have been addressed at all.¹³

The main body of this thesis is divided into three parts. Following this introduction (section 1), section 2 analyses the procedures employed for adoption of legislative acts seeking, *inter alia*, to determine any patterns to their use in the constitutive treaties. Since the constitutive treaties tie (at least to an extent¹⁴) legislative procedures with legislative acts, such an analysis could give an indication about the scope of the concept of legislative act as well as the role they play in the EU system (which, lest it is forgotten, is institution-wise very different from constitutional systems of member states from which the concept of legislative act derives). Section 3 analyses Articles 290 and 291 TFEU, which were likewise introduced into EU law by the Lisbon Treaty as part of introducing legislative acts into EU law. It seeks to establish the scope of those articles as well as the relationship between delegated and implementing acts, on the one hand, and legislative acts, on the other. Section 4 tackles head on the distinction between legislative and non-legislative acts seeking to formulate the concept of legislative act obtaining in EU law. Finally (in section 5), some overall conclusions are formulated.

2. Ordinary legislative procedure and special legislative procedure

2.1. Introduction

Neither constitutive treaty speaks of legislative power. However both constitutive treaties frequently speak of legislative acts and legislative procedures. Article 289 TFEU is the provision which explains the meaning of these terms. It reads as follows.

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.
3. Legal acts adopted by legislative procedure shall constitute legislative acts.
4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a

¹² As evidenced in significant differences in approaches of academic commentators considered in this thesis.

¹³ For instance, in the field of interplay between legislative and regulatory acts. See section 4.3 below.

¹⁴ No commentator writing after the adoption of the Lisbon Treaty has expressly and openly denied such a connection outright.

recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

At first glance this provision seems rather neat: there are two types of legislative procedure, and legislative acts are the instruments adopted via a legislative procedure. It is easy – indeed tempting – to assume that legislative procedures and legislative acts are (respectively) the ways to exercise and the corollaries of legislative power. A closer look, however, reveals legislative procedures and legislative acts to be less than clear matters of EU law.

2.2. Ordinary legislative procedure

2.2.1. Procedure

The name – ordinary legislative procedure – derives from the Constitutional Treaty¹⁵ and so does the wording currently set forth in Article 294 TFEU. It reads as follows.

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.
3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.
7. If, within three months of such communication, the European Parliament:
 - (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
 - (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;

¹⁵ See Alan Dashwood and Angus Johnstone, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty* (2004) 41 *Common Market Law Review* 1483

(c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

(a) approves all those amendments, the act in question shall be deemed to have been adopted;

(b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

It repeats verbatim Article III-396 of the Constitutional Treaty. The precursor of the ordinary legislative procedure in EU law¹⁶ was “the procedure referred to in Article 251” (as it was called in the constitutive treaties). It was commonly referred to as the co-decision procedure.¹⁷ That precursor procedure had been set out in the Article bearing number 251 of the treaty ever since the coming into force of the Treaty of Amsterdam. Immediately before that (*i.e.* between the coming into force of the Treaty of Maastricht and the Treaty of Amsterdam) it was set forth in Article 189b. Before that the relevant Article (which was very substantially changed by the Single European Act) of the then EEC Treaty was 149.

Looking at Article 251 EC as it stood between the coming into force of the Treaty of Amsterdam and the coming into force of the Treaty of Lisbon,¹⁸ one notices the difference in language compared to Article 294 TFEU. Article 251 EC read as follows.

1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.

The Council, acting by a qualified majority after obtaining the opinion of the European Parliament:

- if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended,
- if the European Parliament does not propose any amendments, may adopt the proposed act,
- shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.

If, within three months of such communication, the European Parliament:

- (a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position;

¹⁶ The Constitutional Treaty never came into force.

¹⁷ See Alan Dashwood and Angus Johnstone, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty* (2004) 41 *Common Market Law Review* 1484

¹⁸ No amendments were made to Article 251 EC by the Treaty of Nice.

(b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted;

(c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

4. The Conciliation Committee, which shall be composed of the Members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the Members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted.

6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

However, reading this provision immediately after reading Article 294 TFEU, what strikes one the most is their similarity. Not much seems to have changed as far as substance goes. It would seem that the draft act which the conciliation committee is to take as the basis has been changed. Article 251(5) EC said that the conciliation committee should “address the common position on the basis of the amendments proposed by the European Parliament”. Article 294(10) TFEU says that the conciliation committee is to act “on the basis of the positions of

the European Parliament and the Council at second reading”. That difference is more ostensible than real. According to Article 251(2) EC “common position” denoted the text adopted by the Council after the first round of the Parliament’s amendments to the proposal; the Parliament then got an opportunity to propose (further) amendments to that common position. It is the draft containing those further amendments which the conciliation committee had to take as its starting point. While Article 294(10) TFEU refers to the position of the Council at second reading, Article 294 TFEU itself does not provide for that procedural step. However, the procedure remains the same as it was under Article 251 EC: after the first round of the Parliament’s amendments to the proposal the Council adopts a text of its own; this time it is called a “position”.¹⁹ It is only once the Council has informed the Parliament of its position that the second reading (to which Article 294(10) TFEU refers) commences.²⁰ The Parliament then gets an opportunity to propose (further) amendments to that position.²¹ The Council, however, does not get the opportunity to adopt any position after that: just like under Article 251(3) EC, if the Council does not accept the amendments proposed by the Parliament, the conciliation proceedings are to commence.²² Nowhere – aside from Article 294(10) TFEU – does the TFEU speak of Council’s position adopted during the second reading. While the reference to the Council’s position at second reading in Article 294(10) TFEU may be understood as a reference to what the Council “thought” of the Parliament’s amendments to its initial position when considering those amendments as per Article 294(8) TFEU, requirement that the work of the conciliation committee start from that is hardly a change worthy of note at all. Under the EC Treaty the Council likewise had, before the conciliation stage was reached, the opportunity to consider the Parliament’s amendments made at similar stage of the proceedings. Thus even if the conciliation committee officially had to take as its starting point a different draft, considering the very nature of conciliation²³ and indeed that those considerations of the Council were (under the EC Treaty) and are (under the TFEU) the very reason which lead to the conciliation in the first place²⁴ it is unlikely to make a big – if any – difference in practice. However, it is worth noting here that – unless reference to the Council’s position at second hearing is to be read as an example of bad draftsmanship – it does clearly show that Article 294 TFEU²⁵ in no way amounts to a complete code of even the general rules on how the ordinary legislative procedure functions. There thus seems room for “undergrowth” in this respect (just like there always was such room for comitology).²⁶

¹⁹ Article 294(5) TFEU

²⁰ Paragraphs 6 and 7 of Article 294 TFEU

²¹ Article 294(7) TFEU. It is worth noting that up to this point in the procedure the procedure does not differ in any way from that mandated by Article 251 EC; only the terminology of the TFEU differs slightly from that of EC Treaty.

²² Article 294(8) TFEU

²³ Targeted as it was and is at reaching compromise. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 130.

²⁴ Under the EC Treaty: if it had not disagreed with the amendments the Parliament made to its common position, the act at issue would have been adopted.

²⁵ And therefore the constitutive treaties since they do not actually speak of this Council’s position at second reading (aside from in Article 294(10) TFEU).

²⁶ The expression was used by Robert Schütze in ‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis (2011) 74 *Modern Law Review* 677

The only other respect – or perhaps in light of the discussion in the two foregoing paragraphs the only one respect – in which Article 294 TFEU substantively differs from Article 251 EC lies in paragraph 15 of the former. That provision deals with what happens if ordinary legislative procedure is initiated by someone other than the Commission. Article 251 EC contained no similar rules. Yet, for all practical intents and purposes the issue is moot.²⁷ Thus, essentially, not much changed in the field of what is now called ordinary legislative procedure with the adoption of the Lisbon Treaty. Just like suggested by Dougan the effect of the Lisbon Treaty is in this respect akin to nothing more than “a labelling exercise”.²⁸

Moving to the current state of EU law, it has been not infrequently opined that there is one ordinary legislative procedure and many special legislative procedures.²⁹ That much is said to be capable of being taken away from the very wording of Article 289 TFEU: its paragraph 2 refers to “a special legislative procedure”³⁰ while its paragraph 1 speaks of “the ordinary legislative procedure”. Furthermore, the ordinary legislative procedure is purported to be set forth in one location in the constitutive treaties, specifically in Article 294 TFEU.³¹ There is no single provision of the constitutive treaties which would purport to set forth the functioning of special legislative procedures in general terms.

In case of special legislative procedures, details, such as the voting rules, the “dominant” institution and the input required of the other main institution, to name but a few, are set forth in the legal bases mandating the use of a given special legislative procedure. What is important is that it is not only the difference of input of the “other” main institution – consent

²⁷ The reason why is explained in footnote 44 below.

²⁸ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647. See to the same effect Bruno de Witte, *Legal Instruments and Law-Making in the Lisbon Treaty*, in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008 SpringerWienNewYork), page 97, and Edward Best in *Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?* (2008) 15 *Maastricht Journal of European and Comparative Law* 90.

²⁹ One of the clearest statements of this point has perhaps been made by Jürgen Bast in his *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law* (2012) 49 *Common Market Law Review* 892. The same point has been made by Michael Dougan in *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 617 in sections 5.2.2 and 5.2.3.

³⁰ Jürgen Bast in his *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law* (2012) 49 *Common Market Law Review* 892

³¹ Returning to the point of “undergrowth” taken when dealing with an ostensible difference between Article 251(4) EC and Article 294(10) TFEU, it must be stated that before ever reaching the Council proper, instruments adopted via ordinary legislative procedure first go through the Committee of Permanent Representatives (COREPER). The latter exercises an enormous – some would say close to decisive – influence both on the instruments to be adopted via ordinary legislative procedure and on how the ordinary legislative procedure proceeds. See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), pages 148 and 149. Thus even if one discards (the rest of) the Council’s rules of procedure arguing that they constitute a code of how the Council works as opposed to an instrument containing rules on the adoption of instruments via ordinary legislative procedure, ordinary legislative procedure still involves participation of COREPER, a body created by the TFEU (Article 240). Article 294 TFEU omits any reference to it. In view of that fact alone the thesis that Article 294 TFEU amounts to a code of ordinary legislative procedure is impossible to maintain. Essentially the same could be said of Article 127(4)(1) TFEU which mandates consultation of the European Central Bank (ECB) on any proposed EU act falling within the ECB’s field of competence. However, since these points in respect of COREPER and ECB hold equally true for special legislative procedure, they do not depart from the fact that relatively speaking – compared to special legislative procedure – Article 294 TFEU could, unless there are other impediments, be seen as amounting to a code.

or merely advice³² – which has been seen as a factor distinguishing various special legislative procedures; other aspects – such as voting rules – have been considered relevant as well.³³ In fact the same approach was taken by the Convention on the Future of Europe which drafted the Constitutional Treaty which, in turn, served as the basis for the provisions pertaining to legislative procedures ultimately introduced into EU law by the Treaty of Lisbon. According to the refined mandate of Working Group No IX³⁴ of the Convention, the EU (the EC at the time) had nearly 30 different decision-making procedures.³⁵ Those procedures were listed in Working document no 3 of the Working Group No IX.³⁶ Among others that document listed (in Annexe 1) as separate procedures these six:

1. co-decision with the Council acting by qualified majority;
2. co-decision with the Council acting by qualified majority and after consulting the Court of Auditors;
3. co-decision with the Council acting by qualified majority and after consulting the Economic and Social Committee;
4. co-decision with the Council acting by qualified majority and after consulting the Economic and Social Committee and the Committee of the Regions;
5. co-decision with the Council acting unanimously;
6. co-decision with the Council acting unanimously after consulting the Committee of the Regions.

If that is the measure of difference between procedures, then it becomes very difficult to defend the thesis of one – *the* – ordinary legislative procedure even without going beyond Articles 289 and 294 TFEU themselves. While as a rule the Commission is the institution which initiates ordinary legislative procedures,³⁷ paragraph 4 of article 289 TFEU clearly states that there are various bodies which may initiate the adoption of an act via ordinary legislative procedure. Paragraph 15(1) of article 294 TFEU confirms it. Thus the bodies participating in ordinary legislative procedures may differ. Looking at the aforementioned Working document no 3, participation of different institutions could fairly be said to be the characteristic which separates procedures 1 through 4.

Perhaps more importantly Article 294(15)(1) TFEU explicitly states that should the initiative for a legislative act come from someone other than the Commission, the ordinary legislative *procedure* for the adoption of such an act shall be different from the one applicable in respect of acts the legislative initiative for which has come from the Commission. An ordinary legislative procedure, which has reached the stage where the Parliament has proposed amendments to the position formulated by the Council at first hearing, may end before going to the Conciliation Committee only if the Council accepts all the amendments proposed by

³² *I.e.* being consulted

³³ See, for instance, Michael Dougan in *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 617 in section 5.2.3 or Edward Best in *Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?* (2008) 15 *Maastricht Journal of European and Comparative Law* 93

³⁴ On the simplification of legislative procedures and instruments

³⁵ CONV 271/02, page 3

³⁶ Working document 03 of the Working Group IX (1st October 2002)

³⁷ Article 17(2) TEU and Article 294(2) TFEU

the Parliament.³⁸ Before the Council gets an opportunity to accept or decline the amendments proposed by the Parliament the Commission issues an opinion in respect of those amendments. If the “usual” ordinary legislative procedure is employed,³⁹ the Council has to pay close attention to that opinion of the Commission: while as a rule the Council may accept amendments by a qualified majority,⁴⁰ those amendments in relation to which the Commission has delivered a negative opinion the Council may accept only unanimously.⁴¹ If no unanimity exists in relation to at least one amendment in respect of which the Commission delivered a negative opinion, the ordinary legislative procedure will proceed to the conciliation stage. Essentially the “usual” ordinary legislative procedure thus gives the Commission the power to determine the voting rule applicable in the Council in relation to each and every amendment proposed by the Parliament at the stage in question.

If the ordinary legislative procedure employed is not the “usual” one,⁴² the Commission has no such power. Nor does anyone else have such a power. The Commission would still seem to be under a duty to deliver an opinion in respect of the amendments proposed by the Council – that is required by Article 294(7)(c) TFEU which applies regardless of the identity of the initiator of the ordinary legislative procedure. However the provision which says that

[t]he Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion,⁴³

is disapplied in these “unusual” ordinary legislative procedures by Article 294(15)(1) TFEU. Thus regardless of the opinion of the Commission, any amendment proposed by the Parliament may be accepted by the Council by qualified majority. This essentially changes one part of the second reading stage of an ordinary legislative procedure. Two things are worth stressing here. First, the effect of Article 294(15)(1) TFEU is not a simple replacement of the Commission by the institution which in a given case has the privilege of initiative. Article 294(9) TFEU is disapplied altogether; suddenly there are no conditions in which unanimity of the Council may become necessary – the power to require it is removed from the procedure completely (it is not given to the institution holding the privilege of initiative). Second, returning to the aforemade quotation of Working document no 3, we are dealing here with the same characteristic which separates procedures 1 through 4 on the one hand, from procedures 5 and 6 on the other. As opposed to merely a simple replacement of one institution by another (such as that indicated by article 289(4) TFEU), this is a case of change of the way procedure proper functions (and ultimately perhaps of the voting requirements).⁴⁴

³⁸ Article 294(8) TFEU

³⁹ *I.e.* if the ordinary legislative procedure is initiated by the Commission

⁴⁰ Paragraph 8 of Article 294 TFEU

⁴¹ Paragraph 9 of Article 294 TFEU

⁴² *I.e.* if the ordinary legislative procedure was initiated by someone other than the Council, *e.g.* by the European Central Bank under Article 129(3) TFEU.

⁴³ Article 294(9) TFEU

⁴⁴ This also amounts to a departure from Article 251 EC (the predecessor of Article 294 TFEU). The EC Treaty contained no provision similar to Article 294(15)(1) TFEU. Thus the Commission was always in a position to require that the Council act unanimously at – what is now – second reading. However in practice the question was moot for in no case where the then constitutive treaties granted the privilege of initiative to some entity

There is, in fact one further difference between the “usual” and “unusual” ordinary legislative procedures. According to Article 16(4) TEU usually a qualified majority in the Council is

defined as at least 55% of the members of the Council, comprising at least 15 of them and representing the participating Member States comprising at least 65% of the population of these States. A blocking minority must include at least four members /.../.

However, according to Article 238(2) TFEU that is so only if ordinary legislative procedure is initiated by the Commission.⁴⁵ If ordinary legislative procedure is initiated by someone else, *i.e.* it is an “unusual” ordinary legislative procedure, then the percentage of the members of the Council needed for qualified majority rises to 72% (from 55%); there is further no special rule on blocking minority in that case. This difference becomes especially important in situations where the Commission has a non-exclusive privilege of initiative:⁴⁶ depending on the initiator qualified majority referred to in Article 294 TFEU (being the same qualified majority as that referred to in Article 289 TFEU) might mean different things.

Finally, out of 85 legal bases which mandate the use of an ordinary legislative procedure some 39 specify – just like the legal bases mandating the use of a special legislative procedure do – at least some aspect of how the act is to be adopted which aspect is dealt with neither in Article 289 nor in Article 294 TFEU.⁴⁷

other than the Commission (Article 107(3) EC and Article 41.1 of the Protocol (No 18) on the Statute of the European System of Central Banks and of the European Central Bank granted in to the ECB and Article 13(1) of the Protocol (No 6) on the Statute of the Court of Justice granted it to the ECJ; no provision akin to current Article 76 TFEU existed prior to the Lisbon Treaty) did they mandate the use of the procedure referred to in Article 251 EC.

⁴⁵ That provision applies to all procedures initiated by the Commission or the High Representative. There is, however, no legal basis mandating the use of an ordinary legislative procedure initiated by the High Representative.

⁴⁶ See footnote 61.

⁴⁷ The list behind the number 39 excludes Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union. That provision gives the ECJ the (exclusive) privilege of initiating an ordinary legislative procedure with a view to adoption of an act which would provide for appointment of assistant rapporteurs and lay down the rules of their service. That aspect is clearly the one dealt with by Articles 289(4) and 294(15)(1) TFEU.

Furthermore, the list behind the number 39 does include two provisions (Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank) which provide for a privilege of the ECB to initiate an ordinary legislative provision. The reason for their inclusion is that they also and alternatively to the privilege of the ECB grant the privilege of initiation of an ordinary legislative procedure to the Commission, and in that case – *i.e.* if the ordinary legislative procedure is initiated by the Commission – they regulate a further aspect of the procedure of adoption of the act (they require the ECB to be consulted). For the same reasons – but in respect of the ECJ – the list behind the number 39 includes Articles 257(1) and 281(2) TFEU.

Finally, the list behind the number 39 (and indeed 85) excludes Article 7(3) of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. That provision sets out a general course of action applicable to any ordinary legislative procedure whatever the legal basis employed. It is not a legal basis.

- On fifteen occasions the constitutive treaties mandate that both the Economic and Social Committee and the Committee of the Regions be consulted over the course of the applicable ordinary legislative procedure.⁴⁸
- On nine occasions the constitutive treaties mandate that only the Economic and Social Committee be consulted over the course of the applicable ordinary legislative procedure.⁴⁹
- On four occasions the constitutive treaties mandate that “the institutions concerned” be consulted over the course of the applicable ordinary legislative procedure.⁵⁰
- On three occasions the constitutive treaties mandate that the ECB be consulted over the course of the applicable ordinary legislative procedure.⁵¹
- On two occasions the constitutive treaties mandate that the Commission be consulted over the course of the applicable ordinary legislative procedure.⁵²
- On two occasions the constitutive treaties mandate that the Court of Auditors be consulted over the course of the applicable ordinary legislative procedure.⁵³
- On two occasions the constitutive treaties mandate that the ECJ be consulted over the course of the applicable ordinary legislative procedure.⁵⁴
- On one occasion the constitutive treaties mandate that only the Committee of the Regions be consulted over the course of the applicable ordinary legislative procedure.⁵⁵
- On one occasion the constitutive treaties mandate that – depending on the subject matter – either the Economic and Social Committee or the Committee of the Regions be consulted over the course of the applicable ordinary legislative procedure.⁵⁶
- On one occasion the constitutive treaties mandate that the Economic and Social Committee be consulted over the course of the applicable ordinary legislative

⁴⁸ Articles 91(1), 100(2), 149(1), 153(2)(2), 164, 165(4)(1), 166(4), 168(4), 168(5), 175(3), 177(1), 178(1), 192(1), 192(3), 194(2) TFEU

⁴⁹ Articles 43(2), 51(2), 59(1), 114(1), 157(3), 169(3), 173(3)(1), 182(1), 182(5) TFEU

⁵⁰ Article 336(1) TFEU and Articles 12(1), 14 and 15(1) of the Protocol (No. 7) on the Privileges and Immunities of the European Union

⁵¹ Article 133 TFEU as well as Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank mentioned in footnote 47 – the latter two in case the Commission rather than the ECB initiates the procedure.

⁵² Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank mentioned in footnote 47 (in case the ECB rather than the Commission initiates the procedure). It should be stressed that Article 294(15) TFEU ensures that the Commission may participate in any ordinary legislative procedure, including that conducted on the basis of Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union which does not grant the Commission any privilege of initiative. Thus the requirement that the Commission be consulted in the articles mentioned in the first sentence of the footnote is, in fact, redundant for there is no duty of the consultee to give an opinion, and Article 294 TFEU entitles the Commission to give an opinion in any case.

⁵³ Articles 322(1) and 325(4) TFEU

⁵⁴ Articles 257(1) and 281(2) TFEU

⁵⁵ Article 167(5)(1) TFEU

⁵⁶ Article 178(2) TFEU

procedure and that the member states concerned by the measures at issue agree to them.⁵⁷

- On one occasion the constitutive treaties mandate that both the Economic and Social Committee and the Committee of the Regions be consulted over the course of the applicable ordinary legislative procedure and that the member states to whose territory the measures at issue relate approve them.⁵⁸

This constitutes a total of nine variations based on the identity of the bodies which need to be consulted over the course of – *i.e.* which need to participate in – a given ordinary legislative procedure (there are ten variations if one counts the versions of the ordinary legislative procedure which mandate no consultations in addition to those set forth in Articles 289 and 294 TFEU). The characteristics which vary here are precisely of the same type as the characteristics which in the aforemade quotation of Working document no 3 distinguish procedures 1 through 4 from each other and procedures 5 and 6 from each other.

Put simply, if the aforemade quotation of Working document no 3 contains six different procedures, then the constitutive treaties currently set forth numerous different ordinary legislative procedures.⁵⁹ In only 46 cases out of 85 do the constitutive treaties resort to an ordinary legislative procedure as set forth in Articles 289 and 294 TFEU *tout court*. Of these 46 cases only in 35 cases do the constitutive treaties mandate obligatorily the use of the “usual” ordinary legislative procedure;⁶⁰ of the remaining eleven cases in ten⁶¹ the privilege of initiation is granted to someone in addition to the Commission and in one it is granted exclusively to the ECJ.⁶²

Considering all the possible combinations, there are in total 14 ordinary legislative procedures.⁶³

⁵⁷ Article 188(2) TFEU

⁵⁸ Article 172(1) TFEU

⁵⁹ Edward Best comes to a similar conclusion in *Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?* (2008) 15 *Maastricht Journal of European and Comparative Law* 95; he mentions four variants of ordinary legislative procedure. While he does not expressly say what the four variants are, reading his § 3 it would seem that they correspond to the four entities having the privilege of initiative (*i.e.* they are the ordinary legislative procedure initiated by the Commission, the ordinary legislative procedure initiated by the ECB, the ordinary legislative procedure initiated by the ECJ and the ordinary legislative procedure initiated by ¼ of the member states). His reasoning goes no further than pointing out that the holders of the privilege of initiative are different.

⁶⁰ *I.e.* the one which only the Commission can initiate

⁶¹ Articles 81(1)(2), 82(2), 83(1), 83(2), 84, 85(1)(2), 87(2) and 88(2) TFEU which grant the privilege of initiation to a quarter of the member states (by virtue of article 76 TFEU) and Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank which grant it to the ECB.

⁶² Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union

⁶³ Counting in each case as one the procedures listed in the table under nos. 8 and 9. Strictly speaking multiple permutations are possible (as many as there are permutations of member states) since each one gives “a special veto” only those member states which are concerned by the particular measure being adopted. Multiple permutations are likewise possible in respect of procedure listed under no. 14.

	Initiating institution⁶⁴	Participants not mentioned by name in Article 294 TFEU⁶⁵
1	Commission	None
2	Commission	Economic and Social Committee and Committee of the Regions
3	Commission	Economic and Social Committee
4	Commission	ECB
5	Commission	Court of Auditors
6	Commission	ECJ
7	Commission	Committee of the Regions
8	Commission	Economic and Social Committee and (agreement of) member states concerned
9	Commission	Economic and Social Committee and Committee of the Regions and (approval) of relevant member states
10	Commission	European Council ⁶⁶
11	Commission	CJEU ⁶⁷
12	ECB	Commission
13	ECJ	Commission
14	¼ of member states	Commission

There is, in fact, a further matter pertaining to ordinary legislative procedure, and not concerning the substance of the resulting act or the competence of the EU or of the specific institutions concerned, which is frequently set forth in the legal bases rather than – or, more correctly, in addition to – being set forth in the provisions which purport to regulate the way in which ordinary legislative procedure should function.⁶⁸ According to Article 296(3) TFEU

[w]hen considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

The ordinary legislative procedure provides generically – in Article 289(1) TFEU – only for regulations, directives and decisions. As a general rule it would mean – according to Article 296(1) TFEU – that the institutions concerned have a discretion which one of these types of

⁶⁴ It must not be forgotten that when the initiating institution is not the Commission, (i) qualified majority of the members of the Council means a different thing compared to when the initiating institution is the Commission and (ii) Article 294(9) TFEU does not apply and hence the Council cannot be made incapable of accepting the amendments, which the Parliament has proposed to the position formulated by the Council at first hearing, otherwise than unanimously.

⁶⁵ The bodies listed in this column are to be consulted unless explicitly stated otherwise.

⁶⁶ Theoretical possibility under Article 336(1) TFEU and Articles 12(1), 14 and 15(1) of the Protocol (No. 7) on the Privileges and Immunities of the European Union

⁶⁷ Article 336(1) TFEU and Articles 12(1), 14 and 15(1) of the Protocol (No. 7) on the Privileges and Immunities of the European Union would seem to mandate consultation of the CJEU (“Court of Justice of the European Union” in the constitutive treaties) as opposed to the ECJ. These provisions speak of “institutions concerned”. According to Article 13(1) TEU it is the CJEU which is an institution, not the ECJ: the latter forms part of the former (Article 19(1) TEU). At the same time Articles 257(1) and 281(2) TFEU and Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union speak of the ECJ (“Court of Justice” in the constitutive treaties).

⁶⁸ That is Articles 289 and 294 TFEU and Article 7(3) of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

act to employ. However, on at least 22 occasions a legal basis mandating the use of an ordinary legislative procedure prescribes the type of act which must result:

- on 14 occasions a regulation⁶⁹
- on seven occasions a directive⁷⁰ and
- one occasion either a directive or a regulation.⁷¹

The common wisdom is that the legal basis (as *lex specialis*) “trumps” in this respect Article 289(1) TFEU.⁷² In other words, if a legal basis says that only a directive or a regulation may be adopted – as Article 46 TFEU does – then the wider catalogue set forth in Article 289(1) TFEU is narrowed down to a directive and a regulation. Another way of putting it would be to say that the legal bases either narrow down (in case of Article 46 TFEU) or reduce to nil the discretion of the institutions concerned to choose the type from the catalogue set forth in Article 289(1) TFEU. In fact, Leidenmuehler has gone even further by suggesting that only binding acts may be adopted via ordinary legislative procedure.⁷³ Jürgen Bast has likewise opined that legislative acts must be binding.⁷⁴

But what happens when a legal basis which requires the use of an ordinary legislative procedure is worded as mandating an atypical act? Article 172 TFEU is exactly such a provision. Its first paragraph reads in relevant parts as follows.

The guidelines /.../ shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.⁷⁵

Guidelines are an atypical act. They are not listed in Article 288 TFEU – or indeed anywhere else in Section 1 of Chapter 2 of Title I of Part Six of the TFEU which section is entitled “Legal Acts of the Union”. In addition to regulations, directives and decisions to which Article 289(1) TFEU itself refers that section only mentions recommendations and opinions. It does not set forth any other type of legal acts. Importantly for present purposes, mandating guidelines cannot be seen as either a restriction of the discretion which Article 289(1) TFEU grants to the relevant institutions or a restriction of the catalogue there contained. Article 289(1) TFEU simply refers to no type of instrument which is apt to cover guidelines. Thus this situation – unlike the 22 legal bases mentioned above – constitutes a “true” conflict

⁶⁹ Articles 14(1), 15(3)(2), 164, 178(1), 207(2), 214(5), 224, 257(1), 291(3), 298(2) and 322(1) TFEU as well as Articles 12(1), 14 and 16 of the Protocol (No. 7) on the Privileges and Immunities of the European Union.

⁷⁰ Articles 50(1), 52(2), 53(1), 59(1), 82(2), 83(1) and 83(2) TFEU

⁷¹ Article 46 TFEU

⁷² See, for instance, Franz Leidenmuehler, *Is There a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment* (2010) 4 *Vienna Online Journal on International Constitutional Law* 195, 196, 198 and 199

⁷³ See the text to footnote 43 in *Is There a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment* (2010) 4 *Vienna Online Journal on International Constitutional Law* 197

⁷⁴ *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law* (2012) 49 *Common Market Law Review* at 893 and again at 925

⁷⁵ The guidelines which are to be adopted are to cover the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks in the areas of transport, telecommunications and energy infrastructures and to identify projects of common interest. See Articles 170 and 171 TFEU.

between the legal basis and Article 289(1) TFEU. Furthermore, both as a matter of ordinary language and as a matter of usual understanding of EU law⁷⁶ guidelines connote an instrument of an advisory rather than obligatory nature, *i.e.* they are not binding. Finally, it has to be mentioned that Article 296 TFEU does not get one further in trying to deal with the issue. Its paragraph 1 grants the adopting institutions discretion only to the extent the constitutive treaties do not specify the type of act. Thus paragraph 1 is apt to cover both Article 289(1) TFEU and the legal basis. Its paragraph 3 excludes the acts which are not provided for by the relevant legislative procedure (Article 289(1) TFEU) in the area in question (in our example Article 172 TFEU). Thus that paragraph rules out neither Article 289(1) TFEU nor the legal basis.

Dealing specifically with ordinary-legislative-procedure legal bases worded as mandating the use of atypical acts, Leidenmuehler has opined that since the acts adopted via ordinary legislative procedure have to be binding,

the institution principally has to make use of one of the types enumerated in Article 288 TFEU. In any case this is inevitable if the respective competence refers to the ordinary legislative procedure.⁷⁷

What is somewhat unclear in his account is the reason why he comes to this conclusion. He would, at first glance, seem to contend for something akin to *lex generalis derogat legi speciali*. In fact, Leidenmuehler classifies legal bases worded as mandating the use of guidelines as legal bases in which the constitutive treaties fail altogether to specify the type of act which must result.⁷⁸ Guidelines are in this context expressly equated with – for instance – the generic “measures”.⁷⁹ However from the point of view of how far one can stretch language, it must be noted that “measures” is apt to cover all instruments mentioned in Section 1 of Chapter 2 of Title I of Part Six of the TFEU; “guidelines” is apt to cover recommendations and possibly opinions at the most. None of the latter two features in Article 289(1) TFEU. This cardinal difference would seem to make Leidenmuehler’s explanation difficult to maintain (he himself does not allude to this difference at all). The only way to save it would seem to be to maintain that reference to guidelines is not a reference to the type of the resulting act, but rather to its content. An act (a regulation, a directive or a decision) might bind its addressee to comply with the guidelines, which – if guidelines are non-binding – essentially amounts to a procedural duty to consider them when acting. What is important for present purposes is that this approach – seeing words mandating the use of guidelines as specifying the content rather than the type of act – does not solve the true conflict. It construes it away.

⁷⁶ See, for instance, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 109.

⁷⁷ Is There a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment (2010) 4 *Vienna Online Journal on International Constitutional Law* 197. Presumably then use has to be made of regulations, directives and decisions since neither recommendations nor opinions are said to have binding force.

⁷⁸ Is There a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment (2010) 4 *Vienna Online Journal on International Constitutional Law* 196

⁷⁹ The most famous example of a legal basis using the language of “measures” is probably Article 114 TFEU.

Yet for that very reason this saving approach is not available to Leidenmuehler. He opines that

in case of a competence not specifying the form of act or seemingly providing for a specified atypical act, the recourse to a type not mentioned in Article 288 TFEU solely is permitted if the enactment of an act according to the catalogue is not making sense or is even excluded.⁸⁰

Combined with the preceding quote (suggesting that an act of the form not specified in Article 288 TFEU could be employed if the procedure was not an ordinary legislative procedure), it means that in case of non-ordinary-legislative-procedure legal bases an act could – at least under some circumstances – take the form of guidelines which form is different from all three of regulations, directives and decisions. First, that shows that “guidelines” is neither a synonym for any of the three nor a name of a class (*genus*) to which any of the three belongs. Second, the strategy of construing away the real conflict consists of construing the legal bases, not Article 289 or 294 TFEU. However the difference between non-ordinary-legislative-procedure legal bases and an ordinary-legislative-procedure legal bases both mandating an atypical act, is to be found not in the legal bases (both mandate an atypical act), but in the fact that in one case ordinary legislative procedure applies and in the other it does not. With the strategy being about construing the legal bases, it must be equally available and must yield the same results in case of ordinary-legislative-procedure legal bases and non-ordinary-legislative-procedure legal bases – yet in the latter case Leidenmuehler seems to admit that reference to guidelines is a way to prescribe the type of the resulting act, not its substance. Therefore his approach is ultimately unable to withstand legal scrutiny.

An alternative approach to that of Leidenmuehler would be to construe all references to atypical acts as referring to the substance rather than the type of the resulting act. However in that case the EU would seem to be limited to the acts listed in Section 1 of Chapter 2 of Title I of Part Six of the TFEU for all legal bases set forth in the constitutive treaties (whatever procedure for adoption they mandate). That can hardly be squared with numerous judgments of the CJEU interpreting (rather than annulling) various “soft law” instruments of the Commission (notices, guidelines etc.) in the field of competition law.

A yet further alternative approach to that of Leidenmuehler has been offered by the ECJ in its judgment in case C-77/11.⁸¹ The judgement settled a dispute between the Council and the Parliament as to who should sign the act establishing the budget of the EU. The Council contended that it should be signed by both its president and the president of the Parliament. The Parliament contended that only the president of the Parliament should sign the act. In the event only the president of the Parliament did sign the act, and the Council initiated the proceedings before the ECJ claiming that the act should be annulled.

⁸⁰ Is There a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on the Environment (2010) 4 Vienna Online Journal on International Constitutional Law 199

⁸¹ *Council of the European Union v European Parliament*

Adoption of the budget of the EU is regulated by Article 314 TFEU. The first sentence of that provision reads as follows.

The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions.

The Parliament relied on paragraph 9⁸² of that article which provides that

[w]hen the procedure provided for in this Article has been completed, the President of the European Parliament shall declare that the budget has been definitively adopted.

The Council relied, *inter alia*, on Article 297(1)(2) TFEU,⁸³ which provides that

[l]egislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them,

claiming essentially that since Article 314 TFEU says that the Parliament and the Council establish the budget, therefore both adopt it and hence the presidents of both must sign the act. It should be noticed that the Council conveniently disregarded that Article 297(1)(2) clearly refers to *an* institution, not institutions. Both litigants agreed that a draft budget could not produce legal effects.⁸⁴

The ECJ ultimately ruled for the Parliament. It did so without referring in its reasoning to Article 297(1)(2) TFEU which is a provision particular to special legislative procedures. Instead it essentially relied on the differences between Article 289(2) TFEU and Article 314 TFEU, in other words the difference between the provision setting special legislative procedure out generically and a legal basis mandating its use in a particular situation. Just like Article 289(1) TFEU in case of ordinary legislative procedure, Article 289(2) TFEU clearly states that only

adoption of a regulation, directive or decision /.../ shall constitute a special legislative procedure.

The ECJ held that Article 314 TFEU establishes a procedure (i) appropriate to the specific nature of the budget and (ii) concluded by the act referred to in paragraph 9 of that article.⁸⁵ Thus it was

the President of the Parliament, in his capacity as organ of that institution, who, by adopting the act based on Article 314(9) TFEU, endows the Union's budget with binding force at the conclusion of a procedure characterised by the joint action of the Parliament and the Council.⁸⁶

⁸² Paragraph 35 of the judgment

⁸³ Paragraph 26 of the judgment

⁸⁴ Paragraph 34 of the judgment

⁸⁵ Paragraph 47 of the judgment

⁸⁶ Paragraph 56 of the judgment

In paragraphs 58 – 60 the ECJ explicitly considered – and dismissed – the argument to the effect that the act of the president of the Parliament was unlawful because (i) it was adopted via a special legislative procedure, but (ii) – contrary to Article 289(2) TFEU – it was neither a regulation nor a directive nor a decision.

58. The argument should also be rejected.

59. It should be recalled that Article 314 TFEU lays down a special legislative procedure appropriate to the nature of the budget, which is essentially an accounting document setting out estimates for the European Union of all income and expenditure over a certain period. After the President of the Parliament has verified that the procedure complies with the provisions of the FEU Treaty, that document is annexed to the act by which the President declares, on the basis of Article 314(9) TFEU, that the budget has been definitively adopted.

60. Even though the act based on Article 314(9) TFEU is the outcome of a special legislative procedure, it does not, due to the nature of the budget, take the form of a legislative act in the strict sense of the term for the purpose of Articles 288 TFEU and 289(2) TFEU, and is, in any event, a measure open to challenge for the purpose of Article 263 TFEU, since it endows the Union's budget with binding force.

In essence, in view of particularities of the legal basis (paragraph 59 of the judgment), the resulting act need not be of the type set forth in Article 289(2) TFEU (paragraph 60 of the judgment)⁸⁷ – just as the legal basis says. The procedure employed nevertheless constitutes a special legislative procedure, although the resulting act is not a legislative act.⁸⁸ Thus it would seem that the ECJ is of the opinion that specification of the type of act⁸⁹ in Article 289(2) TFEU does not go to the issue of the applicable procedure, it goes only to the resulting act being legislative or not. In other words: any act may be adopted via a particular special legislative procedure, not just one of the type specified in paragraph 2 of Article 289 TFEU; the procedure for adoption of such an act will still be a special legislative procedure, however only if the act adopted is of the type mentioned in Article 289(2) TFEU is it capable of constituting a legislative act (within the meaning of Article 289(3) TFEU).⁹⁰ Considering the similarities between paragraphs 1 and 2 of Article 289 TFEU (both seem to require the acts to be either regulations, directives and decisions, and both set forth more than one procedure in either case under single generic name), the reasoning of the ECJ would seem equally applicable to paragraph 1 of Article 289 TFEU.

⁸⁷ Nor does it need to be adopted by the entity set forth in Article 289(2) TFEU (paragraph 56 of the judgment).

⁸⁸ Nor was it adopted by the Parliament or the Council (Article 289(2) TFEU).

⁸⁹ As well as specification of the identity of the adopter.

⁹⁰ The same may be repeated in respect of the adopter: any entity specified in a legal basis mandating a special legislative procedure may adopt an act via that special legislative procedure, not just the entities set forth as adopters in paragraph 2 of Article 289 TFEU; the procedure for adoption of such an act by the entity specified in the legal basis will still be a special legislative procedure, however only if the act adopted is of the type mentioned in Article 289(2) TFEU and, presumably, is adopted by the entity set forth therein, does it constitute a legislative act (within the meaning of Article 289(3) TFEU).

The situation dealt with by the ECJ in case C-77/11 is strikingly similar to the one which arises when adopting an act via ordinary legislative procedure on the basis of Article 172 TFEU. First, there is a real conflict between the general rules regulating the applicable legislative procedure (Article 289(2) TFEU) and the legal basis employed (Article 314 TFEU, specifically its paragraph 9). Second, the conflict concerns the type of act to be employed. Third, the general rules state that only a regulation, directive or decision may be adopted, while the legal basis is worded as mandating an atypical act (a declaration made by the president of the Parliament). It thus stands to reason that the ECJ's reasoning should be equally applicable to Article 172. Doing so results in a conclusion that when acting on the basis of Article 172 TFEU the Parliament and the Council should adopt guidelines, and that those guidelines would – in spite of being adopted via ordinary legislative procedure – not constitute legislative acts.

A yet further alternative, perhaps the simplest one of them all, may be offered on the basis of the very same judgment of the ECJ. The instrument there in question⁹¹ was entitled “Definitive adoption of the European Union's general budget for the financial year 2011”, and its sole article read as follows.

The procedure under Article 314 of the Treaty on the Functioning of the European Union is complete and the European Union's general budget for the financial year 2011 has been definitively adopted.

It will be recalled that Article 314(9) TFEU required the president of the Parliament simply to declare that the budget was definitively adopted. It is worded as requiring the making of an action, rather than as requiring the adoption of an act. National laws of at the very least some member states – Estonia, for instance – draw a distinction between acts and actions with only the former being normative.⁹² Based on the wording of Article 314(9) TFEU it would seem to have been open for the ECJ to have opted for deciding that that provision mandated no act at all; that all it did was require an action by the president of the Parliament to conclude the procedure.

Nevertheless it follows from the judgment that the ECJ is of the opinion that Article 314(9) TFEU requires the president of the Parliament to adopt an act.

[I]t is the President of the Parliament, in his capacity as organ of that institution, who, by adopting the act based on Article 314(9) TFEU, endows the Union's budget with binding force at the conclusion of a procedure characterised by the joint action of the Parliament and the Council /.../⁹³

However, re-reading the aforequoted paragraphs 58 – 60, the ECJ did not actually specify the type of the act by which the president of the Parliament declares that the budget has been

⁹¹ Bearing the number 2011/125/EU

⁹² See the judgment of the National Court in case no. 3-3-1-44-10, paragraph 12

⁹³ Paragraph 56 of the judgment

definitively adopted. The ECJ did not specify the type of that act anywhere else in the judgment either. The closest it came to doing so was to reject⁹⁴ that

[t]he act adopted on the basis of Article 314(9) TFEU is merely a declaratory act, adopted by the President of the Parliament.⁹⁵

Hence it is possible to take away from the judgment that what Article 314(9) TFEU requires is an act and that the act has normative force. Looked at this way, it is submitted that one would struggle to find arguments why the act is not a decision within the meaning of Articles 288(4) and 289(2) TFEU. The former reads as follows.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

The act in question was not addressed to anyone. Therefore the second sentence is irrelevant. And the act in question was binding: according to the ECJ it was that act which endowed the budget with binding force.⁹⁶ If that were so, the aforementioned paragraphs 58 – 60 of the judgment would essentially read as nothing more than (i) a refutation of the claim that Article 314(9) mandates an act not mentioned in Article 289(2) TFEU and (ii) a simple application of *lex specialis* rule to the identity of the adopter (Article 314(9) TFEU simply overruling in this respect Article 289(2) TFEU). For present purposes it would offer guidance for the simplest solution to the question what happens if a legal basis contradicts the rule on applicable legislative procedure which rule is set forth in Article 289 TFEU: the legal basis prevails as *lex specialis*. Hence in case of guidelines being mandated by a legal basis also mandating the use of an ordinary legislative procedure, it would mean that the resulting act should be guidelines. Presumably this act could then still be legislative within the meaning of Article 289(3) TFEU (in case of such reading the decision mandated by Article 314(9) TFEU would not be a legislative act because of the nature of the budget, not for any reason linked to the actual decision of the president of the Parliament).

The difficulty with that alternative lays in the fact that if that simple solution – the instrument bearing number 2011/125/EU was actually a decision – was correct, why did the ECJ not say so? It was explicitly confronted with the claim that it was not a decision.⁹⁷ It did not refute that suggestion rather offering in reply the argumentation contained in the aforementioned paragraphs 58 – 60. It did not touch on the matter elsewhere.

Case C-77/11 was decided by the Grand Chamber of the ECJ. On the one hand, it could be argued to endow the judgment with more weight compared to a judgment of the ECJ handed down by a bench of five justices. On the other hand, it could make understanding the judgment more difficult: since there are no separate opinions, at least the majority of the justices need to agree on the text of any judgment of the ECJ, *i.e.* both on the disposition and the argumentation. Ordinarily the minimum majority is three; case C-77/11 was decided by a

⁹⁴ Paragraph 53 of the judgment

⁹⁵ Paragraph 52 of the judgment

⁹⁶ Paragraph 60 of the judgment

⁹⁷ Paragraph 47 of the judgment

Grand Chamber of 15 justices, hence the minimum majority in that case was eight. It is submitted that the likely reason for which the ECJ did not opine that Article 314(9) TFEU mandated adoption of a decision is because no requisite majority was available to agree to such a conclusion. However, that is a point which will likely never be clarified in view of secrecy of deliberations.⁹⁸ Therefore while it is possible to argue that the correct *ratio decidendi* of the judgment in case C-77/11 is that Article 314(9) TFEU mandates the adoption of a decision, it is submitted that such argument is more difficult to square with the actual language of the judgment, and the implications arising from that language, than the solution offered in the text to footnote 87 above.⁹⁹

Furthermore, on the decision-based *ratio decidendi* the conflict between Articles 289(2) and 314 TFEU is construed away. It is no longer a real conflict because by mandating a decision Article 314 TFEU either restricts the catalogue of acts set forth or the discretion of the adopter provided for in Article 289(2) TFEU. As discussed above no such approach is possible in case of Article 172 TFEU. Hence the judgment of the ECJ in case C-77/11 might be seen as irrelevant for solving the real conflict. Admittedly it does not need to be seen as irrelevant because it could still be seen as mandating a simple application of *lex specialis* rule (with the legal basis trumping Article 289 TFEU).

Interestingly enough the law enacted on the basis of Article 172 TFEU accords with Leidenmuehler's approach, not with (either construction of) the judgment of the ECJ or the possibility of taking "guidelines" to be a reference to substance of acts (in which case the acts cannot prescribe any substantive rules to follow). Just as Leidenmuehler suggested that they must the Parliament and the Council have enacted only regulations¹⁰⁰ and decisions¹⁰¹ on the

⁹⁸ Article 35 of the Protocol (No 6) on the Statute of the Court of Justice

⁹⁹ Although it should be stressed that it cannot be excluded that a differently constituted bench of the ECJ might in some subsequent case opt for construing the judgment as stemming from the decision-based *ratio decidendi*.

¹⁰⁰ Regulation (EU) No 512/2014 of the European Parliament and of the Council of 16 April 2014 amending Regulation (EU) No 912/2010 setting up the European GNSS Agency; Regulation (EU) No 283/2014 of the European Parliament and of the Council of 11 March 2014 on guidelines for trans-European networks in the area of telecommunications infrastructure and repealing Decision No 1336/97/EC; Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council; Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU; Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010; Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009; Regulation (EU) No 912/2010 of the European Parliament and of the Council of 22 September 2010 setting up the European GNSS Agency, repealing Council Regulation (EC) No 1321/2004 on the establishment of structures for the management of the European satellite radio navigation programmes and amending Regulation (EC) No 683/2008 of the European Parliament and of the Council

¹⁰¹ Decision (EU) 2015/2240 of the European Parliament and of the Council of 25 November 2015 establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA2 programme) as a means for modernising the public sector; Decision No 1104/2011/EU of the European Parliament and of the Council of 25 October 2011 on the rules for access to the public regulated service provided by the global navigation satellite system established under the Galileo programme

basis of Article 172 TFEU, and these instruments contain substantive rules which must be followed, *i.e.* which are obligatory.¹⁰² It will be recalled that both regulations and decisions are listed in Article 289(1) TFEU. Since none of the regulations or decisions so adopted has been annulled, it might seem that Leidenmuehler's approach (*lex generalis derogate legi speciali*) is the correct one, after all.

A similar situation has arisen in respect of Article 155(2) TFEU. While that provision would seem to mandate no legislative procedure at all, it does provide that the act adopted is to be a decision.

Agreements [between management and labour] concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

Unlike in case of guidelines there would seem to be no way to construe "a decision" as some other type of act mentioned in Section 1 of Chapter 2 of Title I of Part Six of the TFEU. Furthermore the wording of the provision has remained constant throughout various versions of the constitutive treaties ever since the very first time when such power of the Council was set forth in the constitutive treaties.¹⁰³ Yet, the instruments adopted on the basis of Article 155(2) TFEU (and its prior incarnations) have thus far been directives. The directives so adopted have been heavily litigated before the ECJ, both in infringement proceedings¹⁰⁴ and in preliminary rulings.¹⁰⁵ None has ever been annulled.

More interestingly Jean-Claude Piris, at the time the Director-General of the Council Legal Service, said this during the drafting of the Constitutional Treaty.¹⁰⁶

Sometimes, however, the type of act indicated ("decisions" or "directives") has a generic meaning, signifying "act" or "measure" and does not refer to the type of act whose name it bears. Thus Article 139(2) (social policy, agreements between management and labour) provides that "*Agreements concluded at Community level shall be implemented (...) by a Council decision*", while what is actually intended is a directive.

That explains why the Council has consistently adopted directives. It does not explain why those directives have not been annulled (possibly maintaining their validity pending re-

¹⁰² Hence the solution no. 2 offered above (construing "guidelines" as reference to content) is not the one with which the lawmaking practice accords.

¹⁰³ It was first inserted into the EC Treaty by the Treaty of Amsterdam as Article 139(2) EC. The provision bore that number until it was renumbered by the Lisbon Treaty.

¹⁰⁴ See, for instance, case C-305/10 *European Commission v Grand Duchy of Luxembourg*.

¹⁰⁵ For example Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP adopted on the basis of Article 139(2) EC has been considered in some 115 cases.

¹⁰⁶ Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002), Working document 06 of the Working Group IX (6th November 2002), page 16

adoption in proper form) or why, if directive was indeed intended, the mistake was rectified neither by the Nice Treaty nor by the Lisbon Treaty.¹⁰⁷ Piris' most glaring omission of all is the complete lack of any explanation of the basis for his statement that it was not a decision (as the treaty said), but a directive (as the Council, including its legal service, seemingly thought) which was actually intended. No such explanation was given in spite of the fact that the situation would seem to constitute the most glaring of violations of the rule of law imaginable: a situation where the highest-ranking instrument of law clearly and explicitly says one thing, but the executive of the polity governed by that instrument of law does another arguing that the intention – not evidenced in any way – was to have that other thing.

It is submitted that considering the experience with Article 155(2) TFEU it is impossible to take much away from the practice of adopting regulations and decisions on the basis of Article 172 TFEU, and hence draw conclusions from that as to what happens when the legal basis simultaneously mandates the use of an ordinary legislative procedure and is worded as mandating that an atypical act result. In other words, it would seem to be an open question of EU law whether Leidenmuehler is correct, or whether such references to atypical acts should be construed as references to substance and not type, or whether any solution based on the judgement of the ECJ in case C-77/11 should be followed. Or, indeed, that perhaps some yet other solution is possible and the correct one. The only thing on this point which seems to be capable of being taken away from the constitutive treaties and the practice they have generated is that there would seem to be fundamental problems with the way the constitutive treaties are drafted. One could only suppose that certain “concessions” might need to be made in construing the constitutive treaties in view of the fact that the constitutive treaties are a product of give-and-take in international politics when they are negotiated (being not too different from any other international treaty with a similar number of participants each seeking to further its own agenda).

2.2.2. Substance

As has been mentioned some 85 legal bases mandate the use of ordinary legislative procedures. On the side of substantive law the two foremost questions related to ordinary legislative procedures would seem to be these. What areas of competence (exclusive, shared, supporting, coordinating, complementary) do the legal bases requiring the use of ordinary legislative procedures belong to? What subject matters do the legal bases requiring the use of ordinary legislative procedures regulate? A third, perhaps less evident question, is whether there is any pattern behind the use of different ordinary legislative procedures.

2.2.2.1. Competence

Title I of the TFEU sets forth the categories and areas of EU competence. Articles 3 – 6 TFEU list which type of competence a particular field of human activities belongs to. Article 2 TFEU explains what it is that a particular type of competence enables the EU to do.

¹⁰⁷ Nor by the Constitutional Treaty, for that matter. Article III-312(2) of the Constitutional Treaty did expand the catalogue of available instruments by adding regulations, but still failed to mention directives.

Article 3 TFEU lists the areas of exclusive competence of the EU.¹⁰⁸ According to Article 2(1) TFEU it is only the EU which is competent to legislate and adopt legally binding acts in those areas. Article 4(2) TFEU sets forth the areas of “standard” shared competence.¹⁰⁹ According to Article 2(2) TFEU both the EU and member states are competent to legislate and adopt legally binding acts in those areas, however member states are competent to do so only to the extent that the EU has not done so. In other words, the EU can – and frequently does – pre-empt member states from legislating and adopting legally binding acts in those areas.

Paragraphs 3 and 4 of Article 4 TFEU set forth the areas of the other type of shared competence.¹¹⁰ Both paragraphs contain the following language.

/.../ the Union shall have competence /.../; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Thus unlike in case of areas listed in paragraph 2 of Article 4 TFEU, the EU cannot pre-empt member states from legislating and adopting legally binding acts in the areas listed in paragraphs 3 and 4. In the areas listed in those two paragraphs both the EU and the member states may always legislate and adopt legally binding acts. Further, unlike paragraph 2 of Article 4 TFEU, its paragraphs 3 and 4 contain language purporting to limit what the EU is competent to do in exercise of its competences set forth therein.¹¹¹ Thus in areas of research, technological development and space (paragraph 3) the EU may only carry out activities, in particular to define and implement programmes. In areas of development co-operation and humanitarian aid (paragraph 4) the EU may only carry out activities and conduct a common policy.

Article 6 TFEU sets forth the areas where the EU is only competent to support, coordinate or supplement the actions of the member states.¹¹² According to Article 2(5)(1) TFEU the EU cannot supersede the competence of member states in these areas, *i.e.* the EU’s competence is truly to support, coordinate and supplement the actions of member states. While the EU is competent to adopt legally binding acts relating to these areas, such legally binding acts must not entail harmonisation of laws or regulations of member states.

¹⁰⁸ Customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the member states whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, common commercial policy and conclusion of international agreements when their conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as their conclusion may affect common rules or alter their scope.

¹⁰⁹ Internal market; social policy for the aspects defined in the TFEU; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in the TFEU.

¹¹⁰ The areas listed in paragraph 3 are research, technological development and space. The areas listed in paragraph 4 are development co-operation and humanitarian aid.

¹¹¹ Practical effects and consequences of any such purported limitation are a separate issue falling outside the scope of this thesis.

¹¹² Protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation. All these areas come with the *caveat* that the areas are “at European level”.

The last types of competence of the EU are set forth in Article 5 TFEU. Paragraph 1 of that article gives the Council the competence “to adopt measures, in particular broad guidelines for” economic policies of member states (which the latter must co-ordinate within the EU). Paragraph 2 obliges the EU to

take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies,

and paragraph 3 enables the EU to

take initiatives to ensure coordination of Member States' social policies.

Article 2 TFEU, the provision which explicates what it is that a particular type of competence enables the EU to do, is silent in respect of paragraph 3 of Article 5 TFEU. In respect of paragraphs 1 and 2 it simply says that the EU shall have the competence to provide the arrangements determined by the TFEU within which the member states are to coordinate their economic and employment policies.¹¹³

It has been opined that these Article 5 TFEU areas of competence do not fit particularly well the scheme of competences of the EU otherwise established by Title I of the TFEU.¹¹⁴ The explanation for their existence seems to be a political compromise between those member states which would have wished to include them within shared competences and those who would have wished to see them among supporting, coordinating and supplementary ones.¹¹⁵ The resulting compromise is problematic because of the difficulties of drawing boundaries between Article 5 TFEU fields of competence and those listed elsewhere, and of the lack of clarity as what it is exactly that the constitutive treaties enable the EU to do in Article 5 TFEU fields of competence.

Thus the constitutive treaties set forth some five types of competences: exclusive competence; shared competence with pre-emption (standard shared competence); shared competence without pre-emption; competence to support, coordinate and supplement the actions of member states; and the “political” competence to coordinate. Looking at Article 2 TFEU alone it might be tempting to conclude that ordinary (or in fact any) legislative procedures should be available only for adoption of acts in the areas where the EU has exclusive competence and in the areas where it has some type of shared competence. While paragraph 6 of Article 2 TFEU does state that

[t]he scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area,

only paragraphs 1 and 2 of Article 2 TFEU – dealing respectively with exclusive and shared competence – contain language to the effect that the EU is to legislate (in addition to adopting legally binding acts). Paragraph 5, dealing with the competence to support, coordinate and supplement refers only to adopting legally binding acts, while paragraph 3 on the “political”

¹¹³ Article 2(3) TFEU

¹¹⁴ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 88

¹¹⁵ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 89

competence to coordinate omits any reference to either. While every regulation, directive and decision is binding, only some – those adopted via a legislative procedure – would seem to constitute legislative acts.¹¹⁶ Thus only paragraphs 1 and 2 of Article 2 TFEU would seem to refer to the activity of adoption of legislative acts.

With that in mind it is hardly surprising that there are legal bases mandating the use ordinary legislative procedure within the areas of exclusive and of standard shared competence. Article 114 TFEU – the general, or rather the residual, legal basis for measures intended to improve the conditions for the establishment and functioning of the internal market¹¹⁷ – is perhaps the most famous of all legal bases pertaining to internal market (an area of standard shared competence). It provides for the use of ordinary legislative procedure. Examples of legal bases mandating the use of ordinary legislative procedure in an area of exclusive competence could be, for instance, Article 33 TFEU which served as one of the legal bases for the recently adopted Customs Code¹¹⁸ or Article 207(2) TFEU which is the general legal basis for adopting the common commercial policy.

Moving on to the other type of shared competence, Title XIX of the TFEU – on research and technological development and space (and hence falling within the second type of shared competence) – contains several legal bases mandating the use of an ordinary legislative procedure.¹¹⁹ The framework within which the EU is to provide humanitarian aid is likewise to be adopted via ordinary legislative procedure,¹²⁰ as are several instruments dealing with development cooperation.¹²¹

What would seem surprising in the light of paragraphs 1, 2 and 5 of Article 2 TFEU is that several legal bases in the areas in which the EU is only competent to support, coordinate and supplement the actions of member states likewise provide for the use of ordinary legislative procedures. Examples could include Article 165(4)(1) TFEU on incentive measures in the fields of education, youth and sport, Article 166(4) TFEU on vocational training, Article 168(4) TFEU on medical, veterinary and phytosanitary measures, Article 167(5)(1) TFEU on the flowering of cultures, Article 173(3)(1) TFEU on supporting member states in achieving the competitiveness of EU industry, Article 196(2) TFEU on civil protection and Article 197(2) TFEU on improving administrative capacity for implementation of EU law. The foregoing list covers every single area in which the EU is only competent to support, coordinate and supplement the actions of member states, and while Article 168(4) TFEU specifically states that it constitutes derogation from the general rules contained in Articles 2(5) and 6 TFEU, the other legal bases do not. Furthermore, in areas where the EU has only “political” coordinating competence the constitutive treaties likewise provide for the use of

¹¹⁶ Articles 288 and 289 TFEU

¹¹⁷ Paragraph 84 of the judgment of the ECJ in case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union*

¹¹⁸ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code

¹¹⁹ Article 182(1) TFEU on adoption of multiannual framework programmes on R&D, Article 182(5) TFEU on necessary measures for implementation of the European research area, Article 188(2) TFEU on adoption of multiannual framework programmes and Article 189(2) TFEU on European space policy

¹²⁰ Article 214(3) TFEU

¹²¹ See Articles 209(1) and 212(2) TFEU.

an ordinary legislative procedure: Article 149(1) TFEU is a basis for adoption, via an ordinary legislative procedure, of measures (i) incentivising cooperation between member states in the field of employment and (ii) otherwise supporting their actions in that field.

Thus ordinary legislative procedure is employed in areas of every type of competence. The foregoing further shows that ordinary legislative procedure is employed both in areas where harmonisation is permissible as well as those where it is not.¹²² In this latter respect it needs to be added that in some cases harmonisation is excluded even in the area of standard shared competence and simultaneously the use of an ordinary legislative procedure is mandated. Article 19(2) TFEU on incentive measures to support member states in combating discrimination and Article 84 TFEU on supporting member states in the field of crime prevention are the two examples. While these legal bases are formulated in a manner similar to those which lie in the areas where the EU is only competent to support, coordinate and supplement the actions of member states, both legal bases would seem to actually belong to the area of freedom, security and justice, which according to Article 4(2)(1) TFEU is an area of standard shared competence. Under the general rules set forth in Title I of the TFEU the EU may harmonise national laws pertaining to that area.

The foregoing suggests that there is no link between ordinary legislative procedure and any particular type of competence of the EU. That, similarly to what Craig and de Búrca have suggested,¹²³ Article 2(6) TFEU essentially means that while Title I of the TFEU formulates what it is that the EU could do, it says nothing about how it is to do it. Nor, one might add, about the extent to which the EU is allowed to act in the areas described in Title I of the TFEU. The details – which make all the difference in the world – are set forth in the legal bases. Importantly for present purposes it is further possible to conclude that either there is no connection whatsoever between references to “legislating” in Article 2 TFEU and any (not just ordinary) legislative procedure or that references to legislating in Article 2 TFEU are essentially meaningless (that they do not add anything to the remaining language of Article 2 TFEU). It is possible to make the conclusion formulated in the foregoing sentence because in certain situations in respect of which Article 2 TFEU does not state that the EU could legislate, the EU is competent to adopt legislative acts (specifically those adopted via ordinary legislative procedure).¹²⁴ Thus one possibility is that references to “legislating” in Article 2 TFEU are meaningless, because they in no way constrain legislating in areas where the EU is not said to be competent to legislate (areas of the competence to support, coordinate and supplement the actions of member states and of the “political” coordinating competence). Alternatively, if references to “legislating” are seen as constraining some activity (“legislating”) in those areas, “legislate” in Article 2 TFEU must mean something else

¹²² No harmonisation is permissible in the areas where the EU is only competent to support, coordinate and supplement – Article 2(5)(2) TFEU.

¹²³ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 85

¹²⁴ As we saw, there are situations in areas belonging to every single type of competence which the EU has in which situations the EU is entitled to legislate – within the meaning of Article 289 TFEU.

compared to Article 289 TFEU for within that latter meaning the EU does legislate in those two areas.¹²⁵

2.2.2.2. Subject matter

What subject matters do the legal bases requiring the use of an ordinary legislative procedure regulate? The entire list is available in Annexe I to this thesis. What is considered here is whether the subject-matters for which it is – or is not – used form some sort of pattern. In terms of approach taken in this section 2.2.2.2, one could draw parallels with the constitutional principle of parliamentary reservation¹²⁶ recognised in countries belonging to the “Germanic” constitutional tradition. That principle can be concisely stated (although it is perhaps not always easy to apply): the constitution deems some decisions to be of such great importance that only the parliament may be allowed to make them. The closest analogue in EU law is probably the rule of essential elements formulated by the ECJ in its *Frontex* line of case law.¹²⁷ There exist some differences between the two, however. The rule of essential elements basically states that the adoption of rules essential to the subject-matter envisaged by a legislative act is reserved to the EU legislature.¹²⁸ It does not purport – and probably could not in its current form be used – to reserve some particular subject matters in their entirety to the EU legislator. The principle of parliamentary reservation is capable of serving that end: some subject matters might be deemed in their entirety of such importance that they must be wholly regulated by the parliament.

Seen from this perspective it becomes immediately evident upon reading Annexe I that no pattern is to be found. If seen from the perspective of the EU, some rules of fundamental importance must be adopted via ordinary legislative procedures. It is probably difficult to find an issue more central to the EU-project than the four fundamental freedoms; they are the irreducible core of the EU. Article 46 TFEU – the legal basis for adopting rules which make possible the exercise of freedom of movement of workers – mandates the use of an ordinary legislative procedure. Likewise Article 50(1) TFEU – the legal basis for attaining the freedom of establishment as far as some particular activities are concerned. At the same time some rules just as important for the realisation of the fundamental freedoms are adopted on the legal bases which mandate the use of some other rulemaking procedure entirely. Article 31 TFEU – adoption of the common customs tariff without which there could simply be no common market and no free movement of goods – is a good example here. The common customs tariff is adopted by the Council upon the proposal of the Commission; the Parliament is not involved. Finally, some of the legal bases mandating the use of ordinary legislative procedures are at best of secondary importance for the EU. Article 24(1) TFEU could serve as an example here. It mandates the use of an ordinary legislative procedure for setting forth

¹²⁵ See further section 4.3 below.

¹²⁶ *Parlamentarvorbehalt* in German. See, for an example, the judgment of Bundesverfassungsgericht in *Auslandseinsätze der Bundeswehr* (BVerfGE 90, 286). The principle was also considered in *The Lisbon Treaty Judgment* (BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08). In the English translation of the latter available on the website of Bundesverfassungsgericht the principle is called “requirement of parliamentary approval”.

¹²⁷ See section 3.2.6 for a more detailed treatment of *Frontex*.

¹²⁸ Paragraph 64 of *Frontex*. However, see section 4.2.2 below, specifically text to footnote 896.

the rules on citizens' initiative. Regardless of its importance for democracy and democratic legitimacy, it can hardly be central to the EU-project seeing as no such citizens' initiative existed in EU law prior to the Lisbon Treaty coming into force. Another example would be Article 195(2) TFEU on tourism which likewise mandates the use of an ordinary legislative procedure. While not without its significance, promotion of tourism could hardly be given the same importance in the EU as the four fundamental freedoms.

Seen from the perspective of a citizen, the same lack of pattern would seem to be the case. If one makes the not unreasonable assumption that a citizen would – if informed – care first and foremost about democracy and his own rights, it becomes evident that ordinary legislative procedure is well used for both issues of utmost importance – such as the aforementioned citizens initiative (Article 24(1) TFEU), the combat of discrimination (Article 19(2) TFEU), free movement of workers (Article 46 TFEU) or the rules on recognition of judgements handed down in criminal proceedings (Article 82(1)(2)(a) TFEU) – as well as issues of considerably lesser importance. The aforementioned measures on tourism (Article 195(2) TFEU) could serve as an example here. Article 112 TFEU could serve as example of a non-ordinary-legislative procedure legal basis the provisions adopted on which are likely to be important to an ordinary citizen: that article regulates the introduction of countervailing charges on imports from another member state (for a citizen: the price of goods imported from another member state). That provision does not mandate the use of any legislative procedure; measures are to be adopted by the Council upon proposal of the Commission; the Parliament is not involved.

Finally, yet another perspective could be the depth of EU's interference in a particular subject matter. For instance, Article 169(3) TFEU on consumer protection provides for a minimum harmonisation; member states may introduce more stringent measures if they wish. The aforementioned Article 19(2) TFEU is an example of an even "shallower" interference with a subject matter: it enables the adoption of basic principles of the EU's incentive measures supporting the member states' actions combating discrimination. Article 52(2) TFEU would seem to be a legal basis providing for yet "shallower" interference still: it enables the EU merely to coordinate the rules (in respect of special treatment for foreign nationals on grounds of public policy, public security or public health) which member states might already have in place. All three legal bases mandate the use of an ordinary legislative procedure. However, some measures adopted via ordinary legislative procedures amount to as detailed a regulation of a subject-matter as one could imagine leaving no room for any other rules. The aforementioned Customs Code, recently adopted *inter alia* on the basis of ordinary-legislative-procedure-mandating Articles 33 and 207(2) TFEU, could serve as an example here. Furthermore, provisions serving as legal bases for the creation of institutional rules of the EU itself would not seem capable of being classified on a scale of depth of interference at all. Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union enabling the appointment of assistant rapporteurs and creation of rules governing their service could serve as an example here. That article provides for the use of an ordinary legislative procedure. Finally, it is worth noting that in at least two cases – Articles 178(1)

and 182(5) TFEU – the ordinary legislative procedure is mandated for adoption of implementing measures. Article 178(1) TFEU reads as follows.

Implementing regulations relating to the European Regional Development Fund shall be taken by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

Article 182(5) TFEU reads as follows.

As a complement to the activities planned in the multiannual framework programme, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the measures necessary for the implementation of the European research area.

What is worthy of mention here is that these two provisions would seem to refer to measures to make, respectively European Regional Development Fund and European research area, operational, to put them into practice.¹²⁹ Essentially, the instruments adopted (or to be adopted) on those legal bases would not seem to be much different either from implementation by member states or from implementing acts referred to in Article 291 TFEU.¹³⁰

To sum up, looking at the use of ordinary legislative procedure from the perspective of depth of EU's interference with a subject matter yields no pattern.

Annexe I to this thesis does however indicate one particularity – one pattern – pertaining to the use of ordinary legislative procedures. There is no provision of the TEU which mandates its use. Thus, ordinary legislative procedure is never employed for adopting acts in the field of common foreign and security policy. If one considers for a moment the political significance of common foreign and security policy, another regularity divulges itself. We have seen that – considered both from the perspective of the EU and that of an average citizen – ordinary legislative procedure is employed for adoption of acts of both high and low importance, and further, that other rulemaking procedures are at least sometimes employed for adoption of acts of high importance. Conspicuous by their absence from this list are situations where completely non-legislative procedures are employed for adoption of

¹²⁹ Since the adoption of the Lisbon Treaty no instruments have been adopted on the basis of Article 182(5) TFEU. Two regulations have been adopted on the basis of Article 178(1) TFEU: Regulation (EU) No 437/2010 of the European Parliament and of the Council of 19 May 2010 amending Regulation (EC) No 1080/2006 on the European Regional Development Fund as regards the eligibility of housing interventions in favour of marginalised communities and Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal. Both go very much into the specifics of the subject matter.

¹³⁰ The fact that the constitutive treaties mandate the adoption implementing measures by special legislative procedure (by the Council with consent of the Parliament) is even clearer from Article 311 TFEU. Paragraph 3 of that article requires the Council to adopt, after having consulted the Parliament, a decision regulating the system of EU's own resources. According to paragraph 4 of that article the implementing measures necessary for that system are to be adopted via special legislative procedure.

measures of lesser importance for either of those constituencies (the EU and average citizens).

2.2.2.3. Different ordinary legislative procedures

Looking at the use of ordinary legislative procedure the other way around, *i.e.* starting from the type of the ordinary legislative procedure employed rather than from the area of competence where or the subject matter in respect of which it is employed, the first thing one notices is that all instances where an institution other than the Commission has the privilege of initiative are rather technical. There are three such legal bases. Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank¹³¹ require the use of an ordinary legislative procedure for amendment of certain provisions of the statute of the ESCB and the ECB. Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union requires the use of an ordinary legislative procedure in respect of a subject matter of substantially similar nature, but concerning the ECJ: the appointment of assistant rapporteurs and creation of rules governing their service. All three concern the functioning of non-political institutions of the EU.

The remaining eight legal bases granting privilege of initiative to someone other than the Commission while mandating the use of an ordinary legislative procedure all grant that privilege to a quarter of member states and are all contained in Chapters 4 and 5 of Title V of the TFEU. That title is called “Area of freedom, security and justice” and the chapters – “Judicial cooperation in criminal matters” and “Police cooperation”. Unlike the three legal bases mentioned in the preceding paragraph, the matters dealt with here are hardly those the importance of which could conveniently be downplayed by labelling them as “technical”.¹³² For instance Article 82(1)(2)(a) TFEU enables the adoption of rules and procedures for ensuring recognition throughout the EU of all forms of criminal judgments and judicial decisions; Article 83(1) TFEU enables formulation of minimum rules concerning the definition of criminal offences and sanctions in some areas.¹³³ These are the very things which would seem to concern the everyday functioning of society.

Looking at these eleven legal bases from the point of view of areas of competence, the legal bases mentioned in the foregoing paragraph belong to the area of standard shared competence (Article 4(2)(j) TFEU in particular). The legal bases granting the privilege of initiation to the ECB would seem to belong simultaneously to several different areas of competence. Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank enable the amendment of the following provisions of the statute of the ESCB and the ECB regulating, respectively, the following issues.

Provision of the statute	Subject matter which the provision regulates
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¹³¹ The two provisions are worded identically.

¹³² This is not to say that “technical” means less important.

¹³³ For a full list see Annexe I to this thesis.

Article 5.1	Collection of statistical information by the ECB
Article 5.2	Collection of statistical information by national central banks ¹³⁴ (as proxies of the ECB)
Article 5.3	Harmonisation of rules on collection, compilation and distribution of statistical information
Article 17	Ability of the ECB and national central banks to open accounts and accept collateral
Article 18	Conduct by the ECB and by national central banks of open market and credit operations
Article 19.1	Creation and enforcement of rules on minimum reserves of credit institutions
Article 22	The role of the ECB and national central banks in clearing and payment systems
Article 23	Ability of the ECB and national central banks to establish relations with third parties and to engage in transactions usually engaged in by banks
Article 24	Ability of the ECB and national central banks to engage in administrative affairs
Article 26	Certain accounting rules applicable to the ECB and national central banks
Article 32.2	Allocation of the income of national central banks in the performance of the ESCB's monetary policy function
Article 32.3	Allocation of the income of national central banks in the performance of the ESCB's monetary policy function
Article 32.4	Allocation of the income of national central banks in the performance of the ESCB's monetary policy function
Article 32.6	Clearing and settlement of the balances arising from allocation of the aforementioned income
Article 33.1(a)	Amount of the profit of the ECB to be retained as reserves
Article 36	Creation of staff regulations

It would thus seem that none of the provisions which can be changed on the basis of Article 129(3) TFEU and Article 40.1 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank are such that they would exclusively belong to an area where the EU has exclusive competence, *e.g.* the area of monetary policy of the member states whose currency is the euro.¹³⁵ Yet, it seems equally clear that some measures in that area of exclusive competence could be adopted on the these two legal bases: for instance it is not inconceivable that Article 18 or Article 19.1 of the statute are changed in a way which both affects directly and has as its object the regulation of monetary policy of those member states whose currency is the euro (for instance by regulating the ability of national central banks of those member states only to conduct open market and credit operations and by requiring credit institutions established in those member states only to hold more – or less – capital; both measures would affect the supply of money). At the same time, amendments of, for instance, Articles 5.1 – 5.3 of the statute might amount to regulating

¹³⁴ “National central bank” refers to a national central bank of any member state, not just one whose official currency is the euro (Article 123(1) TFEU).

¹³⁵ Article 3(1)(d) TFEU

internal market and thus fall within the area of standard shared competence.¹³⁶ Amendment of Article 23 (and some different amendment of Articles 18 or 19) of the statute could easily fall within the field of economic policy – where the EU is said to have only the “political” coordinating competence.¹³⁷

Moving onto Article 13(1) of the Protocol (No 3) on the Statute of the Court of Justice of the European Union, the legal basis providing for the ECJ’s exclusive privilege of initiative, it would not seem to comfortably fall within any area of competence formulated in Title I of the TFEU. There is simply no mention in that title of making changes to the institutional structure of the EU. Admittedly appointment of an assistant rapporteur is a very minor change – essentially creation of a new job. Yet it does change the structure of the ECJ. Similar point could be made in respect of some articles of the statute of the ESCB and the ECB listed in the table above. Article 36, and possibly Article 32.6, could serve as examples here.¹³⁸

Be it as it may, considering all the eleven legal bases together there would not seem to be any pattern to the way they are employed in the constitutive treaties. Adding to the list the other 39 “modified” legal bases does not result in emergence of any pattern. The same Article 129(3) TFEU – considering this time the option of the Commission initiating an ordinary legislative procedure and the ECB being consulted – could serve as an example of one of such modified legal basis capable of falling, in certain circumstances, within the area of exclusive competence of the EU. Articles 43(2) TFEU (mandating the consultation of the Economic and Social Committee) and Article 192(1) TFEU (mandating the consultation of both the Economic and Social Committee and the Committee of the Regions) could serve as other examples.¹³⁹ At the same time Article 114 TFEU – the most famous internal market legal basis; it belongs to the area of standard shared competence – mandates the consultation of the Economic and Social Committee. Article 182(5) TFEU – the legal basis for adopting measures necessary for implementation of the European research area and hence belonging to the area of shared competence without pre-emption – mandates the consultation of the European Economic and Social Committee. Article 167(5)(1) TFEU – the legal basis for adopting measures intended to attain the EU’s objectives in the area of culture where the EU only has the competence support, coordinate and supplement the actions of member states – mandates the consultation of the Committee of the Regions. Finally, Article 149(1) TFEU on incentivising member states’ cooperation in the field of employment is an example of a legal basis belonging to the area of “political” coordinating competence which legal basis mandates consultation of both the Economic and Social Committee and the Committee of the

¹³⁶ Article 4(2)(a) TFEU

¹³⁷ Article 5(1) TFEU

¹³⁸ Legal bases for such amendment would seem to fall within what Von Bogdandy and Bast have classified as exclusive competence of the EU, *i.e.* things which only the EU can do (as opposed to things which only the EU may do). Exclusive competences listed in Article 3(1) TFEU are things which only the EU may do, not things which only the EU can do. As such in the typology offered by Von Bogdandy and Bast Article 3(1) TFEU competences would be concurrent, not exclusive. See Armin Von Bogdandy and Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, 39 *Common Market Law Review* (2002) 227.

¹³⁹ The area would be the conservation of marine biological resources under the common fisheries policy (Article 3(1)(d) TFEU).

Regions. All the legal bases mentioned in this paragraph mandate the use of ordinary legislative procedure.

The same exercise could be performed backwards: there are areas of all five types of competence where an ordinary legislative procedure *tout court* is employed:

- area of exclusive competence – Article 33 TFEU (customs cooperation);
- area of standard shared competence – Article 46 TFEU (free movement of workers);
- area of shared competence without pre-emption – Article 214(3) TFEU (framework for humanitarian aid);
- area where the EU only has competence to support, coordinate and supplement the actions of member states – Article 197(2) TFEU (administrative cooperation);
- area of “political” coordinating competence – Article 189(2) TFEU (European space policy).

Looking at Annexe I to the thesis, it should be evident that the same could be shown regarding subject-matters – especially so, considering that the doctrine of parliamentary reservation is inherently subjective (different observers might reasonably – and for good reasons – affix different importance to the same subject matter).

Looking back at the questions posed at the beginning of this section 2.2.2,¹⁴⁰ it is possible to say that ordinary legislative procedures are employed in all types of competence areas and in respect of subject matters of virtually any level of importance. There seems to be no pattern behind how various ordinary legislative procedures are divided between types of competence areas or between subject matters. The only other two things which may be taken away are that no ordinary legislative procedure is ever mandated by the TEU (and hence none is ever used in the field of CFSP) and that it is surprisingly difficult, if not impossible, to find subject matters of lesser importance measures in respect of which must be adopted via a non-legislative procedure.

2.3. Special legislative procedure

2.3.1. Procedure

Academic commentators would seem to agree that there is no one special legislative procedure; there are many special legislative procedures.¹⁴¹ Indeed Article 289(2) TFEU seems to say so itself by referring to *a* special legislative procedure. Thus, unlike in case of ordinary legislative procedures, there would seem to be no purported code of how a special legislative procedure is to function, and there would seem to be no special legislative procedure *tout court*. The basic outlines of any special legislative procedure are contained in

¹⁴⁰ What areas of competence (exclusive, shared, supporting, coordinating, complementary) do the legal bases requiring the use of ordinary legislative procedures belong to? What subject matters do the legal bases requiring the use of ordinary legislative procedures regulate? Is there any pattern behind the use of different ordinary legislative procedures?

¹⁴¹ See the opinion of Michael Dougan and Jürgen Bast (footnote 29). See also to the same effect Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 133.

Article 289(2) TFEU and in Article 17(2) TEU read in conjunction with Article 289(3) TFEU. The Commission is, just like in case of ordinary legislative procedures, the default holder of the privilege of initiative (except that in case of special legislative procedures Article 289 TFEU does not specify the default holder, only Article 17(2) TEU does¹⁴²). The reason why there is no special legislative procedure *tout court* is that unlike in case of ordinary legislative procedure there is neither a general rule on who adopts the act – the Council or the Parliament – nor a general rule on what the other one of the two is to do in that procedure.

At least some 36 legal bases mandate the use of a special legislative procedure.¹⁴³ 32 of these 36 legal bases mandate that the Council adopt the act.¹⁴⁴ Of the remaining four three mandate that the Parliament adopt the act.¹⁴⁵ That leaves Article 314 TFEU which deals with the adoption of the budget of the EU and was already discussed in section 2.2.1 above (albeit from a slightly different perspective). Prior to the judgment of the ECJ in case C-77/11 it was unclear whether the Council or the Parliament was to adopt the budget. Indeed, the *chapeau* of Article 314 TFEU is seemingly worded as mandating that the two adopt the budget together.

The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions.

Thus, the article could have been read as *lex specialis vis-à-vis* Articles 289(2) and 297(1)(2) TFEU which say that only one institution adopts acts via any single special legislative

¹⁴² There is one *caveat*: in view of paragraph 60 of the ECJ's judgment in case C-77/11 (see section 2.2.1 above) where it held that when an act other than a regulation, a directive or a decision is adopted via a special legislative procedure, the resulting act is not a legislative act, should a legal basis mandate that some other act result, there would presumably be no default holder of the privilege of initiative. That is because Article 17(2) TEU which grants the privilege of initiative by default to the Commission does so only for legislative acts, and according to the ECJ an atypical act adopted via a special legislative procedure is not a legislative act within the meaning of Article 289(2) TFEU. The only alternative is that "legislative act" means different things in Articles 17 TEU and 289 TFEU. No problems pertaining to this issue seem to have arisen in practice.

¹⁴³ See Annexe II to this thesis for a list.

¹⁴⁴ Articles 19(1), 21(3), 22(1), 22(2), 23(2), 64(3), 77(3), 81(3), 83(2), 86(1)(1), 87(3)(1), 89, 113, 115, 118(2), 126(14)(2), 127(6), 153(2)(3), 182(4), 192(2), 194(3), 203, 223(1)(2), 262, 308(3), 311(3), 311(4), 312(2)(1), 349(1) and 352(1) TFEU as well as Article 2(1) of the Protocol (No 37) on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel. Special mention should go to Article 83(2) TFEU. The text of that legal basis mentions neither the Council nor the Parliament. It reads as follows.

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

It is possible to say that only the Council is the adopter of acts on the basis of Article 83(2) TFEU when a special legislative procedure is to be employed because that legal basis is available only for adopting measures in respect of areas which have already been harmonised by EU law, and the procedure to follow is the same as that for adoption of those harmonising measures. The constitutive treaties do not contain a single legal basis (i) which mandates the use of a special legislative procedure and (ii) which could be used for harmonising laws of member states and (iii) where the act is to be adopted by the Parliament.

¹⁴⁵ Articles 223(2), 226(3) and 228(4) TFEU

procedure. Ultimately the ECJ opted for an even more *lex specialis* solution: neither institution was empowered to adopt the budget. Both have to participate in the adoption, indeed consent to it, but

it is the President of the Parliament, in his capacity as organ of that institution, who, by adopting the act based on Article 314(9) TFEU, endows the Union's budget with binding force at the conclusion of a procedure characterised by the joint action of the Parliament and the Council.¹⁴⁶

While it is true that the resulting act was not legislative within the meaning of Article 289(2) TFEU,¹⁴⁷ the ECJ clearly stated that the procedure employed for its adoption was a special legislative procedure.¹⁴⁸ Thus it follows from that judgment that even to the minimal extent to which Article 289(2) TFEU purports to formulate the rules on a special legislative procedure (*viz.*, adoption of a regulation, a directive or a decision by one of the Council and the Parliament with the participation of the other) that formulation is incomplete. There is at least one instance where an organ of one of those institutions (as opposed to that institution as a collegiate body) adopts an act via a special legislative procedure with the consent of both institutions.

Moving on to voting rules, despite the fact that as a general rule the Council is to act by qualified majority (Article 16(3) TEU), only 6 out of the 32 legal bases which mandate a special legislative procedure with the Council being the adopter actually follow that rule enabling the Council to act by qualified majority outright.¹⁴⁹ A further two legal bases – Articles 83(2) and 312(2)(1) TFEU do the same thing conditionally. The latter currently requires the Council to act unanimously, but Article 312(2)(2) TFEU enables the European Council to switch the Council's decision-making to qualified majority.¹⁵⁰ Moving to Article 83(2) TFEU, it will be recalled that it is a legal basis for approximation of criminal laws of member states when such approximation

proves essential to ensure the effective implementation of a[n EU] policy in an area which has been subject to harmonisation measures.

Article 83(2) TFEU does not set out the procedure to be employed for approximating criminal laws. Instead it contains a *renvoi* to the procedure employed for adoption of harmonisation measures concerned: the same procedure is to be employed for approximating criminal laws on the basis of Article 83(2) TFEU. Of the six other legal bases which mandate the use of a special legislative procedure with the Council being the adopter and acting by qualified majority only Article 349 TFEU could conceivably serve as a legal basis for harmonising national laws, albeit only those in force in Guadeloupe, French Guiana,

¹⁴⁶ Paragraph 56 of the judgment in case C-77/11

¹⁴⁷ Paragraph 60 of the judgment in case C-77/11

¹⁴⁸ Paragraph 59 of the judgment in case C-77/11

¹⁴⁹ Articles 23(2), 182(4), 311(4), 314 and 349(1) TFEU and Article 2(1) of the Protocol (No 37) on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel

¹⁵⁰ The European Council has not yet done so.

Martinique, Mayotte, Réunion, Saint-Martin, the Azores, Madeira and the Canary Islands.¹⁵¹ Thus Article 83(2) TFEU is included here on the list of provisions which enable the Council to act by qualified majority.

The remaining 25 (or rather 26¹⁵²) legal bases mandating the use of a special legislative procedure with the Council being the adopter require the Council to act unanimously. Of the four legal bases mandating the use of a special legislative procedure without the Council being the adopter¹⁵³ three always enable the Council to act by qualified majority.¹⁵⁴ Article 223(2) TFEU is split in this respect. Article 223(2) TFEU is a legal basis for the Parliament to adopt via a special legislative procedure the rules governing the performance of the duties of the members of the Parliament. In general, the Council may give its consent to any such rules by qualified majority, however when the rules concern taxation of the members or ex-members of the Parliament, the Council must act unanimously.

The Parliament too has – like the Council – different voting requirements applied to it in different special legislative procedures. Whenever it is the adopter,¹⁵⁵ it may act by simple majority. However, two legal bases mandating the Council to adopt a measure via a special legislative procedure with the consent of the Parliament require the latter to give that consent by the majority of its component members: Article 223(1)(2) TFEU on election of the Parliament and Article 312(2)(1) TFEU on adoption of multiannual financial framework. One further provision mandating the use of a special legislative procedure without the Parliament being the adopter may require the Parliament to act in a special legislative procedure by the majority of its component members: Article 314 TFEU on the adoption of the budget. If the Council and the Parliament agree on the budget, no action on the part of the Parliament by majority of its component members is required. Such action is required for the Parliament

- to amend a draft budget (Article 314(4)(c) TFEU),
- to reject the “compromise” budget agreed by the Conciliation Committee (subparagraphs b and c of paragraph 7 of Article 314 TFEU) and
- to overrule the Council altogether and adopt the budget in such form as it wishes (Article 314(7)(d) TFEU). In this latter case in addition to the majority of the component members of the Parliament at least three fifths of the members of the Parliament who cast their vote need to have voted for overruling.

¹⁵¹ It is admittedly uncertain whether Article 349 TFEU could serve as a legal basis for harmonisation. Its language is similar to that of Article 352 TFEU (the so-called flexibility clause). The latter excludes harmonisation only in situations where the constitutive treaties expressly exclude it. Article 349 TFEU does not expressly exclude its use as a legal basis for harmonisation at all. The debate of the proper scope of Article 349 TFEU lies, however, outside the scope of this thesis.

¹⁵² If one includes Article 83(2) TFEU onto that list. Examples of legal bases which would enable the adoption of an act on the basis of Article 83(2) TFEU via a special legislative procedure with the Council needing to act unanimously would include Articles 64(3) and 77(3) TFEU.

¹⁵³ Articles 223(3), 226(3), 228(4) and 314 TFEU

¹⁵⁴ Articles 226(3), 228(4) and 314 TFEU

¹⁵⁵ Acts on the basis of Articles 223(3), 226(3) and 228(4) TFEU

Thus in special legislative procedures one of three different voting standards may be employed in the Council (unanimity or one of two qualified majorities¹⁵⁶ depending on whether the initiative for the adoption of a given act came from the Commission or not) and one of three in the Parliament (simple majority, majority of component members and majority of component members simultaneously with a three fifths majority of votes cast).

Moving on to what the “participating” institution (*i.e.* the one of the Council and the Parliament which does not adopt the act in question)¹⁵⁷ is to do in a given special legislative procedure, there are several possibilities. Of the 33 legal bases mandating the use of a special legislative procedure with the Parliament playing the role of the “participating” institution,¹⁵⁸

- 23 require the Parliament to give an opinion (to be consulted)¹⁵⁹ and
- 11 require the Parliament to give its consent.¹⁶⁰

The four¹⁶¹ legal bases¹⁶² mandating a special legislative procedure with the Council playing the role of the “participating” institution all require the Council to give its consent. Article 314 TFEU deserves special consideration at this point. While Article 314(7)(d) TFEU does enable the Parliament to overrule the Council completely and essentially adopt such budget as it – the Parliament – desires, the Council can preclude the special legislative procedure of adopting the budget ever reaching that stage. There are two points where it may do so. First, Article 314(7)(d) TFEU “kicks in” only once a conciliation committee has adopted a so-called joint text of the proposed budget.¹⁶³ All the members of the Council form part of the conciliation committee, and the joint text is only adopted if, *inter alia*, those members agree to it by qualified majority. Hence the Council¹⁶⁴ can simply preclude the adoption of any joint text. Even if the joint text is adopted, Article 314(7)(d) TFEU still does not “kick in” unless

¹⁵⁶ Article 16(4) TEU and Article 238(2) TFEU

¹⁵⁷ Article 289(2) TFEU

¹⁵⁸ 32 legal bases mandating a special legislative procedure with the Council adopting the resulting act and Article 314 TFEU where the act is adopted by the president of the Parliament.

¹⁵⁹ Articles 22(1), 22(2), 23(2), 64(3), 77(3), 81(3), 83(2), 87(3)(1), 89, 113, 115, 118(2), 126(14)(2), 127(6), 153(2)(3), 182(4), 192(2), 194(3), 203, 262, 308(3), 311(3) and 349(1) TFEU

¹⁶⁰ Articles 19(1), 21(3), 25(2), 83(2), 86(1)(1), 223(1)(2), 311(4), 312(2)(1), 314 and 352(1) TFEU as well as Article 2(1) of the Protocol (No 37) on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel. The reason why the total number of legal bases comes to 34 rather than 33 lies in the fact that Article 83(2) TFEU, which has been discussed above, occasionally requires an opinion (when the *renvoi* is to an articles listed in footnote 159, for instance Article 64(3) TFEU or Article 77(3) TFEU) and occasionally the consent (when the *renvoi* is to an article listed in the foregoing sentence of this footnote 160, for instance Article 21(3) TFEU or Article 352(1) TFEU).

¹⁶¹ The total number of legal bases (33 for the Parliament and four for the Council) seems to come to 37 rather than 36 in this respect, because one legal basis – Article 314 TFEU – gives both the Council and the Parliament the “participating” role; neither is the adopter. See the judgment of the ECJ in case C-77/11 discussed above in section 2.2.1 for further details.

¹⁶² Articles 223(2), 226(3), 228(4) and 314 TFEU

¹⁶³ Article 314(6) TFEU

¹⁶⁴ Article 314(5)(1) TFEU is, strictly speaking, worded as requiring the consent of the qualified majority of the members of the Council or their representatives, but no practical differences would seem to flow from this wording.

the Council rejects the joint text. As long as it consents to it, all the Parliament can do is force the submission of a new budget by the Commission;¹⁶⁵ it cannot adopt any budget it wishes.

The first variable to be considered in this section 2.3 which played a role in respect of ordinary legislative procedures as well is the privilege of initiative. The list of its holders in case of special legislative procedures would seem no wider than in case of ordinary legislative procedures; it is however different. Of the 36 legal bases 32 grant a privilege of initiative to the Commission. The remaining four legal bases – Articles 223(1)(2), 223(2), 226(3) and 228(4) TFEU – grant it exclusively to the Parliament. Of the 32 legal bases granting the Commission a privilege of initiative

- on one occasion – Article 308(3) TFEU enabling the Council to amend the statute of the EIB – the privilege is shared by the Commission and the EIB,
- on four occasions – Articles 83(2), 86(1)(1), 87(3)(1) and 89 TFEU – it is shared by the Commission and $\frac{1}{4}$ of member states (by virtue of Article 76 TFEU) and
- on the remaining 27 occasions it is held exclusively by the Commission.

It is worth noting in this respect that unlike in case of ordinary legislative procedures the participation of the Commission in special legislative procedures is not quite as ubiquitous. First, Article 289(2) TFEU purporting to set forth the general meaning of “special legislative procedures” does not mandate the Commission’s participation. Second, Article 17(2) TEU only mandates the Commission’s participation – consisting of initiation of the proceedings – for legislative acts and “except where the Treaties provide otherwise”. In fact, one of the aforementioned four legal bases which do provide otherwise (*i.e.* grant the privilege of initiative to the Parliament) in case of a special legislative procedure, makes no mention of the Commission at all. That legal basis is Article 223(1)(2) TFEU enabling adoption of the rules governing the election of the Parliament; it would seem that the constitutive treaties do not grant the Commission any role at all in the special legislative procedure for the adoption of those rules.

The same is true of Articles 83(2), 86(1)(1), 87(3)(1) and 89 TFEU when the procedure is initiated by $\frac{1}{4}$ of member states rather than by the Commission. None of the four provisions mentions the Commission, hence its only participation is initiating the procedure with the privilege to do so deriving from Article 17(2) TEU and Article 76(a) TFEU. However the former article contains a conflict clause disapplying it if some other provision of the constitutive treaties provides otherwise, and Article 76 TFEU – in paragraph b – grants the privilege concurrently to $\frac{1}{4}$ of member states. *Viz.* either the Commission or $\frac{1}{4}$ of member states may initiate the procedure. Since none of these four legal bases mentions the Commission, it stands to reason that should the initiative come from $\frac{1}{4}$ of the member states, the Commission would not need to be party to the proceedings at all; no-one would need to involve it. It is apposite to recall that in case of ordinary legislative procedures Article 294 TFEU ensured that even if the Commission did not initiate a given ordinary legislative

¹⁶⁵ Article 314(7)(c) TFEU

procedure, the proposal would still be communicated to it,¹⁶⁶ it would still be able to participate in working of the conciliation committee should it so wish¹⁶⁷ and it would still be obliged to opine on the amendments which the Parliament makes at second reading to the Council's position.¹⁶⁸

Another point worthy of being repeated here is that the definition of qualified majority in the Council changes depending on whether the special legislative procedure is initiated by the Commission¹⁶⁹ or someone else. In the former case there are rules on blocking minority and only 55% of the members of the Council are needed for qualified majority, while in the latter this percentage rises to 72% and there are no rules on blocking minority.¹⁷⁰ Thus the legal bases mandating in a seemingly similar manner qualified majority voting in the Council might actually require different things. For instance, Articles 223(2) (to the extent it mandates qualified majority voting in the Council), 226(3) and 228(4) TFEU which give the privilege of initiative to the Parliament, on the one hand, and Articles 19(1), 21(3) and 22(1) TFEU (the very first three articles mandating a special legislative procedure), on the other hand, actually speak of different majorities in the Council in spite of employing the same language.

In terms of participation in a special legislative procedure of an entity other than the initiator, adopter and that of the Council and the Parliament which is not the adopter,

- on three occasions the constitutive treaties mandate that the Economic and Social Committee be consulted over the course of the applicable special legislative procedure;¹⁷¹
- on three occasions the constitutive treaties mandate that each member state approve in accordance its own constitutional requirements the measures adopted via the applicable special legislative procedure;¹⁷²
- on three occasions the constitutive treaties mandate that the Commission be consulted over the course of the applicable special legislative procedure;¹⁷³
- On two occasions the constitutive treaties mandate that both the Economic and Social Committee and the Committee of the Regions be consulted over the course of the applicable special legislative procedure;¹⁷⁴
- On two occasions the constitutive treaties mandate that the ECB be consulted over the course of the applicable special legislative procedure;¹⁷⁵

¹⁶⁶ Article 294(15)(2) TFEU

¹⁶⁷ Article 294(15)(2) TFEU

¹⁶⁸ Subparagraph c of paragraph 7 of Article 294 TFEU which is, unlike paragraphs 2 and 9 and the second sentence of paragraph 6, not disappplied in situations where the proposal does not come from the Commission.

¹⁶⁹ Or, hypothetically, the High Representative. See section 2.3.3 below.

¹⁷⁰ Article 16(4) TEU and Article 238(2) TFEU

¹⁷¹ Articles 113, 115 and 182(4) TFEU

¹⁷² Articles 25(2), 223(1)(2) and 262 TFEU

¹⁷³ Articles 223(2), 228(4) and 308(3) TFEU; the latter in case the EIB rather than the Commission initiates the procedure.

¹⁷⁴ Articles 152(2)(3) and 192(2) TFEU

¹⁷⁵ Articles 126(14)(2) and 127(6) TFEU

- On one occasion the constitutive treaties mandate that the Commission give its consent to the measure to be adopted via the applicable special legislative procedure;¹⁷⁶
- On one occasion the constitutive treaties mandate that the EIB be consulted over the course of the applicable special legislative procedure.¹⁷⁷

As we saw in section 2.2.1 above there are a total of three classes of variables¹⁷⁸ differentiating the different ordinary legislative procedures.¹⁷⁹ There are seven classes of variables differentiating between different special legislative procedures: the identity of the adopter; the action required of that one of the Council and the Parliament which is not the adopter (“the other institution”); the voting requirement to be followed by the adopter; the voting requirement to be followed by “the other institution”; the holder of the privilege of initiative; the identity of the participating entities other than the Council, the Parliament and the initiator; whether those participating entities may veto the resulting measure; and whether the procedure to be followed by the participating entities is dictated by EU law or by national law of the member states.

Just like in case of ordinary legislative procedures legal bases mandating the use of a given legislative procedure sometimes mandate the type which the resulting act is to take. Of the 36 legal bases

- 8 require that a regulation result,¹⁸⁰
- 3 require that a directive result¹⁸¹ and
- one requires that the resulting act be a decision.¹⁸²

Thus some 24 legal bases mandating the use of a special legislative procedure do not prescribe in any way the type of the act which is to be the outcome of the special legislative procedure. There are, however, among the 36 no legal bases which would mandate the use of an atypical act.¹⁸³

¹⁷⁶ Article 226 TFEU

¹⁷⁷ Article 308(3) TFEU in case the Commission rather than the EIB initiates the procedure.

¹⁷⁸ The identity of the holder of privilege of initiative, the identity of the participating entities other than those mentioned in Article 294 TFEU and whether the participating entities other than those mentioned in Article 294 TFEU need only be consulted or must consent to the resulting measure. The difference in the voting requirements set forth in paragraphs 15(1) and 9 of Article 294 TFEU as well as Article 16(4) TEU and Article 238(2) TFEU is not a separate class of variables in case of ordinary legislative procedures: it itself depends, indirectly, on the identity of the holder of the privilege of the initiative.

¹⁷⁹ There is obviously a further variable written into Article 294 TFEU, *viz.* at what reading the measure will be adopted, but that is something common to all ordinary legislative procedures. It does not depend on the legal basis (to the point that measures adopted on the same legal basis could differ in the respect referred to in the foregoing sentence).

¹⁸⁰ Articles 86(1)(1), 118(2), 127(6), 223(2), 226(3), 228(4), 311(4) and 312(2)(1) TFEU

¹⁸¹ Articles 23(2), 83(2) and 115 TFEU

¹⁸² Article 311(3) TFEU

¹⁸³ It should be mentioned here that the aforesaid Article 314(9) TFEU does not, strictly speaking, set forth any type of act which must result. Further, in respect of Article 223(2) TFEU it should be noted that while it does refer to laying down “regulations and general conditions”, in that case it is clear that that reference is to the content rather than the type of the act to be adopted: the same provision expressly says that any act adopted on the basis of it must be a regulation. Article 223(2) TFEU therefore simply constitutes an example of lax drafting:

2.3.2. Commonalities between special and ordinary legislative procedure

Are there any commonalities between all the ordinary legislative procedures and all the special legislative procedures (leaving for the moment aside the areas where they are employed)? There would seem to be just two: consent of the Council is always needed for adoption of the resulting act and the Parliament always participates in any such procedure. The third “suspect” – participation of the Commission – turns out to be a mirage. Article 223(1) TFEU is a legal basis mandating a special legislative procedure without any participation of the Commission whatsoever. Importantly this “exclusion” cannot be casually swiped aside: it is simply too important a legal basis. It enables the adoption of the rules governing the election of the Parliament. As such it is important both from the perspective of the EU (it goes to institutional set up, and ultimately the institutional balance¹⁸⁴) and from the perspective of a citizen (it goes to democracy of the polity). In addition, there are, as mentioned, a further four legal bases mandating the use of a special legislative procedure which may have the same effect: Articles 83(2), 86(1)(1), 87(3)(1) and 89 TFEU.

The fourth “suspect” – sufficiency of consent of the Council and the Parliament proves likewise a mirage: as mentioned above, there are legal bases mandating special legislative procedures which require consent of the Commission (Article 226 TFEU) or of member states (Articles 25(2), 223(1)(2) and 262 TFEU). In fact, there are two legal bases mandating ordinary legislative procedure which essentially require consent of at least some member states – Articles 172(1) and 188(2) TFEU.

However, what the foregoing treatment of legislative procedures (both the ordinary and the special ones) has quietly demonstrated is that Article 289 TFEU sets no substantive criteria for the acts resulting from those procedures. While the ECJ’s judgment in case C-77/11 might be read as applying at least some substantive criterion to determining whether an act is legislative, even if the act fails to meet any such criterion, that does not make the procedure itself any less legislative within the meaning of Article 289 TFEU. In paragraph 60 of that judgment the ECJ opined that

[e]ven though the act based on Article 314(9) TFEU is *the outcome of a special legislative procedure*, it does not, *due to the nature of the budget, take the form of a legislative act* in the strict sense of the term for the purpose of Articles 288 TFEU and 289(2) TFEU, and is, in any event, a measure open to challenge for the purpose of Article 263 TFEU, since it endows the Union’s budget with binding force.

For present purposes it is a moot point whether that passage should be read as saying that the substance of an instrument adopted via a legislative procedure is capable of taking it out of the group of legislative acts or whether it should be read in some more subtle manner. For instance as saying that in view of the particular nature of the instrument the TFEU sets forth a

the term “regulation” is quite clearly used in two different senses in the very same sentence. That is hardly conducive to clarity.

¹⁸⁴ The rules governing election of the Parliament undoubtedly have effect on the political composition of the Parliament (as evidenced by examples of gerrymandering in national electoral systems) which in turn affects its actual relationships with other institutions.

“special” special legislative procedure and it is that procedure (or some aspect of it, such as the atypical adopter of the resulting act, or some corollary of it, such as the resulting act being a “declaration”) which takes the resulting act out of the group of legislative acts. Indeed paragraph 59 of the judgment would seem to point to some variation of the second alternative (more subtle reading) in as much as it (i) stresses that because of the nature of the budget a particular legislative procedure has been set forth in Article 314 TFEU and (ii) underlines the fact that the adopter is an atypical one, *i.e.* not mentioned in Article 289 TFEU, and (iii) calls the instrument which that atypical adopter is to adopt a generic “act” (rather than using one of the three “names” referred to in Article 289(2) TFEU).¹⁸⁵

Thus the third commonality of all ordinary and special legislative procedures is that they are determined purely by reference to being called a legislative procedure.¹⁸⁶ There are no requirements as to the substance of the resulting acts. That would seem to be in stark contrast with the Constitutional Treaty which served, in this respect, as the basis for the Lisbon Treaty. According to Articles I-33 and I-34 of the Constitutional Treaty only European laws and European framework laws could be legislative acts. While Article I-34 did state that they were to be adopted via a particular procedure (either an ordinary or a special legislative procedure), sub-paragraphs 2 and 3 of paragraph 1 of Article I-33 had the following to say.

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

From that Alexander Türk has concluded that

this approach corresponds to the rationale on which the characterisation of legislation in substance is based: legislation should be adopted in general and abstract terms to ensure the equal treatment of those subjected to its rules. It should therefore not be drafted with the intention of dealing with the particular situation of, and with exclusive application to, specific individuals. European laws therefore combine the notion of legislation in form, due to the procedure by which the act is adopted, and that of legislation in substance.¹⁸⁷

¹⁸⁵ Paragraph 59 reads as follows: “It should be recalled that Article 314 TFEU lays down a special legislative procedure appropriate to the nature of the budget, which is essentially an accounting document setting out estimates for the European Union of all income and expenditure over a certain period. After the President of the Parliament has verified that the procedure complies with the provisions of the FEU Treaty, that document is annexed to the act by which the President declares, on the basis of Article 314(9) TFEU, that the budget has been definitively adopted.”

¹⁸⁶ Or by complying with the conditions set forth in either Articles 289(1) and 294 TFEU or Article 289(2) TFEU. See section 2.3.3 below. There are no words in any of these provisions which would set forth some substantive criterion.

¹⁸⁷ Alexander Türk, The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1565

The TFEU clearly takes a different path in respect of substance. In addition to regulations¹⁸⁸ and directives it explicitly includes decisions onto the list of types of potential instruments resulting from either an ordinary or a special legislative procedure. According to Article 288(4) TFEU a decision may be addressed to one particular person; it does not need to be of general application. It is further submitted that a budget¹⁸⁹ might very well be seen as another example of an act – adopted via a special legislative procedure – which is not of general application.

However, as regards the procedure the TFEU follows the same path as the Constitutional Treaty. The latter was, after all, the source from which the TFEU “borrowed” ordinary and special legislative procedures.¹⁹⁰ As is evidenced by the foregoing quotation for Türk the Constitutional Treaty adopted the notion of legislation in form. Since the

Constitutional Treaty does not produce a constitution corresponding to those of [the] Member States,¹⁹¹

but

[t]he distinction in the Constitutional Treaty between legislative acts as a category of legal acts and non-legislative acts sets it apart from the EC Treaty and raises the presumption that legislative acts under the Constitutional Treaty correspond to legislation in form as employed in the constitutional systems of its Member States,¹⁹²

Türk concludes that the term “legislation” might legitimately be used in EU law only if it could be used in a functionally equivalent way to that employed in states.¹⁹³

Dealing then with arguments contending that since none of the EU’s institutions is democratically legitimate the way a national parliament is, there cannot be any EU legislation in form for that requires an institution akin to a national parliament, he suggests that any such argument would do no more than demonstrate an inability to perceive the EU and its lawmaking in any other way than by reference to state parameters.¹⁹⁴ It should instead be understood, he argues, that

[e]ach [EU] institution represents a particular interest in the law-making process that allows the Union to form a system of functional representation. Despite its distinguishing features, similarities with the national system become apparent when

¹⁸⁸ Which, according to Türk, must unavoidably be of general application. See The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1565.

¹⁸⁹ To the extent that the judgment of the ECJ in case C-77/11 should not be read as affirming that the Article 314(9) TFEU act is a decision. See the text to footnote 97 above.

¹⁹⁰ See Articles I-34 and III-396 of the Constitutional Treaty.

¹⁹¹ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1558

¹⁹² The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1558

¹⁹³ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1558

¹⁹⁴ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1560

bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making.¹⁹⁵

Thus legislation in form is possible at EU level. Dealing with particular procedures he opines that ordinary legislative procedure should properly be considered legislative, because¹⁹⁶

- it is a joint effort by the Council and the Parliament (*i.e.* the adoption of the resulting act without agreement of both is impossible),
- the procedure allows the Parliament to protect minority interests,
- the procedure necessarily entails an exchange of views between the Parliament and the Council:
 - according to the Parliament's rules of procedure the Council may appear before the Parliament's committees and comment on proposed amendments before final votes thereon are taken,¹⁹⁷
 - the act cannot be adopted before each of the two institutions considers the position of the other, which "means that the adopted act reflects the discussion in the parliamentary committee and the plenary, where the proposals and the amendments are discussed in public"¹⁹⁸ and
 - should the Council disagree with the position of the Parliament, it must explain its reasons¹⁹⁹ thus putting the Parliament "in full possession of the arguments before the Council" and in a position to serve as "a public forum for discussion on the issues before it", and
- the proposed act is discussed in public: it is discussed in plenary by the Parliament and even if the procedure goes all the way through the conciliation stage – which occurs behind closed doors – the joint text adopted by the Conciliation Committee will be publicly discussed in the Parliament.²⁰⁰

He concludes by stating that

[t]he presentation of these arguments in public reflects the spectrum of the discussion and justifies the procedure to be considered as legislative. It can therefore be concluded that the ordinary legislative procedure should be considered as legislative procedure, as it allows an equal representation and consideration of the relevant interests in the Union by the respective institutions. The EP is also in an adequate position to fulfil its public forum function in this procedure.²⁰¹

He offers no in-depth analysis of the role of the Commission in an ordinary legislative procedure nor does he engage with the fact that there is more than one ordinary legislative

¹⁹⁵ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1561

¹⁹⁶ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1562

¹⁹⁷ Currently Rule 58 of the Rules of Procedure of the European Parliament

¹⁹⁸ That is indeed the case under Article 294 TFEU, see paragraphs 3 and 4 in particular.

¹⁹⁹ Currently Article 294(6) TFEU

²⁰⁰ Currently Article 294(13) TFEU

²⁰¹ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1563

procedure. Presumably these aspects are held to be of no consequence when considering legislation in form.

The situation with special legislative procedures Türk seems to find somewhat more complex. He divides special legislative procedures into two: those which require consent of both the Council and the Parliament for the adoption of an act and those which require only the consent of the Council with the Parliament merely offering its opinion.²⁰² In respect of the former he concludes

[i]t is /.../ justified to qualify the procedure, in which the consent of the EP is required by the Constitutional Treaty, as legislative. Similarly, the procedure in which the consent of the Council is mandatory before the EP can adopt the act should be regarded as legislative.²⁰³

The reason for such a conclusion is that the Parliament's ability to withhold its consent gives the Parliament sufficient influence because its consent may be gained only by accommodating its view. While such special legislative procedure entails only one reading in the Parliament, that nevertheless

seems sufficient to provide a public forum for a discussion on the merits of the act.²⁰⁴

No separate consideration is given to situations where the Council is the one which is merely to consent: all the reasoning, which Türk offers, pertains to the position of the Parliament.

Writing of special legislative procedures requiring mere consultation of the Parliament (there are none which would enable the Parliament to adopt an act after merely consulting the Council), Türk notes first of all that such procedures are indistinguishable – in terms of procedural steps needed to be taken for the adoption of an act – from those leading to the adoption of some non-legislative acts, for instance European regulations.²⁰⁵ Second, he opines that in such special legislative procedures the Parliament has little influence over the outcome of the act adopted. Thus

²⁰² The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1563

²⁰³ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1565

²⁰⁴ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1564

²⁰⁵ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1563. Türk was writing about the Constitutional Treaty. While the TFEU does not employ the term “European regulation”, the same argument could be, and indeed has been, made in respect of the TFEU. For instance the procedure mandated by Article 103(1) TFEU, the legal basis for adopting regulations and directives governing competition law, *i.e.* a field where the EU has exclusive competence, consists of adoption of a regulation or a directive by the Council upon proposal of the Commission after consulting the European Parliament. For an opinion to the effect that Article 103(1) TFEU does not mandate a special legislative procedure instead mandating a non-legislative procedure see Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647, and Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law* (2012) 49 *Common Market Law Review* 896. Article 103(1) TFEU does not say that the procedure set forth in it is a special legislative procedure. Each of the 36 legal bases considered in section 2.3.1 does contain a statement to the effect that the procedure is a special legislative procedure.

it is doubtful that the EP can perform its public forum function in the consultation procedure,²⁰⁶

because the Council's presence in the Parliament is very limited.²⁰⁷

At the parliamentary committee stage, a representative of the Council's secretariat might be present; and at times someone from the Presidency is present. This means that the major player in the procedure, the Council, is not involved in the discussions at the committee stage. Also, at the plenary stage, though the Presidency is represented, it rarely engages in the discussion. Moreover, the fact that the Council sometimes *de facto* decided on the proposal before it has received the EP's opinion, reflects the limited influence of the EP and that the discussions in plenary do not adequately reflect the legal text to be adopted. The Council is not forced to defend its decision and therefore need not to engage in a debate with the EP.²⁰⁸

The crux of the issue is not that the deliberations are not public, but

that the presentation of the arguments for and against the act is only offered from the EP's point of view, which is not even binding on the Council.²⁰⁹

To sum up, since (i) the impact of the Parliament is limited which, in turn, limits public display of arguments and (ii) there are said to be some non-legislative procedures which are indistinguishable from special legislative procedures mandating a mere consultation of the Parliament, Türk comes to the conclusion that special legislative procedures mandating a mere consultation of the Parliament are not legislative at all. In doing so the outcome of his analysis is essentially to confirm the conclusion which he had reached when analysing EC law as it stood after the Nice Treaty: only such procedures which necessitate consent of both the Parliament and the Council are legislative in form.²¹⁰

Türk's account is problematic for several reasons. First, speaking of point (ii) made in the preceding paragraph, the argument is too strong: the point is equally valid in relation to those special legislative procedures which necessitate the consent of the Parliament.²¹¹ Thus if that argument matters, it excludes special legislative procedures which necessitate the consent of the Parliament from the legislative group as well. Besides, the question could be asked why not look at the situation the other way around, *i.e.* instead of considering special legislative procedures mandating a mere consultation of the Parliament as non-legislative because of their equivalence to procedures leading to adoption of non-legislative acts, by considering those latter procedures as legislative because they mandate the same procedural steps as

²⁰⁶ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1563

²⁰⁷ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1564

²⁰⁸ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1564

²⁰⁹ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1564

²¹⁰ Alexander Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (2006 Kluwer Law International), pages 222 and 227 *et seq.*

²¹¹ See Articles I-59(1), I-58(2), I-60(2), III-325(6)(a), I-44(2) and I-18(1) of the Constitutional Treaty. The corresponding provisions of the current constitutive treaties are Articles 7(1), 49 and 50(2) TEU and Articles 218(6)(a), 329(1)(2) and 352(1) TFEU.

special legislative procedures? Speaking of point (i) made in the preceding paragraph, first, it must be noted that he starts from the premise that the Constitutional Treaty (and hence, for present purposes, the Lisbon Treaty which follows the Constitutional Treaty in relevant respects) is somehow set apart from the EC Treaty as far ordinary and special legislative procedures go. We saw in section 2.2.1 that Article 251 EC procedures are not all that different from ordinary legislative procedures. As for special legislative procedures, there has been no change in procedure: the legal bases which now mandate a special legislative procedure and which existed in the EC Treaty²¹² mandated under the EC Treaty that same procedure.²¹³ The only difference is that they did not contain words “special legislative procedure” with appropriate auxiliaries.²¹⁴ The point that there have been no major changes in what are now called legislative procedures (when compared to the position under the EC Treaty as it stood after the Treaty of Nice) has also been made by other commentators, Dougan²¹⁵ and Best²¹⁶ for instance. De Witte has gone as far as suggesting that

[a]s before, there will be no single united procedure for making EU legislation, but co-decision procedure (which, in its operation, will not be modified) will henceforth be called ordinary legislative procedure (Article 289(1) TFEU). All the remaining procedures (including mainly the consultation and assent procedures) will be called special legislative procedures.²¹⁷

²¹² There are no parallels in the EC Treaty to current Articles 21(3), 77(3), 81(3), 83(2), 86(1)(1), 118(2), 194(3), 311(4) or 312(2)(1) TFEU.

²¹³ The procedures set forth in Articles 19(1), 22(1), 22(2), 25(2), 113, 115, 126(14)(2), 127(6), 153(2)(3), 182(4), 192(2), 223(1)(2), 223(2), 228(4), 262, 308(3), 311(3), 349(1) and 352(1) TFEU as well as Article 2(1) Protocol (No 37) on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel (all these articles mandate a special legislative procedure) are the same as the ones set forth in the corresponding articles of the EC Treaty: respectively Articles 13(1), 19(1), 19(2), 22(2), 93, 94, 105(14)(2), 105(6), 137(2)(2), 166(4), 175(2), 190(4)(2), 190(5), 195(4), 229a, 266(3), 269(2), 299(2)(2) and 308 EC as well as Article 2(1) Protocol on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel. Only the role of the Parliament changed in three of these legal bases. Article 127(6) TFEU requires that Parliament be consulted whereas its predecessor Article 105(6) EC required that the Parliament give its assent. Article 352(1) TFEU requires that the Parliament give its consent whereas its predecessor Article 308 EC required that the Parliament be consulted. Article 2(1) of Protocol (No 37) on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel requires that the Parliament give its consent whereas its predecessor Article 2(1) of Protocol on the financial consequences of the expiry of the ECSC Treaty and on the Research fund for Coal and Steel required that the Parliament be consulted.

²¹⁴ There are further situations where a legal basis currently mandating a special legislative procedure did exist in the EC Treaty, but mandated some completely different procedure. These, however, are not cases of changes in what is now called “special legislative procedure”; these are cases of extending what is now called “special legislative procedure” to those legal bases. The procedure as such did not change; its field of application did. Such switch occurred in respect of the following legal bases: Articles 23(2) TFEU, 64(3) TFEU, 87(3)(1) TFEU, 89 TFEU, 203 TFEU, 226(3) TFEU. They correspond, respectively, to Articles 20 EC, 57(2) EC, 30(1)(a) EU, 32 EU, 187 EC and 193(3) EC. Article 314 TFEU and its predecessor Article 272 EC are likewise an example of a similar switch, however since the procedure set forth in those articles is considerably more detailed than any other special legislative procedure, the changes were more significant.

²¹⁵ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, (2008) *Common Market Law Review* 647

²¹⁶ Edward Best in *Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?* (2008) 15 *Maastricht Journal of European and Comparative Law* 90

²¹⁷ *Legal Instruments and Law-Making in the Lisbon Treaty*, in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008 SpringerWienNewYork), page 97

In fact Working Group No IX itself in its final report dealt with the switch from co-decision to ordinary legislative procedure under the heading “Changes of wording”²¹⁸ where it discussed precisely that: changes of the wording and connotations of different wordings, nothing more. The modifications of wording were not said to change anything else.

Thus this premise that distinction between legislative and non-legislative acts somehow sets the Constitutional Treaty (and hence the Lisbon Treaty) apart from the EC Treaty is simply wrong in law. If anything, that incorrectness is further demonstrated by Türk’s own conclusions: as far as legislation in form is concerned he reached basically the same ones both under the Constitutional Treaty and under the EC Treaty as it stood after the Treaty of Nice.²¹⁹ Thus his own account is proof of no change at all.

Second, no explanation is given for why the use of the language of “legislation” is legitimate only if such use is functionally equivalent to the use made of it in member states. This is simply postulated as fact.

Third, while Türk suggests that the EU and its lawmaking must not be perceived through state parameters, he does just that by requiring that the term “legislation” be used in a functionally equivalent manner to the way it is used in states. If anything, that is not simply perceiving the EU and its lawmaking through state parameters, it is applying those parameters to the EU, especially considering that he purports to demonstrate that different legal consequences follow in EU law depending on whether a particular EU instrument is or is not legislation in form (*i.e.* whether that instrument is or is not functionally equivalent to state legislation).²²⁰ He says as much himself by claiming that

[d]espite [the EU’s] distinguishing features, similarities with the national system become apparent when bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making.²²¹

A further issue with this third problem is that the use of the language of “legislation” might – and does – differ from state to state. It is unclear which states one should use as comparators.

Fourth, and moving to the specifics of the argumentation, if special legislative procedures requiring consent are sufficient for “legislativeness”, then large parts of the argumentation regarding ordinary legislative procedures are otiose. It will be recalled that such special legislative procedures were “legislative” because the Parliament could block adoption of resulting acts hence being in a position to affect their content and because the Parliament did serve as a public forum for discussing the merits of the resulting acts. Thus if one reading in the Parliament coupled with its ability to block adoption of an act is sufficient for “legislativeness”, why speak of exchange of views in the context of ordinary legislative

²¹⁸ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 15

²¹⁹ Alexander Türk, *The concept of legislation in European community law: a comparative perspective* (2006 Kluwer Law International), pages 222 and 227

²²⁰ *The Concept of the “Legislative” Act in the Constitutional Treaty* (2005) 6 German Law Journal 1566-1569

²²¹ *The Concept of the “Legislative” Act in the Constitutional Treaty* (2005) 6 German Law Journal 1561

procedures? Clearly that is not a necessary condition for “legislativeness”. Nor is equal representation²²² for in any special legislative procedure one of the two institutions (more frequently the Council) is the dominant one, and it is usually only the dominant one which adopts the act.²²³ That leaves three other grounds which Türk gives for his conclusions in respect of ordinary legislative procedures: joint effort, protection of minority interests by the Parliament and discussion of the act in public.

There is no explanation in Türk’s account as to why an ordinary legislative procedure enables the Parliament to protect minority interests nor does he offer any evidence of that. On the one hand, looking at the issue from the point of view of institutional bias and the basis from which the Parliament has thus far advanced its agenda (claiming to have, unlike any other EU institution, direct democratic legitimacy), the Parliament is a majoritarian institution.²²⁴ Indeed it has been opined elsewhere that

Article 10 TEU contains a concise statement of the Union’s dual basis of democratic legitimacy: *citizens* are directly represented at the Union level in the European Parliament; *Member States* are represented in the European Council and the Council, those representatives being themselves democratically accountable either to their national parliaments or their citizens.²²⁵

It thus seems foolhardy to suggest without more that the Parliament is somehow the protector of minority interests. It is undoubtedly true that the Council, the Parliament and the Commission have different biases, *i.e.* they “take care” of different interest, but none of those would necessarily seem minority ones. On the other hand, since this argument was not advanced in respect of special legislative procedures mandating consent, this argument too seems unnecessary for the conclusion.

This leaves two grounds both of which are applicable to both ordinary legislative procedures and those special legislative procedures which require consent of both the Council and the Parliament: joint effort (both the Council and the Parliament being able to block adoption) and public discussion. The latter, however, also occurs in case of those special legislative procedures which require merely consultation of the Parliament. Türk purports to deal with this obstacle by suggesting that

the assent procedure can be distinguished from the consultation procedure, as [the discussion in Parliament in case of the assent procedure] reflects the act in its final version.²²⁶

Is that a relevant difference? It is submitted that it is not. According to Article 16(8) TEU the Council is also to hold its debates in public when it is dealing with a legislative act, and the

²²² The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1563

²²³ Currently Articles 289(2) and 297(1)(2) TFEU, in the Constitutional Treaty – Articles I-33(2) and I-39(1)(2).

²²⁴ Miguel Poiates Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (1998 Hart)

²²⁵ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) Common Market Law Review 639

²²⁶ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1565

Council does deal with final version of any legislative act, including those adopted via a special legislative procedure mandating consultation of the Parliament. To be fair to Türk it should be noted that that was also the case both under the Constitutional Treaty (Article I-50(2)) and under EC law before that. In the latter case it was admittedly prescribed by the Council's Rules of Procedure²²⁷ rather than a constitutive treaty, but for practical purposes it would not seem to be a relevant difference. The law was the same, its source differed.

One could argue that the difference lies in the fact that the Council's deliberations are frequently limited to expression of agreement in respect of legislative proposals on which it votes: most of deliberating is done by COREPER and various technical committees, and their meetings are not public.²²⁸ Meetings of the committees of the Parliament, on the other hand, mostly are public.²²⁹ Hence the difference in this respect between the two types of special legislative procedure. That seems, however, a very tenuous basis for putting forward a conceptual distinction.

Thus to maintain the argument of public discussion as a separate distinction between different types of special legislative procedure (instead of reducing it to lack of joint effort), the crux of the argument in respect of public discussion seems to go to the debate in the committees of the Parliament. As we saw Türk holds the debates in the committees of the Parliament to be insufficient in case of special legislative procedures mandating consultation of the Parliament, because the presence of the Council in those committees is said in case of such procedures to be insufficient. Yet the rules of procedure of the Parliament would not in this respect seem to differ significantly between special legislative procedures requiring consent and special legislative procedures requiring an opinion of the Parliament. In any case the Council is not bound by the rules of procedure of the Parliament nor is it under any duty to participate in the work of any parliamentary committee in any ordinary or special legislative procedure. The fact that it might do so in some cases is occasioned by the Parliament's ability to block adoption of acts in those cases, not by the applicable rules of procedure. Thus the lack of participation of the Council goes likewise ultimately not to the question of debate, but to the issue of joint effort. The same is true of the suggestion that the Council frequently disregards opinions of the Parliament.

Furthermore, what would be the practical consequence of any parliamentary debate in respect of the final version of the proposed act? What would change? On Türk's own argument – to the effect that the Council frequently disregards the opinion of the Parliament – nothing at all. Thus any parliamentary debate is or would be, just as debates in the Council are, essentially “useless” albeit for a different reason. The debates in the Council are useless because nothing is actually debated in substance, they are or would be useless in the Parliament because they have or would have no more practical consequence than debates in the press.

²²⁷ Article 8(1)(b) of the Council Decision of 22 July 2002 adopting the Council's Rules of Procedure (2002/682/EC, Euratom) and Article 8(1)(b) of the Council Decision of 22 March 2004 adopting the Council's Rules of Procedure (2004/338/EC, Euratom)

²²⁸ See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), pages 148 and 149

²²⁹ Rule 115(3) of the current Rules of Procedure of the European Parliament

Therefore the argument of lack of public discussion shows itself to be – at the level of legal argumentation – misdirected: to the extent that the difference between public discussions held over the course of special legislative procedures requiring consent (which for Türk are legislative) and those held over the course of special legislative procedures which require consultation (which for Türk are not legislative) has practical consequences those consequences go to joint effort, not to quality of discussion. As Türk himself admits

[t]he objection is not so much that the deliberations are not public, but that *the presentation of the arguments for and against the act is only offered from the EP's point of view, which is not even binding on the Council.*²³⁰

Since the arguments offered from the Council's point of view (if not the debates in which those arguments are offered) are made public and were so at the time,²³¹ the part of the criticism quoted in italics is essentially a criticism of two chambers of the law-maker being located in different places. That seems hardly forceful. As has been shown, it is difficult to see what the offering of arguments from the Council's point of view in the Parliament would change. Thus, as may be gleaned from the part of the criticism quoted in bold, lack of public debate is ultimately reduced to the fact that in special legislative procedures where no consent of the Parliament is needed, the latter cannot "bind" the Council to its position – cannot block adoption of the resulting act.

Therefore Türk's opinion to the effect that ordinary legislative procedures and those special legislative procedures which require consent of both the Council and the Parliament are legislative while the other special legislative procedures are not is ultimately based on one ground: joint effort. Consent of both the Parliament and the Council is needed for adopting acts via the former, while consent of only the Council is needed for adopting acts via the latter.

It has been demonstrated above that currently there are ordinary legislative procedures where the role of the Commission is no more than advisory.²³² The same was true under the Constitutional Treaty.²³³ There are currently likewise special legislative procedures where the role of the Commission is merely advisory.²³⁴ The same was likewise true under the Constitutional Treaty.²³⁵ Furthermore there are currently special legislative procedures where

²³⁰ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 German Law Journal 1564

²³¹ Article 9 of the Council Decision of 22 July 2002 adopting the Council's Rules of Procedure (2002/682/EC, Euratom) and Article 9 of the Council Decision of 22 March 2004 adopting the Council's Rules of Procedure (2004/338/EC, Euratom) as well as the judgment of the ECJ in joined cases C-39&52/05P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* and Article 12 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

²³² See section 2.2.1.

²³³ See, for instance, Article III-264.

²³⁴ See section 2.3.1.

²³⁵ See, for instance, Article III-330(2).

the Commission simply does not participate.²³⁶ The same was again true under the Constitutional Treaty.²³⁷

It should be recalled at this stage that Türk started his treatment of the issue by stating that any formal concept of legislation requires the participation of “all constitutionally relevant institutions in a deliberative process of law-making” and that “[e]ach [EU] institution represents a particular interest in the law-making process that allows the Union to form a system of functional representation”.²³⁸ What institutions are constitutionally relevant in the EU?

It is impossible to adopt an act via a legislative procedure within the meaning of Article 289 TFEU without consent of the Council. That leaves the Parliament and the Commission as the two “generalist” institutions which in some cases cannot block the adoption, via a legislative procedure within the meaning of Article 289 TFEU, of an act. As we saw, Türk’s treatment essentially comes down to a statement that a special legislative procedure where the Parliament does not have that blocking ability is not legislative. Thus perhaps a more poignant way of putting the question formulated at the end of the last paragraph is to ask whether it can properly be said that the Commission is less constitutionally relevant than the Parliament. If it cannot, then on Türk’s own assumption there are considerably more ordinary and special legislative procedures which are not legislative.

Article 17(1) TEU tasks the Commission with the promotion of the general interests of the EU, including ensuring application of EU law. Tasked with these duties the Commission is normally seen as the watchdog in the EU institutional set-up. It is the Commission which ensures that the common EU interests (integration in the widest sense) set forth in the constitutive treaties are actually if not achieved, then at least pursued, frequently in spite of the more fickle political forces dominating the Council and the Parliament.²³⁹

The issue of the Commission’s relative importance specifically in ordinary legislative procedure has recently been considered by the ECJ in case C-409/13.²⁴⁰ The dispute arose when the Commission withdrew its proposal for a framework regulation of the Parliament and the Council laying down general provisions for macro-financial assistance to third countries. The Council, supported by ten member states, challenged that withdrawal before the ECJ complaining that it was unlawful because

in withdrawing the proposal for a framework regulation by the contested decision, the Commission exceeded the powers conferred upon it by the Treaties and, in so doing,

²³⁶ See the first paragraph of this section 2.3.2.

²³⁷ See Articles I-16(2), III-264(b), III-271(3), III-274(1), III-275(3) and III-277. These legal bases excluded the Commission only if the initiative for adoption of an act came from ¼ of the member states. There was no provision akin to Article 223(1)(2) TFEU which would exclude the Commission in any case.

²³⁸ The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1561

²³⁹ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), pages 39, 45, 48 and 49

²⁴⁰ *Council of the European Union v European Commission*

undermined the institutional balance, as the Treaties do not give it the power to withdraw a legislative proposal in circumstances such as those here.²⁴¹

The Grand Chamber of the ECJ disagreed. It started by opining that it was for the Commission to determine the subject-matter, objective and content of any legislative proposal it makes.²⁴² From a combination of Article 17(2) TEU and Articles 289 and 293 TFEU it followed – according to the ECJ – that

[j]ust as it is, as a rule, for the Commission to decide whether or not to submit a legislative proposal and, as the case may be, to determine its subject-matter, objective and content, the Commission has the power, as long as the Council has not acted, to alter its proposal or even, if need be, withdraw it.²⁴³

While the ECJ did say – in paragraph 75 – that the power of withdrawal does not confer upon the Commission a power of veto in the conduct of the legislative process, the only practical consequence of that finding was that the Commission would have to motivate any withdrawal, because any such withdrawal was subject to judicial review by the ECJ.²⁴⁴ Hence the veto of which the ECJ spoke seems to have meant a “political” veto to withdraw a proposal without explanation (akin to that held by the Parliament, when its consent is needed, and the Council in respect of adoption of an act), not a veto to block adoption of an act if suitable reasons are given. Importantly for present purposes any withdrawal motivated by the intentions of the Parliament and the Council to

[distort] proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d'être*,

entitles the Commission to withdraw the proposal,²⁴⁵ *i.e.* any such withdrawal will pass the ECJ’s judicial review. In a situation where it is the Commission itself which determines the subject-matter, objective and content of a legislative proposal as it sees fit, that would not seem a high bar to cross. The situation at issue in case C-409/13 demonstrates as much. According to the recitals of the proposal its principal objective was to create a framework which would enable the EU to make macro-financial assistance available expeditiously and put an end to delays which

result from the taking of decisions, by the Parliament and the Council jointly, in respect of each case where [macro-financial assistance] is granted.²⁴⁶

The Commission proposed to do so by obtaining from the Parliament and the Council (implementing) power to decide on the grant of macro-financial assistance itself,²⁴⁷ however

²⁴¹ Paragraph 67 of the judgment

²⁴² Paragraph 70 of the judgment

²⁴³ Paragraph 74 of the judgment

²⁴⁴ Paragraphs 76 – 79 of the judgment

²⁴⁵ Paragraph 83 of the judgment

²⁴⁶ Paragraph 85 of the judgment

²⁴⁷ Paragraph 87 of the judgment

that was by no means the sole content of the proposal. For instance, it included criteria – democracy, rule of law, respect for human rights – which a recipient of macro-financial assistance would need to meet in order to become eligible for the assistance.²⁴⁸ The Parliament and the Council, while keeping those criteria, proposed to replace the grant of power to the Commission with adoption of each and every decision to grant macro-financial assistance on case-by-case basis via ordinary legislative procedure.²⁴⁹ The ECJ held that

the Commission was entitled to consider that the amendment planned by the Parliament and the Council so far as concerns [replacement of grant of power to the Commission with ordinary legislative procedure] was liable to distort that proposal, on the essential issue of the procedure for granting [macro-financial assistance], in a way which would have prevented the objectives pursued by the Commission through the proposal from being achieved and which, therefore, would have deprived the proposal of its *raison d'être*.²⁵⁰

That was because the objective of creating an expedited procedure would not be attained. From this it follows that the Commission is in a position to withdraw a legislative proposal even if the amendments which the Parliament and the Council intend to make precludes the achievement of only one of the objectives of the proposal (here: creation of expedited procedure; the other objective being the setting forth of eligibility criteria). Furthermore, the ECJ will only review whether the Commission was entitled to take the view that the intended amendments would preclude the achievement of the objectives of the proposal; the Commission need not show that its view is ultimately correct, and the ECJ will not review the ultimate correctness of the Commission's view. That is undoubtedly a light review.

Finally in response to the claim that enabling the Commission to withdraw a legislative proposal which it has submitted would be undemocratic and hence contrary to paragraphs 1 and 2 of Article 10 TEU, the ECJ essentially opined that there was no hierarchy between different provisions of the constitutive treaties and hence Article 10 TEU could not overrule Article 17(2) TEU read in conjunction with Articles 289 and 293 TFEU.

[I]t is apparent from Article 17(2) TEU, read in conjunction with Articles 289 TFEU and 293 TFEU, that the Commission has the power not only to submit a legislative proposal but also, provided that the Council has not yet acted, to alter its proposal or even, if need be, withdraw it. Since that power of the Commission to withdraw a proposal is inseparable from the right of initiative with which that institution is vested and its exercise is circumscribed by the provisions of the abovementioned articles of the FEU Treaty, there can be no question, in this instance, of an infringement of [the principle of democracy]. Accordingly, this line of argument must be rejected as unfounded.²⁵¹

²⁴⁸ Paragraph 9 of the judgment

²⁴⁹ Paragraph 90 of the judgment

²⁵⁰ Paragraph 94 of the judgment

²⁵¹ Paragraph 96 of the judgment

The argument which the ECJ refuted – that it would be undemocratic for the Commission to be allowed to withdraw its proposal – would essentially seem to demonstrate an inability to perceive the EU and its lawmaking in any other way than by reference to state parameters, something Türk himself warned against.

From the foregoing it would seem clear that the ECJ deems the Commission constitutionally very relevant for the EU, not much – if any – less relevant in fact than is the Council or the Parliament. The only difference between the blocking abilities (vetoes) of the three institutions (when they have them) is that the Commission’s one is at least in part not political,²⁵² *i.e.* it cannot “veto” a proposal for any reason whatsoever nor without explaining its reasons. Nevertheless the bar which the Commission needs to cross to exercise its “non-political” veto is, as we saw, not very high. Furthermore the Commission itself controls the height of the bar (by setting unilaterally the subject-matter, objective and content of any legislative proposal it makes). Thus for practical intents and purposes the “vetoes” of the Commission and the Parliament are comparable in ordinary and special legislative procedures. And unlike the Council neither of the Commission and the Parliament has them in all ordinary and special legislative procedures (although the Parliament has them in all ordinary legislative procedures).

There would seem to be no good reason for the position to have been different under the Constitutional Treaty. Current Article 293 TFEU was then Article III-395 and current Article 17(2) TEU was then Article I-16(2). In neither case did the content change. However, if there truly is no reason for considering the Commission constitutionally irrelevant in the EU or even simply less relevant than the Parliament, then the criterion of joint effort by the Council and the Parliament is itself irrelevant. What is necessary is a joint effort by the Council, the Parliament and the Commission.

It is to be recalled that Türk discarded special legislative procedures requiring the Parliament merely to be consulted from constituting joint effort: only those where both the Council and the Parliament could block adoption of an act did. Hence it would seem that this blocking ability is – according to Türk – a pre-requisite for the effort being joint; merely giving an opinion does not suffice for that purpose. Yet none of the three types of legislative procedures Türk set out – (i) ordinary legislative procedures, (ii) special legislative procedures requiring consent of both the Council and the Parliament and (iii) special legislative procedures requiring consent of the Council and consultation of the Parliament – contains exclusively procedures where all three institutions have that blocking power.

²⁵² The case discussed dealt with withdrawal of a proposal already submitted. The Commission likewise would need to give reasons if it declines to submit a proposal should either the Council (article 241 TFEU) or the Parliament (article 225 TFEU) officially request it to do so. Considering that the Commission needs to give reasons, the “veto” of not submitting a proposal when officially requested would likewise not seem to be political. However the “veto” of not submitting a proposal when there has been no official request by either the Council or the Parliament would seem not to differ much from the Council’s or the Parliament’s veto of voting against a proposal. In none of these three cases does the relevant institution have to explain why it declined, respectively, to submit a proposal or to pass it. There are no limits on what may serve as a reason for doing so.

Thus if joint effort is the criterion and what is needed is a joint effort by all constitutionally relevant institutions, the conclusion that only ordinary legislative procedures and those special legislative procedures which require consent of both the Council and the Parliament are legislative simply does not follow. Thus Türk's argumentation ultimately falls apart.

The final, and perhaps the largest, problem with Türk's account is somewhat different. It could be very concisely formulated: "Why?"

What is the purpose of his account? Taking a step back, the conclusion would seem peculiar for it essentially seems to read as follows:

- ordinary legislative procedures are legislative;
- special legislative procedures requiring consent of the Parliament are legislative;
- special legislative procedures requiring no more than an opinion of the Parliament are not legislative.

One could be excused for being surprised by a conclusion that some special legislative procedures are not legislative. Surely the Constitutional Treaty said that they were, and the constitutive treaties say that they are (Article 289 TFEU).

The meaning Türk assigns to "legislative" when he holds that some special legislative procedures are not "legislative" is legislation in form. Leaving for the moment aside the problems with his argumentation and assuming its correctness and hence the correctness of the conclusion, Türk would seem to endeavour to apply to the EU some concept of legislation which – at the very least some parts of – the constitutive treaties (Section 1 of Chapter 2 of Title I of Part Six of the TFEU) simply do not support. While that concept might be familiar from national laws²⁵³ and hence easy to understand, it is submitted that attempting to endow one term with several meanings within one instrument is undesirable (*inter alia* as being conducive to confusion), and should be avoided if such avoidance is at all possible. The fact that the constitutive treaties themselves already contain that undesirability²⁵⁴ is, if anything, a further reason for abstaining from exacerbating the situation. In this respect it is worth noting that Türk's legislation in form cannot be squared with the use of "legislating" in Article 2 TFEU (the other concept of legislation which might be employed in the constitutive treaties which concept has so far been mentioned). It is easy to see why on the basis of an example. Measures adopted on the basis of Article 195(2) TFEU enabling the EU to complement the member states' measures in the area of tourism would fall within the area of competence where the EU may only support, supplement and coordinate actions of member states (Article 6(d) TFEU). Paragraph 5 of Article 2 TFEU does not – unlike paragraphs 1 and 2 of that article – say that the EU may legislate in that area. Yet according to Türk's account measures on the basis of Article 195(2) TFEU would be legislative for that provision mandates a usual ordinary legislative procedure. It is unclear why Türk's account is necessary – what problem it solves or obviates, or, more generally, what the need that it answers is.

²⁵³ See the third problem in with his account, discussed in text to footnote 221 above.

²⁵⁴ See the last paragraph of section 2.2.2.1.

To sum up, it is fair to say that there are only three commonalities between all the ordinary and all the special legislative procedures: need for consent of the Council for adopting the resulting act, participation of the Parliament in the procedure and lack of any substantive criteria whatsoever for the acts resulting from those procedures.²⁵⁵ What is not common is the notion of “legislation” (i) employed in the constitutive treaties, (ii) employed in the Constitutional Treaty serving as their basis and (iii) developed on the basis of those instruments by commentators. The “legislation” (i) referred to in Article 2 TFEU, (ii) Article 289 TFEU and (iii) Articles I-33 (specifically sub-paragraphs 2 and 3 of its paragraph 1) and I-34 of the Constitutional Treaty and (iv) the one developed on the basis of the EC Treaty and the Constitutional Treaty by Alexander Türk are all different; they cannot be squared one with the other.

2.3.3. Extent of special legislative procedures

In section 2.3.1 above it was suggested that the TFEU contains some 36 legal bases mandating the use of some special legislative procedure. Article 289(2) TFEU gives the following explanation of a special legislative procedure.

In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

The constitutive treaties contain nothing further directly in point, *i.e.* dealing generally with special legislative procedures. As mentioned in footnote 205, each of the 36 legal bases dealt with in section 2.3.1 specifically states that the procedure which it mandates is a special legislative procedure. There are, however, some 56 further legal bases which mandate the adoption of an instrument by the Council with the participation of the Parliament, and which are not called – in the relevant legal basis – either ordinary or special legislative procedures.²⁵⁶ While some of those legal bases mandate that the resulting act be neither a regulation, nor a directive nor a decision,²⁵⁷ at least nine of the 56 legal bases mandate that a decision must result,²⁵⁸ one legal basis mandates that the resulting act should be a regulation (Article 109 TFEU) and one that it should be either a regulation or a directive (Article 103(1) TFEU). The remaining 42 legal bases do not prescribe the type of act which must result. As for the two legal bases mandating neither a regulation, nor a directive nor a decision, we have already seen that the ECJ seems to have held in its judgment in case C-77/11 that that of itself is not enough to preclude the adoption procedure of such act from being a special legislative procedure.²⁵⁹ Since all the procedures set forth in these 56 legal bases mandate adoption of an act by the Council with the participation of the Parliament, the question whether these

²⁵⁵ Although, possibly, not for legislative acts within the meaning of Article 289(3) TFEU. See the text between footnotes 184 and 185.

²⁵⁶ See Annexe 3 to this chapter.

²⁵⁷ Article 121(2) TFEU mandating that a recommendation result and Article 148(2) TFEU worded as mandating an atypical act (guidelines)

²⁵⁸ Articles 27(3) and 41(3)(1) TEU and Articles 83(1)(3), 218(3), 218(5), 218(6)(1), 218(6)(a), 218(6)(b) and 218(9) TFEU

²⁵⁹ See section 2.2.1 above.

procedures amount to special legislative procedures would ultimately seem to come down to the question of the meaning of the nine opening words of Article 289(2) TFEU:

In the specific cases provided for by the Treaties /.../

It is undoubted that in none of these 56 cases do the constitutive treaties say that the procedure is a special legislative procedure. Hence the question can be put thus. Does a lack of a statement in a legal basis to the effect that the procedure which that legal basis mandates is a special legislative procedure mean that the procedure is not a special legislative procedure even though it complies with all the other requirements set forth in Article 289(2) TFEU (as interpreted by the ECJ)?

First of all, current law clearly excludes Articles 70, 121(2), 126(11), 134(3), 155(2), 215(1), 218(3), 218(4), 218(5), 218(6)(1), 218(7), 218(9), 219(1)(2) and 329(2) TFEU from the list of legal bases which could be seen as mandating a special legislative procedure. All these legal bases mandate that the Council adopt the relevant act and that the Parliament be informed. In principle it could be argued that informing the Parliament does amount to the Parliament participating in the procedure. While, unlike being consulted, being informed does not grant the Parliament even an ability to delay adoption of the act, it does enable the Parliament to serve as an informed forum for political debate – unlike in cases when the Parliament need not be informed where the Parliament might not have all the relevant information. However in its judgment in case T-160/13²⁶⁰ the GC held that a regulation adopted on the basis of Article 215(1) TFEU, which requires that the Council adopt the measure and inform the Parliament of that adoption,

[cannot be regarded as having been adopted under a special legislative procedure within the meaning of Article 289(2) TFEU] in view of the lack of any involvement of the European Parliament in the adoption of the contested regulation.

Thus being informed does not constitute participation within the meaning of Article 289(2) TFEU. While that judgement has been appealed,²⁶¹ for the time being it is the only authority directly in point.²⁶²

That leaves 42 legal bases. There are two decisions of the GC directly in point as to whether they do or do not mandate special legislative procedures. In the earlier of the two – the order in case T-121/10²⁶³ – the GC held that

même si le règlement attaqué a été adopté en utilisant une procédure qui correspond à la procédure législative spéciale prévue par l'article 289, paragraphe 2, TFUE, cette circonstance – en l'absence d'une référence à la procédure législative spéciale que

²⁶⁰ *Bank Mellat v Council of the European Union*, paragraph 50

²⁶¹ On the 26th March 2017

²⁶² Admittedly one could distinguish the Article 218 TFEU legal bases – by virtue of paragraph 10 of Article 218 TFEU the Parliament is to be immediately and fully informed at all stages of the procedure. It would seem that the Parliament's involvement in those cases is superior to that mandated by other legal bases calling for the Parliament to be informed (for the Parliament is constantly “kept in the loop”), but is inferior to that mandated by legal bases calling for the Parliament to be consulted (in which case the Parliament has a suspensive veto).

²⁶³ *Giovanni Conte and Others v Council of the European Union*

l'article 37 CE ne contient pas – ne suffit pas, à elle seule, pour pouvoir conclure qu'il s'agit d'un acte législatif.²⁶⁴

That was held to be so precisely because Article 289(2) TFEU provides that an act adopted by the Council with the participation of the Parliament constitutes a legislative act only “in the specific cases provided for by the Treaties”;²⁶⁵ and in the case there at hand the constitutive treaties did not so provide (there was no statement to that effect in the legal basis). The order of the GC in case T-121/10 was not appealed.

In a judgment in a more recent case – T-512/12²⁶⁶ – a completely differently constituted GC came to the opposite conclusion.

In the present case, as appears from its preamble, the contested decision was adopted following the procedure defined in Article 218(6)(a) TFEU, which provides that the Council, on a proposal by the negotiator, in this case the Commission, is to adopt a decision concluding the agreement after obtaining the consent of the European Parliament. That procedure satisfies the criteria set out in Article 289(2) TFEU and therefore constitutes a special legislative procedure.

The GC did quote Article 289(2) TFEU, including the “specific cases” language in paragraph 70. No further mention was made of it, however. Thus the GC seems to have held the reference to “the specific cases provided for by the Treaties” in Article 289(2) TFEU irrelevant for deciding whether a particular legal basis mandates a special legislative procedure or not. The judgment in case T-512/12 was appealed. Advocate General Wathelet did agree with the GC on this point, although he seems to have considered the issue in a slightly different key: not whether the procedure for adoption of the contested act constituted a special legislative procedure, but whether the act constituted a legislative act.

One of the grounds on which the Council challenged the judgment in case T-512/12 was that

the General Court erred in law by ruling in paragraphs 70 and 71 of the judgment under appeal that the contested decision was a legislative act. /.../ [T]he contested decision is not a legislative act because its legal basis, namely the first paragraph of Article 207(4) in conjunction with Article 218(6)(a) TFEU, does not make explicit reference to a legislative procedure.²⁶⁷

Advocate General Wathelet started by noting that the legal bases of the contested decision did not – unlike those contained in Articles 203, 349 and 352 TFEU – make any explicit

²⁶⁴ Paragraph 45; the order is not available in English.

²⁶⁵ Paragraph 43

²⁶⁶ *Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union*, paragraph 71

²⁶⁷ Opinion of Advocate General Wathelet in case C-104/16P *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*, paragraph 149

reference to a legislative procedure.²⁶⁸ He then opined that the lack of that reference was insufficient for concluding that the act was not legislative.²⁶⁹

153. Article 289(3) TFEU defines legislative acts as being ‘[l]egal acts adopted by legislative procedure’, that is, the ordinary legislative procedure or the special legislative procedure.

154. Under Article 289(2) TFEU, the special legislative procedure consists in ‘the adoption ... of a decision ... by [the Council] with the participation of the European Parliament’.

155. Article 218(6)(a)(i) TFEU provides that ‘the Council shall adopt the decision concluding the agreement ... after obtaining the consent of the European Parliament in the [case of] association agreements’.

156. I cannot see how the requirement of the prior consent of the Parliament cannot be regarded as the participation of the Parliament in the procedure.

Dealing specifically with the lack of reference to “the specific cases provided for by the Treaties”, advocate general Wathelet suggested that

[t]he fact that Article 289(2) TFEU uses the words ‘[i]n the specific cases provided for by the Treaties’ does not necessarily mean that every provision of the FEU Treaty which envisages the special legislative procedure must indicate it explicitly. It is sufficient that the definition given in that provision is respected.²⁷⁰

The ECJ eventually disposed of the case, allowing the appeal, without engaging with the issue at all (not even implicitly).²⁷¹ Its disposal of the case throws no light on the correctness or incorrectness of the conclusion of the GC.

It is submitted that the view of the GC in its judgment in case T-512/12 and of advocate general Wathelet is clearly the better one. However, that seems to go against the grain of the

²⁶⁸ Paragraph 151

²⁶⁹ Paragraph 152

²⁷⁰ Paragraph 157. In the case at hand he thought that conclusion to have been reinforced by the fact that the legal basis at issue, Article 218(6)(a) TFEU, required the consent of the Parliament for concluding the international treaty, and in its judgment in case C-658/11 *European Parliament v Council of the European Union* at paragraph 55 the ECJ had opined that the consent of the Parliament for concluding an international treaty was required when its consent was also necessary for adopting an internal EU act in the field covered by the international agreement, *i.e.* where either special legislative procedure requiring consent of the Parliament or an ordinary legislative procedure applied for adoption of internal EU acts in that field. See paragraph 158 of the opinion in case C-104/16P.

²⁷¹ Judgment of the ECJ in case C-104/16P *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*. The issue arose as part of a dispute about the standing of Front Polisario to institute the proceedings, *viz.* whether the challenged act was regulatory for the purposes of Article 263(4) TFEU or not, it being assumed that a legislative act could not be regulatory. If it were deemed regulatory, Front Polisario would have needed to show direct concern and a lack of implementing measure, while if it were deemed legislative rather than regulatory Front Polisario would have needed to show direct and individual concern. Instead of engaging with these issues the ECJ decided that the challenged act did not apply to Front Polisario *ratione loci* which meant that the challenged act was of no concern of any type to Front Polisario.

academic opinion which seems unusually uniform in this respect: the commentators tend to treat the procedures mandated by the 42 legal bases as non-legislative.²⁷² Much could certainly be said for such treatment – that there are only 36 legal bases mandating a special legislative procedure – being correct if the question were decided under the Constitutional Treaty; the current constitutive treaties are a different matter altogether. That would seem to follow from the interaction of Articles I-33, I-34 and I-35 of the Constitutional Treaty with the way particular legal bases were drafted in the Constitutional Treaty, and the lack of that interaction in the current constitutive treaties.

Article I-33 of the Constitutional Treaty set forth at least four types of explicitly binding acts: European law, European framework law, European regulation and European decision. A European law was to be a legislative act of general application binding in its entirety and directly applicable in all member states.²⁷³ A European framework law was to be a legislative act binding, as to the result to be achieved, upon each member state to which it is addressed, but leaving to the national authorities the choice of form and methods.²⁷⁴ A European regulation was to be a non-legislative act either binding in its entirety and directly applicable in all member states or binding, as to the result to be achieved, upon each member state to which it is addressed, but leaving to the national authorities the choice of form and methods.²⁷⁵ A European decision was to be a non-legislative act, binding in its entirety and, in case it specified its addressees, only on the addressees.²⁷⁶ According to paragraphs 1 and 2 of Article I-34 of the Constitutional Treaty only European laws and European framework laws could be adopted via an ordinary or a special legislative procedure.

1. European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396. If the two institutions cannot reach agreement on an act, it shall not be adopted.
2. In the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.

Neither European regulations nor European decisions could be adopted via such procedures. These instruments could be adopted only by the European Council, the Council and the

²⁷² See Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law* (2012) 49 *Common Market Law Review* 893; Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 644; Edward Best in *Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?* (2008) 15 *Maastricht Journal of European and Comparative Law* 95. For a textbook approach to the same effect see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 134 (text to and in footnote 71). Making without more such a statement in a textbook could be seen as showing that the issue is considered an uncontroversial point of law. For the same statement in respect of the Constitutional Treaty see Alexander Türk, *The Concept of the “Legislative” Act in the Constitutional Treaty* (2005) 6 *German Law Journal* 1563.

²⁷³ Article I-33(1)(2) of the Constitutional Treaty

²⁷⁴ Article I-33(1)(3) of the Constitutional Treaty

²⁷⁵ Article I-33(1)(4) of the Constitutional Treaty

²⁷⁶ Article I-33(1)(5) of the Constitutional Treaty

Commission (paragraphs 1 and 2 of Article I-35 of the Constitutional Treaty). The procedure for the adoption of a European regulation or a European decision might admittedly be similar to some special legislative procedure, however the resulting act would, at the very least formally, differ: a European regulation or a European decision as opposed to a European law or European framework law. Let us consider, as examples, the first paragraphs of Articles III-126 and III-163 of the Constitutional Treaty, the former mandating a European law or European framework law of the Council (hence a special legislative procedure – Article I-34(2) of the Constitutional Treaty) and the latter a European regulation of the Council.

Article III-126(1): A European law or framework law of the Council shall determine the detailed arrangements for exercising the right, referred to in Article I-10(2)(b), for every citizen of the Union to vote and to stand as a candidate in municipal elections and elections to the European Parliament in his or her Member State of residence without being a national of that State. The Council shall act unanimously after consulting the European Parliament. These arrangements may provide for derogations where warranted by problems specific to a Member State.

Article III-163(1): The Council, on a proposal from the Commission, shall adopt the European regulations to give effect to the principles set out in Articles III-161 and III-162. It shall act after consulting the European Parliament.

The procedures are exactly the same: the Council adopts the act on proposal of the Commission²⁷⁷ and after consulting the Parliament. At this point one might be pardoned for thinking that this raises the same issue of “specific cases”²⁷⁸ all over again – just as in case of the current constitutive treaties. It could further be argued that the difference of resulting acts which exists in the Constitutional Treaty (in our example, European law or European framework law in one case and a European regulation in another) is irrelevant: in light of the judgment of the ECJ in case C-77/11²⁷⁹ it could be argued that adopting an act via a special legislative procedure which act is seemingly not listed among those which are capable of being adopted via special legislative procedure does not mean that the procedure is not a special legislative procedure; it goes only to whether the act itself legislative or not. While the judgment was delivered on the basis of the TFEU, it could be argued that it and the Constitutional Treaty do not display any relevant differences.

That thinking would however miss the point of the interaction of Articles I-33 – I-35 of the Constitutional Treaty with the way the legal bases contained in that treaty were drafted. No legal basis contained in the Constitutional Treaty prescribed, in terms, the use of an ordinary or a special legislative procedure. Procedure was specified only when the type of resulting act was either a European regulation or a European decision. The legal bases which in fact required the acts to be adopted via an ordinary or a special legislative procedure only

²⁷⁷ In case of Article III-126(1) of the Constitutional Treaty the fact that the proposal must be made by the Commission derives from Article I-26(2) and sub-paragraphs 2 and 3 of paragraph 1 of Article I-33 of the Constitutional Treaty.

²⁷⁸ Both Article I-34(2) of the Constitutional Treaty and Article 289(2) TFEU commence by similar words: “In the specific cases provided for /.../”

²⁷⁹ Discussed in section 2.2.1 above.

specified that the resulting act be a European law or European framework law. When nothing further was specified in the legal basis, that automatically meant that the procedure for the adoption would need to be an ordinary legislative procedure, because according to Article I-34(1) of the Constitutional Treaty it was normally only via that procedure that a European law or a European framework law could be adopted. This also explains the first words of Article I-34(2) of the Constitutional Treaty, *viz.*

[i]n the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.

Since procedure was irrevocably tied to acts, ordinary legislative procedure normally applied whenever the act mandated was a European law or a European framework law. Only when a different adopter was specifically mentioned in a legal basis set forth in the Constitutional Treaty – as was the case in the aforementioned Article III-126(1) – would a special legislative procedure apply. Reference to “specific cases” was thus necessary to distinguish legal bases which mandated adoption of European laws or European framework laws via an ordinary legislative procedure from those legal bases which mandated adoption of European laws or European framework laws via some other procedure which procedure would necessarily entail participation of both the Council and the Parliament, *i.e.* to distinguish between different legislative procedures. Reference to “specific cases” was not inserted to distinguish between legislative and non-legislative procedures (as the Council submitted in its appeal in Case C-104/16P that it did in the TFEU). In the Constitutional Treaty the procedure was irrevocably linked to the act with the result that only European laws or European framework laws could be adopted via a legislative procedure.

While it is possible to argue that European regulations or European decisions would in some cases – such as that of the aforementioned Article III-163(1) – be essentially adopted via the same procedure as European laws and European framework laws and, depending on the situation, perhaps even that they would have the same normative content as the latter, in view of the wording of Articles I-33 – I-35 of the Constitutional Treaty and their interaction with the way the legal bases were drafted there would seem to be no valid argument for saying that such European regulations or European decisions were adopted via a special legislative procedure.²⁸⁰ That is simply because – as used in the Constitutional Treaty – a “special legislative procedure” is a term of art denoting, in the words of Article I-35(2) of the Constitutional Treaty, the adoption of European laws and European framework laws by any procedure whatsoever which is capable of being employed to that end, other than ordinary legislative procedure. In a sense “special legislative procedure” is a residual class.

²⁸⁰ Pointing out this similarity between European regulations or European decisions, on the one hand, and European laws and European framework laws, on the other, amounts essentially to criticising the Constitutional Treaty for not providing for a bigger distinction between the two “classes”. It cannot make the distinction which was made – even if it was one purely in names – disappear; all it can do is argue that it should be made to disappear, but that would have required an amendment of the Constitutional Treaty. See section 4.5 for further consideration of this issue.

Thus the academic commentators' treatment of the current constitutive treaties would have been correct had it applied to the Constitutional Treaty: there the 42 legal bases mostly mandated European regulations and European decisions, not European laws or European framework laws.

Looking at the current constitutive treaties, they set forth only three types of explicitly binding acts: regulations, directives and decisions.²⁸¹ Each of these may be adopted both via an ordinary or a special legislative procedure,²⁸² as well as via a procedure which undoubtedly is neither.²⁸³ Furthermore, the current constitutive treaties, unlike the Constitutional Treaty, do not tie any procedure to a particular act. Instead each legal basis specifically refers to the procedure which is to be employed for the adoption of acts on that legal basis. Thus the provisions corresponding to Articles III-126(1) and III-163(1) of the Constitutional Treaty currently, respectively, read as follows.

Article 22(1) TFEU: Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 103(1) TFEU: The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

The procedures are again the same: adoption of an act (of a regulation, a directive or a decision in case of Article 22(1) TFEU²⁸⁴ and of a regulation or directive in case of Article 103(1) TFEU) by the Council upon proposal of the Commission²⁸⁵ and after consulting the Parliament. To the extent that academic commentators hold that the former mandates a special legislative procedure, while the latter does not because Article 289(2) TFEU says that

[i]n the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure,

they employ these words to distinguish between legislative and non-legislative procedures as opposed to between different legislative procedures, *i.e.* for a different purpose altogether compared to the one for which it was employed in the Constitutional Treaty from which the formulation is borrowed. Furthermore, under their construction a “special legislative

²⁸¹ Article 288 TFEU

²⁸² See Annexes I and II to this thesis for examples.

²⁸³ See, for a prominent example, Article 105(3) TFEU enabling the Commission to adopt regulations.

²⁸⁴ These are the types mandated by Article 289(2) TFEU.

²⁸⁵ In case of Article 22(1) TFEU the fact that the proposal must be made by the Commission derives from Article 17(2) TEU and paragraphs 2 and 3 of Article 289 TFEU.

procedure” loses its status as the term of art in the constitutive treaties. It cannot denote adoption of regulations, directives and decisions by any procedure whatsoever which is capable of being employed to that end, other than an ordinary legislative procedure, because instruments of each of those types may be adopted via some non-legislative procedure. In the constitutive treaties “special legislative procedure” is not a residual class.

While the reading offered by the GC in its order in case T-121/10 and by the commentators is possible, it is submitted that such reading cuts the historic links between the Constitutional Treaty and the current constitutive treaties, and disregards the intended structure of the constitutive treaties. It is based on giving the phrase “in the specific cases provided for” a completely different meaning compared to that which it initially bore, and as a result on precluding special legislative procedures from being a residual class. If one were to keep the original meaning, it would be difficult to argue against holding that the 42 legal bases mandate a special legislative procedure.

Keeping for the moment a historic perspective, a counter-argument could be devised. If the 42 legal bases do mandate a special legislative procedure, some other provisions of the constitutive treaty rather than Article 289(2) TFEU are given a different meaning compared to that which they initially bore (in other words: other historic links between the Constitutional Treaty and the current constitutive treaties are cut). Namely, most of these 42 legal bases originally – in the Constitutional Treaty from which they hail – mandated a non-legislative act.²⁸⁶ Reading them now as mandating a special legislative procedure would mean that – in most cases²⁸⁷ – the resulting acts would be legislative. As a consequence Protocol (No 1) on the Role of National Parliaments in the European Union and in Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality would become applicable in relation to the acts adopted on any of the 42 legal bases, and as a result national parliaments would attain a modicum of powers to supervise adoption of acts on those legal bases. Under the Constitutional Treaty these two protocols would not have applied to the corresponding legal bases: the protocols applied only to legislative acts (European laws and European framework laws), while the corresponding legal bases mandated that non-legislative acts result (European regulations and European decisions).

Thus the construer is presented with two seemingly equally unappealing options: whichever choice he makes (that the 42 legal bases do mandate a special legislative procedure or that they do not) he may both find support and strong opposition in historic arguments. Thus he must inevitably cut one historic tie.

There are no materials which would explain this “hobbled” transposition of the provisions of the Constitutional Treaty into the Treaty of Lisbon. It is submitted that it is likely that no-one considered the issue at all with the result that the transposition was inherently flawed. At this point it is difficult to disagree with Dougan’s suggestion that

²⁸⁶ See Annexe III to the thesis for correlation with the Constitutional Treaty. For the distinction between legislative and non-legislative acts, as well as the connection between acts and procedures in the Constitutional Treaty see section 4.5 below.

²⁸⁷ Aside from possibly Article 148(2) TFEU mandating guidelines (depending on what is the proper reading of the ECJ’s judgment in case C-77/11).

[t]he desire to bestow upon the Union a clearer hierarchy of norms, for the sake of enhancing the transparency of its activities, has therefore been undermined by a combination of shallow conception and poor execution.²⁸⁸

Looking at the drafting history of the Constitutional Treaty does not immediately render the picture much clearer, however it would ultimately seem to point towards the position of advocate general Wathelet and of the GC in its judgment in case T-512/12.

The two leading *rapporteurs* of the Working Group IX – Koen Lenaerts²⁸⁹ and Michel Petite²⁹⁰ – did not directly engage with the issue of extent of special legislative procedures. Instead both Lenaerts and Petite simply opined that the constitutive treaties should be implemented via one single procedure – the co-decision (ordinary legislative procedure, using the terminology of the TFEU) – which should result in adoption of laws; another legislative procedure was not something they deemed desirable.²⁹¹ The same lack of attention to special legislative procedure seems to manifest itself in the work of Working Group IX more generally. Many of the delegates apparently considered that only what is now known as ordinary legislative procedure should be employed seeing no room at all for what is now special legislative procedure, other than for ratifying certain international agreements.²⁹² Those who did not share that view sometimes postulated a different approach altogether – one under which the issue of extent of special legislative procedure in its current form (a procedure determined without any reference to any substantive criteria whatsoever for acts resulting from the procedure) could not arise.²⁹³ Some members of Working Group IX avoided mentioning what is now special legislative procedure altogether.²⁹⁴ The proposal for

²⁸⁸ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647. To be fair, the problems, which the use of the phrase “[i]n the specific cases provided for by the Treaties” was liable to create in the system created by the Lisbon Treaty, might have been understood by the initial drafters of the Lisbon Treaty. Article 249a(2) proposed at paragraph 239 of its first draft (of 23rd July 2007, CIG 1/07) did not contain the phrase.

A special legislative procedure shall consist in the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.

The second draft (of 5th October 2007, CIG 1/1/07 REV 1) did contain the phrase in paragraph 236. Article 249a(2) read the same way as Article 289(2) TFEU. The documents available on the website of the 2007 IGC contain no explanation of the change.

²⁸⁹ *How to Simplify the Instruments of the Union?* (17th October 2002), Working document 07 of Working Group IX (6th November 2002)

²⁹⁰ *Simplifying Legislative Procedures and Instruments*, Working document 08 of Working Group IX (31st October 2002)

²⁹¹ Page 9 of Working document 08 of Working Group IX (31st October 2002) and paragraphs 4, 9 and 10 of Working document 07 of Working Group IX. To be fair, Lenaerts’ position was a good deal more detailed. However since the details do not go to the issue of the whether the 42 legal bases should be seen as mandating a special legislative procedure or not, they will be considered below in section 4.2.2.

²⁹² Working document 12 of Working Group IX (31st October 2002) described therein as “an issues paper on procedures”. See also the paper by Mr Johannes Voggenhuber, Working document 26 of Working Group IX (20th November 2002), page 3, and the paper by Mrs Johanna Maij-Weggen, Working document 18 of Working Group IX (13th November 2002), page 3.

²⁹³ See, for instance, paper by Mr Matti Vanhanen, Working document 24 of Working Group IX (15th November 2002) where he advocated substantive approach to the issue of legislative vs non-legislative. While he mentioned the pre-Constitutional Treaty equivalent of current special legislative procedure – the assent procedure – the issue considered here simply could not arise on his terms.

²⁹⁴ Paper by Mr Dick Roche, Working document 25 of Working Group IX (18th November 2002)

a “legislative/executive” delimitation within the institutional system of the EU submitted to the members of Working Group IX²⁹⁵ suggested that co-decision should be the general procedure for adoption of “legislative acts”, but not that it should be the only one. According to the summary of the replies to the questionnaire submitted to the members of Working Group IX, most members of Working Group IX

consider that the concept of a legislative act should be defined by its content and not by the adoption procedure. Some propose defining a legislative act as one which determines the fundamental principles and general guidelines in a given area, embodies political choices or establishes the essential elements of implementing measures in the field in question. Most of the replies take the view that the codecision procedure should be the rule for adoption of legislative acts, with specific provisions and exceptions for certain areas. The CFSP, JHA and the common agricultural policy were cited as areas in which such exceptions should be established.²⁹⁶

It would thus seem that Working Group IX (its members) had mostly in mind some substantive concept of legislation – something which while not wholly impossible to reconcile with the Constitutional Treaty,²⁹⁷ is impossible to reconcile with Article 289 TFEU. Considering the fields to which the members of Working Group IX sought to confine special legislative procedure, it is worth noting that international agreements are currently adopted by the Council after either consulting the Parliament or receiving its consent, but the legal bases – sub-paragraphs a and b of paragraph 6 of Article 218 TFEU – make no mention of special legislative procedure. The same is true of CFSP (Articles 27(3) and 41(3)(1) TEU) which could be seen as mandating special legislative procedures, although it does not mention them. That would seem to be an argument for concluding that the 42 legal bases do mandate special legislative procedures. Common agricultural policy rules are currently exclusively adopted either via an ordinary legislative procedure (article 43(2) TFEU) or via a clearly non-legislative procedure (Article 43(3) TFEU), so no conclusion may be drawn here. The justice and home affairs seem to have all three types of legal bases, sometimes within the same article: Article 83(1)(1) TFEU mandates an ordinary legislative procedure, Article 83(2) TFEU mandates an expressly special legislative procedure and Article 83(1)(3) TFEU mandates a procedure which could be seen as a special legislative procedure, but is not called that in the legal basis.

Moving on to the position of the Praesidium of the Convention on the Future of Europe, that is, if anything, even less clear.

[T]he Praesidium reached the conclusion in the light of the amendments and the debate in plenary that the designation “legislative” for the procedure which constitutes the general rule could prove misleading, since it appears to be the determining

²⁹⁵ Working document 11 of Working Group IX (29th October 2002), page 3

²⁹⁶ Working document 13 of Working Group IX (6th November 2002), page 4

²⁹⁷ Alexander Türk has indeed done that. See the quote to footnote 187. Complete reconciliation with the Constitutional Treaty is however impossible: as suggested by Türk it cannot successfully be argued that the Constitutional Treaty is based solely or even predominantly on some substantive concept of legislation (which is what seems to have been in the minds of members of Working Group IX).

criterion and not the consequence of the "legislative" nature of the act. The Praesidium agreed to clarify its scope as a legislative procedure under ordinary law. It refers to it as "ordinary legislative procedure", in order to avoid excluding the legislative nature of the very limited number of acts which might be adopted by the Parliament or by the Council with varying degrees of participation by the other arm of the legislative authority by virtue of procedures which, while undoubtedly legislative, are "special".

The system described in draft Article I-33 implies that legislative acts are always adopted by the legislator.²⁹⁸

The Praesidium essentially states that "legislative" is a term of art: it is not employed as a characterisation of an instrument, which is the normal use of the term; it is instead employed to designate the general procedure – by which the Praesidium seems to mean the co-decision, but that is not explicitly spelled out anywhere – via which instruments of EU law are adopted. The Praesidium then seems to be essentially saying that "legislative" ended up ultimately being used by the Convention as a term of art designating that both the Council and the Parliament, whom the Praesidium sees as jointly constituting the legislator,²⁹⁹ participated in the adoption of an instrument. The Praesidium thought the use of "legislative" to essentially mean co-decision to be confusing because "legislativeness" of an act does not, in case of such use, follow from the nature of the act; instead it precedes the very adoption of the act. Thus it designated the general procedure via which EU law is adopted (co-decision) as "ordinary legislative procedure" rather than "legislative procedure" *tout court* in order to avoid

excluding legislative nature of the very limited number of acts which might be adopted by the Parliament [with some participation of the Council or *vice-versa*].

Thus special legislative procedures were created to be a term of art covering procedure for adoption of those acts. What is utterly confusing is what those acts were intended to be – or indeed what the Convention meant at all. There are several possibilities.

First, despite purporting to ground the Constitutional Treaty in a non-substantive concept of "legislation", the Convention meant those acts which are legislative by nature. On the one hand, it is difficult to square that with the rules (contained at the time in draft Article I-34) on European regulations and European decisions: whoever the adopter of the latter might be, their (normative) nature would not seem to be much different from the acts adopted via special legislative procedure. This approach would be very difficult (at least without going into details of formal logic ordinarily quite alien to EU law) or even impossible to square with the statement that "legislative acts are always adopted by the legislator" (the Convention seems to have considered "legislator" to mean the Council and the Parliament jointly).³⁰⁰ On the other hand, this approach is difficult to square with the beginning of the quotation where

²⁹⁸ See Draft Constitution, Volume I – Revised Text of Part One (28th May 2003), CONV 724/1/03 REV 1, page 88 (comment to draft Article I-33)

²⁹⁹ See the mention of "the other arm of the legislative authority" in the quote.

³⁰⁰ European regulations and European decision could be adopted by the Commission – Article I-34(2) of the Constitutional Treaty.

the Convention seems to say that ordinary legislative procedure has nothing to do with nature of the resulting acts – it is a term meaning “co-decision”.

Second, the Convention meant all the acts adopted by what it saw as the legislator (the Parliament with the participation of the Council or vice versa). That, however, is impossible to square with the Constitutional Treaty in as much it mandated that European regulations and European decisions be adopted by that same legislator without those acts being legislative (with the result that no legislative procedure was employed for their adoption).

Third, as suggested by Türk,³⁰¹ the Convention meant some combination of the two: those acts which are legislative by nature and adopted by the legislator via an undoubtedly legislative procedure. This could be squared with the last sentence of the quote: “legislative acts are always adopted by the legislator” considering that, strictly logically speaking, it does not imply that legislator adopts only legislative acts. However, there is no indication anywhere in the quoted document as to how to determine which of the acts adopted by the legislator are legislative by nature and which procedures are undoubtedly legislative. Presumably the reference to “undoubtedly legislative procedures” must mean something other than legislative procedure meant at the beginning of the quote (meaning there co-decision) for if it meant co-decision there would be no need for any special legislative procedure. If it included special legislative procedure, it would be difficult to understand why it does not include procedures for adoption of European regulations and European decisions by the Council with the participation of the Parliament or *vice-versa*.

It would further seem completely unclear how the employment of the term “legislative” as a term of art designating a procedure could exclude legislative nature of an act. In this connection it is further worth noting that the word “legislative” is employed eight times in that quote and seems to bear at least five different meanings: (i) the first, third and fourth use seem to refer to co-decision, (ii) the second and the fifth use seem to refer to legislative nature of an act without further explanation, (iii) the sixth use (which seems to coincide in meaning with “legislator” used in the last sentence of the quote) seems to denote the Parliament and the Council together when adopting an act of some sort, (iv) the seventh use seems to refer to some procedure other than the one meant by the first, third and fourth use and (v) the eighth use seems to mean acts adopted by the Parliament and the Council, but it is unclear whether all such acts or, if not, which ones. It is submitted that any instrument which succeeds in using the same term in at least five different meanings within the space of four consecutive sentences is not a reliable guide. Thus the fourth possibility would be that the Praesidium simply formulated a text which was acceptable to its 13 members, doing so on the basis of documents which already constituted mutually acceptable compromises reached within Working Group IX. Clarity was left to play second fiddle to political bargaining.

Writing about the drafting of the Constitutional Treaty and dealing specifically with why some legal bases in the Constitutional Treaty mandate a special legislative procedure while

³⁰¹ See the quote to footnote 187 above.

others do not,³⁰² Liisberg has suggested that the large number of non-legislative procedures in the Constitutional Treaty could be explained by the desire of the drafters to keep the use of the “special” moniker to a minimum, using it only where deemed absolutely necessary (for reasons of transparency and legitimacy, perhaps).

During the first plenary debate on the report from WG IX, the Chairman promised that there would only be a limited number of exceptions to the general rule that legislative acts would be adopted under the ordinary legislative procedure (co-decision). Against that background there could well have been a preference with the drafters of the initial texts of Part III to characterize a legal basis as non-legislative rather than having to add it to the list of exceptional legal bases subject to special legislative procedures, notwithstanding the implications this might have for transparency in Council procedures and the “early warning mechanism” under the subsidiarity protocol.³⁰³

Liisberg offers the specific example of the common agricultural policy.

A plausible explanation [for splitting the main agricultural legal basis, Article 37 EC, into a legislative part and a non-legislative part – paragraphs 2 and 3 of Article III-231 of the Constitutional Treaty³⁰⁴] could to be that proponents of more European Parliament influence were satisfied with the Parliament finally becoming co-legislator on the general agricultural rules, whereas Member States wanted to hold on to Council regulatory control of sensitive details such as prices and quotas. Again, the reason a special legislative procedure was not prescribed for the legal basis covering the sensitive detailed areas of agricultural regulation, instead of classifying it as a non-legislative legal basis, might also have been political as could have been the case with competition and state aid/.../.³⁰⁵

Liisberg’s explanation accords rather well with the difficulties one encounters in trying to find guidance in the preparatory materials of the Constitutional Treaty. His account means that the division of legal bases of the Constitutional Treaty between those mandating a legislative procedure and those mandating a non-legislative procedure was not principled in any way; it was the result of political bargaining and compromising as well as (perhaps futile) attempts at sticking to initial promises. If that is true, it is difficult to maintain that the 42 legal bases do not mandate special legislative procedures. The Constitutional Treaty’s mandating that those procedures are non-legislative is, on Liisberg’s argument, essentially a happenstance. At the same time his argument in no way changes the meaning of the phrase

³⁰² It is recalled here that under the Constitutional Treaty no doubt could arise of whether a particular procedure mandated by a legal basis constituted a special legislative procedure or not.

³⁰³ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 28

³⁰⁴ The position under the TFEU is the same as under the Constitutional Treaty. Paragraphs 2 and 3 of Article 43 TFEU correspond to paragraphs 2 and 3 of Article III-231 of the Constitutional Treaty.

³⁰⁵ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 29

“in the specific cases provided for” in Article I-35(2) of the Constitutional Treaty or shows that meaning or conclusion reached in respect of or based on it to amount to a happenstance. Nor does it show the role performed by “special legislative procedure” in the Constitutional Treaty to be a happenstance. It is submitted that this clearly points to choosing to maintain the historic ties with the meaning of the phrase “in the specific cases provided for” rather than with whether a particular legal bases mandated a special legislative procedure or a non-legislative procedure. While it would extend the field of application of the two protocols giving a modicum of supervisory powers to national parliaments, it is submitted that, first, it is simply a necessary corollary of the choice motivated by other reasons and, second, it would hardly be problematic or indeed undesirable.³⁰⁶ Thus Liiberg’s account, which gains force from an overview of the preparatory materials of the Constitutional Treaty, supports the conclusion that the 42 legal bases do mandate special legislative procedures.

There seems to be one further difficulty with concluding that the GC was correct in Case T-512/12 rather than in case T-121/10. The difficulty may easily be gleaned from the wording of Articles 349(1) and 352(1) TFEU.

Article 349(1) TFEU: Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

Article 352(1) TFEU: If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

Each of these provisions seems to mandate two alternative procedures. One is called a special legislative procedure, the other one isn’t. In either case the two procedures are identical. In either case both procedures fill the requirements set by Article 289(2) TFEU for special legislative procedures (if one does not consider reference to “the specific cases provided for”

³⁰⁶ Looked at from the perspective of EU law, the same could be said about the possibility of replacing those procedures with ordinary legislative procedures pursuant to art 48(7)(2) TEU which would arise should those procedures constitute special legislative procedures.

to be such a requirement). In either case the only words which distinguish the two procedures are “in accordance with a special legislative procedure”.

It could be argued that if the first sentences of these two provisions already mandated a special legislative procedure, their second sentence would be otiose.³⁰⁷ More significantly it shows starkly that if the 42 legal bases do mandate special legislative procedures, then

(i) the mention of a special legislative procedure in any legal bases which contain it is otiose because the procedure would have been a special legislative procedure even without the mention and

(ii) the words “In the specific cases provided for in the Treaties” in Article 289(2) TFEU are otiose because they do no more than repeat the meaning of the words “the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament” in as much as the specific cases are those when the procedures set forth in the legal bases mandate “the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament” regardless of how that requirement is formulated or arrived at.

There is only one authority of the CJEU which mentions this issue: advocate general Wahl in his opinion in joined cases C-132-136/14³⁰⁸ mentions this point in relation to Article 349(1) TFEU.

Lastly, however, one amendment brought about by the Treaty of Lisbon has unfortunately muddied the waters. I refer to the seemingly anodyne reference in the first paragraph, second sentence of Article 349 TFEU to the possibility that ‘specific measures ... [might be] adopted by the Council in accordance with a special legislative procedure’. For one thing, it seems to me that Article 349 TFEU itself constitutes a special legislative procedure under Article 289(2) TFEU. Still, commentators disagree on the implications of this sentence, as did the parties and interveners during their oral argument. However, in the present cases, it is not necessary to settle that point authoritatively.

³⁰⁷ There is in fact a third provision with a similar structure in the TFEU: Article 203.

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

However, in case of Article 203 TFEU there is no risk of the second sentence being otiose because the first one does not mandate the same procedure as the second one. The Parliament does not participate in the procedure set forth in the first sentence, while it must participate in the procedure set forth in the second sentence. Hence the provision would essentially seem to give the Council a choice whether to adopt itself “the rules and the procedure for the association of the countries and territories with the Union” or to involve the Parliament in the adoption.

³⁰⁸ *European Parliament and European Commission v Council of the European Union*, paragraph 52

Advocate general Wahl did not seek to settle the point at all. One of the commentators (Perrot) he alluded to opined

that this ‘sibylline’ sentence aims to overrule other special legislative procedures which lay down voting requirements stricter than those which follow from Article 16(3) TEU (qualified majority),

although another one (Omarjee) took the contrary view. Yet a third one (Ziller) argued that the

sentence ought to be understood in the light of the wording of Article III-330 of the Constitutional Treaty, which referred to certain categories of legislative acts within a new hierarchy of norms arguably corresponding, under the Treaty of Lisbon, to the triptych consisting of legislative, delegated and executive acts.³⁰⁹

It is unclear how either sentence of Article 349(1) TFEU could overrule any special legislative procedure laying down stricter voting majorities: both sentences provide for voting by qualified majority which is the voting majority prescribed by Article 16(4) TEU. By virtue of Article 16(3) TEU that voting majority applies to any action of the Council (whether it is acting via an ordinary legislative procedure or a special legislative procedure or a clearly non-legislative procedure) unless a particular provision provides otherwise.³¹⁰ Thus reference to special legislative procedure in Article 349(1) TFEU is simply irrelevant for the purposes of voting majorities, be it the applicable ones or the ones which would be applicable but for that reference. As for Ziller’s point, it is just as unclear how references to European laws and European framework laws in Article III-330 of the Constitutional Treaty could correspond to all of legislative, delegated and executive acts under the TFEU. Perhaps even more unclear is the relevance of Article III-330 of the Constitutional Treaty: that was the legal basis for establishing the rules for the election of the Parliament.³¹¹

As for the arguments of the parties which advocate general Wahl alluded to,

the *Council* and the *Kingdom of Spain* submitted, on the basis of the historical interpretation of Article 349 TFEU, that the purpose of that sentence is to give the Council the possibility of adopting specific measures both in the form of legislative and non-legislative acts. The *Portuguese Republic* took the view that the aim of that sentence is to give priority to Article 349 TFEU over other special legislative procedures while the *French Republic*, in contrast, submitted that said aim is to cumulate the requirements of those procedures. The *Commission* disagreed with all

³⁰⁹ See footnote 18 of the opinion of advocate general Wahl in joined cases C-132-136/14.

³¹⁰ Article 238(1) TFEU is such a provision, but it applies only when the Commission does not hold the privilege of initiative. The Commission does hold that privilege under both the first and the second sentence of Article 349(1) TFEU (the same is true of Article 352(1) TFEU).

³¹¹ Reading Ziller’s essay to which advocate general Wahl referred does not clarify any of these points. See Jacques Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in Dimitry Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Wolters Kluwer 2011), pages 69 – 88. It should be noted that Ziller does suggest (on page 74) that the intention of both the Convention on the Future of Europe and of the Lisbon IGC was to preserve the substance of Article 299(2) EC without making any changes to it.

these views, arguing, *inter alia*, that the distinction between a legislative and a non-legislative act does not equate to the dichotomy ‘primary/secondary EU law’.³¹²

It is at best unclear how reference to a special legislative procedure in some paragraph could give that procedure priority over other special legislative procedures in other provisions. If what Portugal meant was that the aim was to give the particular special legislative procedure priority over other possible special legislative procedures in respect of the legal basis in question, *i.e.* to apply that special legislative procedure (rather than some other special legislative procedure) to that legal basis, then it still does not explain why the two-sentence structure was needed. The question is not why that particular version of special legislative procedure was chosen, but why the second sentence providing for that special legislative procedure was inserted into Article 349(1) TFEU seeing that the first sentence provided for the same procedure albeit without calling it a special legislative procedure.

A similar lack of clarity obtains in relation to the suggestion of France: the procedures the requirements of which were said to have been cumulated are, in terms of requirements, the same. If accumulation was nevertheless the aim, why was that set as the aim? The Commission’s view that “the distinction between a legislative and a non-legislative act does not equate to the dichotomy ‘primary/secondary EU law’” is understandable (both procedures provide for adoption of acts directly on the basis of the constitutive treaties), but it does not help one much further. It assumes as given that the first sentence mandates a non-legislative procedure rather than a special legislative one; it does not seek to explain that assumption.

The position of the Council and Spain is perhaps the only rationally understandable one. Essentially, they argue, Article 349(1) TFEU grants the Commission, the Council and the Parliament an option to decide whether to make the resulting act subject to national parliaments’ supervision or not. National parliaments’ supervision over EU acts is set forth in Protocol (No 1) on the Role of National Parliaments in the European Union and in Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. Such supervision exists only in relation to legislative acts. In fact when viewed independently (as opposed to considering supervision point as an argument in dealing with the historical connection between the Lisbon Treaty and the Constitutional Treaty) this is probably the strongest argument of all for suggesting that the 42 legal bases are not legislative: the constitutive treaties could be said to not mention special legislative procedure in these legal bases precisely to avoid the supervision by national parliaments. The difficulty with this argument is that there is simply no evidence of that being the intention: as Liiberg suggested, it would seem that the choice between special legislative procedures and substantively similar non-legislative procedures in the Constitutional Treaty (where these legal bases mandated a non-legislative procedure) was simply not conditioned by this consideration.

In any case, even if it the argument advanced by the Council and by Spain could be ultimately correct in respect of Article 349(1) TFEU, it would still fail to deal with the similar

³¹² See footnote 18 of the opinion of advocate general Wahl in joined cases C-132-136/14. The sentence referred to in the quotation is the second sentence of Article 349(1) TFEU – see paragraph 52 of the opinion of advocate general Wahl in joined cases C-132-136/14.

structure of Article 352(1) TFEU. Paragraph 2 of Article 352 TFEU makes Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality (which contains the bulk of supervisory powers of national parliaments³¹³) applicable to any act adopted on the basis of paragraph 1 of Article 352 TFEU.

Looking at the drafting history of Articles 349(1) and 352(1) TFEU, of their predecessors – be in the EC Treaty³¹⁴ or in the Constitutional Treaty³¹⁵ – only the Constitutional Treaty predecessor of Article 349(1) TFEU contained something similar mandating adoption of European laws or European framework laws (in either case by a special legislative procedure) or European regulations or European decisions. It may thus be suggested that the “mess” which Article 349(1) TFEU finds itself in might result from rewriting that provision into the language of the TFEU which does not provide for different instruments – not even by name – for acts adopted via a special legislative procedure, on the one hand, and those adopted via a non-legislative procedure, on the other. Looking at the preparatory materials of the Lisbon Treaty that would not seem to be the case, however.

In the draft of the Lisbon Treaty dated 23rd July 2007³¹⁶ paragraph 2 of Article 299 EC (which would later become Article 349(1) TFEU) which had read as follows:

[h]owever, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies[,]

was to be amended as follows:

at the beginning of the first paragraph, the word "However," shall be deleted and the words "the French overseas departments" shall be replaced by "Guadeloupe, French Guiana, Martinique, Réunion"; the following sentence shall be added at the end of the paragraph: "Such acts shall take the form of legislative acts where the legal basis for

³¹³ As far as normative acts of the EU are concerned Protocol No 1 does not contain virtually anything which is not already part of Protocol No 2. The only possible exception is the effect of the 8-week period. Article 4 of Protocol No 1 explicitly excludes adoption during that period of an act the draft of which has been forwarded to national parliaments, other than in urgent cases. Article 6 of Protocol No 2 simply says that national parliaments have eight weeks to issue their opinions in respect of such drafts. While Protocol No 2 contains no explicit ban on adoption of the act during that 8-week period, the better opinion is that when read as a whole Protocol No 2 does prohibit such adoption. Otherwise its provisions would become moot, *e.g.* it would be impossible to reconsider the draft should the need to do so arise (Article 7) nor could the further procedural requirement contained in sub-paragraphs a and b of paragraph 3 of Article 7 be met if the act could be adopted during the 8 weeks given to national parliaments to issue their opinions.

³¹⁴ Articles 299(2)(1) and 308, respectively

³¹⁵ Articles III-424(1) and I-18(1), respectively

³¹⁶ CIG 1/07, see paragraph 289

the adoption of Union measures in the area concerned provides for the adoption of legislative acts."

The meaning of "legislative acts" was given in paragraph 239 of that draft.

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article [III-396].
2. A special legislative procedure shall consist in the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.
3. Legal acts adopted by legislative procedure shall constitute legislative acts.

Thus it would seem that the objective of the addition of what became the second sentence of Article 349(1) TFEU was not to give the EU institutions a choice as essentially seems to have been suggested by the Council and by Spain in joined cases C-132-134/14. The objective was that when the application of EU law to the remote areas was being determined (that determination is what Article 349 TFEU regulates), the act determining the application should be adopted via the same procedure as the act the application of which was being extended.

In the draft of 5th October 2007,³¹⁷ the wording of the second sentence of what became Article 349(1) TFEU assumed the form it would ultimately take. The documents available on the website of the 2007 IGC contain no explanation of the change. Therefore, without more, it is impossible to opine with any certainty whether the change was

- simply a horribly executed rephrasing without any change of the meaning compared to the July draft or
- intended to simplify the procedure set forth in the July draft by making a particular special legislative procedure applicable to all acts which determined the application of legislative acts and keep a non-legislative procedure applicable to acts determining application of all other acts (with the outcome of Protocols Nos 1 and 2 applying to the former, but not the latter³¹⁸) or
- a horribly drafted attempt at bringing the text back in line with Article 299(2) EC (as suggested by Ziller³¹⁹) or
- made for some other reason.

³¹⁷ CIG 1/1/07 REV 1, paragraph 287

³¹⁸ The difference from the position advocated by the Council and by Spain in joined cases C-132-136/14 is that it would be predetermined by Article 349(1) TFEU itself whether the protocols would apply to the act of extension or not; it would not lay within the discretion of the EU institutions adopting the act of extension.

³¹⁹ Jacques Ziller, *Outermost Regions, Overseas Countries and Territories and Others after the Entry into Force of the Lisbon Treaty*, in Dimitry Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Wolters Kluwer 2011), page 74

Subsequent case-law of the ECJ, however, indicates that probably neither the first nor the second explanation for the change is correct. One of the instruments challenged (by the Commission) in the already mentioned joined cases C-132-136/14 was Council Directive 2013/62/EU of 17 December 2013 amending Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, following the amendment of the status of Mayotte with regard to the European Union. According to directive 2013/62 itself it was adopted via special legislative procedure. It contained one substantive provision (Article 1).

In Article 3(2) of Directive 2010/18/EU, the following subparagraph is added:

‘By way of derogation from the first subparagraph, the additional period referred to therein shall be extended to 31 December 2018 as regards Mayotte as an outermost region of the Union within the meaning of Article 349 TFEU.’

Thus it determined how some other instrument of EU law was to apply to Mayotte. The other instrument – directive 2010/18 – was a directive of the Council alone, adopted on the basis of Article 155(2) TFEU. Hence it was not a legislative act nor was it adopted via any legislative procedure.³²⁰ If the meaning of Article 349(1) TFEU remained the same as it was in the draft of 23rd July 2007 or if the idea remained the same with the change occasioned by the aforescribed desire for simplification, directive 2013/62 should have been annulled: it determined the application of an act, which had been adopted via a non-legislative procedure, yet directive 2013/62 was adopted on the basis of the second, not the first, sentence of Article 349(1) TFEU. The Grand Chamber of the ECJ deciding the case dismissed all applications holding the acts, including directive 2013/62, valid. Admittedly the case was never put this way nor did the ECJ directly engage with the point, but that does not change the final outcome.

As for what became Article 352(1) TFEU, the draft of 23rd July 2007 did not change Article 308 EC much (aside from prescribing that the Parliament must consent to the adoption of measures instead of being consulted as was the case under Article 308 EC).³²¹ The wording of the provision corresponded verbatim to the wording of the first sentence of Article 349(1) TFEU. In the draft of 5th October 2007 the text remained the same – except that a second sentence was added. The wording of the second sentence corresponded verbatim to the wording of the second sentence of Article 349(1) TFEU.³²² That was the way the wording of Article 352(1) TFEU came about. The documents available on the website of the 2007 IGC contain no explanation of the addition. What is clear is that the idea behind it could not have been something akin to the *ratio* of the wording in the July draft of what became Article 349(1) TFEU. No measure adopted on the basis of Article 352 TFEU has any corresponding or related measure adopted on some other legal basis.

³²⁰ While the procedure “involved” the Parliament, the Parliament was only informed with the result that the procedure was non-legislative. See the judgment of the GC in case T-160/13 mentioned in the text to footnote 260.

³²¹ See paragraph 291 of the draft.

³²² See paragraph 289 of the draft.

The overview of drafting history of Articles 349(1) and 352(2) TFEU and of the case-law of the ECJ seems therefore unable to explain the interplay of the first and second sentence of either provision, although various arguments are available. At this point it would be tempting to conclude that the 42 legal bases should not be considered as mandating a special legislative procedure, because (a) doing so would render otiose certain parts of Article 289(2) TFEU as well as of the 36 legal bases mentioning explicitly a special legislative procedure, not to mention first sentences of Articles 349(1) and 352(1) TFEU, and (b) it could be argued that the lack of any mention in them of a special legislative procedure is intended to disapply Protocols Nos 1 and 2 in relation to the acts adopted on their basis (to the extent that this is a separate point from (a)). Thus the GC was correct in its order in case T-121/10 after all.

However, that disregards that (i) there is no evidence of any intention to effect such a distinction in application of Protocols Nos. 1 and 2, (ii) the tentative conclusion reached above in this section 2.3.3 immediately prior to engaging with the issue of Articles 349(1) and 352(2) TFEU and (iii) that the correctness of the position proffered in the order in case T-121/10 in no way explains the drafting of both Article 349(1) TFEU and Article 352(1) TFEU (it could conceivably explain only the former). More importantly point (a) made in the preceding paragraph is conclusion-neutral and point (b) could be seen as being less weighty considering some of the consequences which would flow if the 42 legal bases mandated special legislative procedures.

Point (a) is conclusion-neutral for two reasons. First, there are plenty of provisions of the constitutive treaties which are otiose. Both Article 349(1) TFEU and Article 352(1) TFEU say that if an act is adopted on their basis via a special legislative procedure, that is to be done on a proposal of the Commission. These references to the proposal of the Commission are otiose because by virtue of Article 17(2) TEU that is in any case so; if it is not then the resulting acts are not legislative.³²³ Article 50(2) TEU could be another example of a provision part of which is otiose. It states that the Council is to act by qualified majority. Pursuant to Article 16(3) TEU that is so in any case unless the constitutive treaties provide otherwise. In fact, in view of Article 16(3) TFEU any provision of the constitutive treaties mandating that the Council act by qualified majority is otiose. Thus, a provision of the constitutive treaties being otiose is not something extraordinary, let alone significant enough to condition construction of some provision of the constitutive treaties.

Second, if one assumes that a provision of the constitutive treaties being otiose is nevertheless important, concluding that the 42 legal bases do not mandate a special legislative procedure does not mean that nothing is rendered otiose. That conclusion renders otiose the following words of Article 289(2) TFEU:

³²³ Under Article 17(2) TEU the Commission holds a privilege of initiating adoption of legislative acts as opposed to initiating legislative procedures. In view of the judgement of the ECJ in case C-77/11 (discussed at length in section 2.2.1 above) a legislative procedure need to result in a legislative act. However, if the legislative procedures mentioned in second sentences of Articles 349(1) and 352(1) TFEU do not result in legislative acts, then Protocols Nos 1 and 2 do not apply to such acts (those protocols apply to legislative acts, not to legislative procedures). That would make the second reason for concluding that the 42 legal bases are not legislative acts disappear.

the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.

If a legal basis mandates a special legislative procedure only when it expressly mentions a special legislative procedure, there is simply no need to specify in general any aspect of that procedure. Such specification might have made sense if creation of secondary legal bases were lawful (in that case the words could have been read as prescribing what conditions a procedure set forth in a legal basis needed to meet to be capable of being lawfully designated as a special legislative procedure), but it is not.³²⁴

Point (b) is less weighty than might initially seem, because if the 42 legal bases mandated special legislative procedures, it would explain the meaning, some would say the existence, of the third sentence of Article 24(1)(2) TEU as well as of Article 31(1)(1) TEU.

Article 24(1)(2) TFEU: The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. ***The adoption of legislative acts shall be excluded.*** The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

Article 31(1)(1) TEU: Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. ***The adoption of legislative acts shall be excluded.***

The sentence rendered in bold italics has stumped commentators³²⁵ because no CFSP legal basis expressly says that the adoption of acts is to occur via a legislative procedure, and Article 289 TFEU contains no words which would exclude its application to CFSP (which would enable the argument that in Articles 24(1)(2) and 31(1)(1) TEU “legislative acts” means something other than what is meant by that term in Article 289 TFEU). Two legal bases among the 42 deal with CFSP: Articles 27(3) and 41(3)(1) TEU. Only the 42 legal bases’ mandating special legislative procedures explains the meaning of Article 24(1)(2): while the acts adopted on the basis of Articles 27(3) and 41(3)(1) TEU are adopted via special legislative procedures and are decisions, no consequences flow from that since the

³²⁴ See the judgment of the ECJ in case C-133/06 *European Parliament v Council of the European Union*, paragraph 56

³²⁵ See Terpan, Böttner and Wessel in Hermann-Josef Blanke and Stelio Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (Springer 2013), paragraphs 24-16 and 31-13 to 31-15, and Piet Eeckhout, *EU External Relations Law* (2nd edn., OUP 2011), pages 478 and 479

resulting acts are not legislative, *viz.* Protocols Nos. 1 and 2 nevertheless do not apply to such acts.

A similar argument could be made in respect of Article 5 of Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

A Member State which is not bound by a measure adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union shall bear no financial consequences of that measure other than administrative costs entailed for the institutions, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Why does that provision speak of members of the Council rather than the Council? It could be argued that this difference in wording is what precludes the procedure from being a special legislative procedure with the result that Protocols Nos 1 and 2 (nor Article 16 TEU for that matter) would apply. This seems one of the few possible explanations, if not the only one, of the difference in wording which explanation actually ascribes any consequences to the difference. The same point could be made in respect of Article 332 TFEU which uses the same wording (*viz.* it refers to the decision by members of the Council as opposed to the Council). That would, admittedly, mean that there are not 42, but 40 of these “other” special legislative procedures (Article 5 of Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice was included on the list of 42).

Thus the conclusions seemingly reached on the basis of consideration of Articles 349(1) and 352(2) TFEU are ultimately nullified.

To sum up, while arguments may be presented for different views, the better view might be thought to be that espoused by advocate general Wathelet in his opinion in case C-104/16P and by the GC in its judgment in case T-512/12. Any procedure which mandates

the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament,

is a special legislative procedure. Thus there are in total some 76 legal bases in the constitutive treaties which legal bases mandate a special legislative procedure. Four consequences flow from this conclusion. First, some 11 legal bases of the 40 (which do not use the words “special legislative procedure”) did not mention the holder of the privilege of initiative.³²⁶ If each of these legal bases mandates a special legislative procedure, then – under Article 17(2) TEU – by default the holder of the privilege of initiative is the Commission (at least when the act being adopted is a regulation, a directive or a decision). The second consequence is that the list of entities holding the privilege of initiative of a

³²⁶ Articles 41(3)(1), 49 and 50(2) TEU, Articles 150(1), 160(1), 246(2), 286(2)(1), 332 and 333(2) TFEU as well as Article 9 the Annex to Protocol (No 22) on the Position of Denmark and Article 6(1) of Protocol (No 31) Concerning Imports into the European Union of Petroleum Products Refined in the Netherlands Antilles

special legislative procedure is extended: Article 27(3) TEU grants that privilege to the High Representative.³²⁷ The third is that three new entities appear on the list of entities whom it might be necessary to consult over a course of a legislative procedure: the Employment Committee,³²⁸ the Economic and Financial Committee³²⁹ and the European Council.³³⁰ Finally, this conclusion “adds” to the list of legal bases mandating a legislative procedure which expressly require the consent of an entity other than the Council or the Parliament for the resulting act to become adopted: Article 27(3) TEU requires the consent of the Commission, Article 81(3)(2) TFEU essentially requires the consent of the national parliament of each member state (Article 81(3)(4) grants each of them a veto) and Article 140(2)(1) TFEU essentially requires the consent of the Article 238(3)(a) majority of the member states whose currency is the euro.

2.3.4. Substance

Turning to the side of substantive law the questions which were posed in respect of ordinary legislative procedures could be rephrased for special legislative procedures thus.

1. What areas of competence (exclusive, shared, supporting, coordinating, complementary) do the legal bases requiring the use of special legislative procedures belong to?
2. What subject matters do the legal bases requiring the use of special legislative procedures regulate?
3. Is there any pattern behind the use of different special legislative procedures?

As we saw in section 2.2.2.1 every area of competence has legal bases which mandate some procedure other than a special legislative one. At least one legal basis mandates a special legislative procedure in the following areas of competence:

- area of exclusive competence – Article 127(6) TFEU (conferral on the ECB of tasks regarding policies related to prudential supervision of financial institutions other than insurance companies);
- area of standard shared competence – Article 115 TFEU (approximation of laws directly affecting the establishment or functioning of the internal market);
- area of shared competence with no pre-emption – Article 182(4) TFEU (specific R&D programmes) and
- area of “political” coordinating competence – Article 148(2) TFEU (adoption of guidelines for employment policies of member states³³¹).

³²⁷ Furthermore the list of legal bases granting a privilege of initiative of special legislative procedure to someone other than the Commission is widened. Article 7(1) TEU for instance grants that privilege to any of the Commission, one third of member states and the Parliament.

³²⁸ Article 148(2) TFEU

³²⁹ Article 134(3) TFEU and Article 6 of the Protocol (No 13) on Convergence criteria

³³⁰ Articles 121(2), 140(2)(1) and 148(2) TFEU

³³¹ On condition that the 40 legal bases do mandate a special legislative procedure. There is no legal basis among the 36 legal bases which explicitly mention a special legislative procedure which legal basis would come within the area of “political” coordinating competence.

Conspicuous by its absence from the list is the area where the EU is only competent to support, coordinate and supplement the actions of member states. There are no legal bases within that area of competence which would mandate a special legislative procedure. On the other hand, two legal bases (Articles 27(3) and 41(3)(1) TEU³³²) do mandate a special legislative procedure within the area of CFSP (Article 2(4) TFEU). That was the only type of competence explained in Article 2 TFEU in the area of which there was no legal basis mandating ordinary legislative procedure. Finally, it is worth mentioning that there are examples of both ordinary and special legislative procedure being mandated not simply within the same area of competence, but by the same article. Article 192 TFEU, setting out legal bases for adoption of measures for the protection of the environment, is an especially good example in this respect for in paragraph 1 it mandates an ordinary legislative procedure, in paragraph 2(1) it mandates a special legislative procedure which is called a special legislative procedure and in paragraph 2(2) it mandates the very same special legislative procedure as in paragraph 2(1), but in paragraph 2(2) it is not called a special legislative procedure.

It is therefore possible to conclude that in every area of competence of the EU there is a legal basis mandating what is denoted in Article 289 TFEU as a legislative procedure.

Moving on to subject matters in respect of which special legislative procedures are employed, there seems to be no very good reason for giving much consideration to interaction of ordinary and special legislative procedures as far as the subject matters in respect of which they are employed are concerned. That is occasioned by Article 48(7)(2) TEU.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Thus, as far as European law is concerned, any use of a special legislative procedure *vis-à-vis* an ordinary legislative procedure is at least potentially fleeting: as a matter of law (if not as a matter of politics) any special legislative procedure could always be replaced by an ordinary legislative procedure. There are further four such switching clauses, commonly known as *passerelles*, in the constitutive treaties: in Article 81(3)(2) TFEU, Article 153(2)(4) TFEU, the aforementioned Article 192(2)(2) TFEU and Article 333(2) TFEU.³³³ However, unlike Article 48(7)(2) TEU, which empowers the European Council to perform the switch, those three *passerelles*, which admittedly have much more limited extent enabling in each case only the change of procedure prescribed by one single legal basis, mandate that the switch be made by an instrument which the Council adopts via a special legislative procedure. The

³³² On condition that the 40 legal bases do mandate a special legislative procedure. There is no legal basis among the 36 legal bases which explicitly mention a special legislative procedure which legal basis would come within the area of CFSP.

³³³ There are further *passerelles* in Article 48(7)(1) TEU and Article 312(2)(2) TFEU, but unlike others they merely enable changing the requisite voting majorities in the Council from unanimity to qualified majority; they do not enable switching from a special legislative procedure to an ordinary one. The entity empowered by Article 48(7)(1) TEU and by Article 312(2)(2) TFEU to enact the switch is the European Council.

flowing relationship between ordinary and special legislative procedure, and as far as question 3 is concerned, a lack of pattern resulting from the flowing nature of the relationship, is further demonstrated by Article 64 TFEU. Its paragraphs 2 and 3 read as follows.

Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Thus, essentially a step forward in liberalisation may be made only via an ordinary legislative procedure, while a step back from the position reached may be made via a special legislative procedure – and the one not granting the Parliament any veto at that.³³⁴

Two more matters may be observed as regards substance. First, certain legal bases which mandate a special legislative procedure would not seem to enable adoption of normative acts at all. Article 246(2) TFEU could serve as an example here: it is the basis for replacement of a member of the Commission. Article 7(1) TEU could be another: it is the basis for deciding that there is a risk that a particular member state might gravely violate the values of the EU. This further demonstrates the disconnect between what Article 289 TFEU calls a legislative procedure and the substance of the resulting act: the act could equally be a one-off, with no normative content, or have normative content, yet in both cases still need to be adopted via a legislative procedure.

Second, the same disconnect is even further demonstrated by the *passerelles* mandating a special legislative procedure and by provisions enabling the amendment of statutes of EU institutions which statutes are contained in protocols to the constitutive treaties³³⁵ (as opposed to provisions enabling the regulation of some aspect of the structure of an institution without amending its statute). If the question was looked at from a perspective of national law whence the term “legislative” comes from, such amendments would not substantively be legislative;

³³⁴ The origin of this “relationship” between legislative procedures seems to be Article III-157 of the Constitutional Treaty. However the positive-law predecessor of Article 64 TFEU, Article 57 EC, would not seem to have contained such a relationship. While it mandated a non-legislative act altogether, it seems to differ further from Article 64 TFEU in as much in the latter the step forward is more difficult to make (consent of more parties is required), while in Article 57 EC it was the step back which was more difficult to make: the making of a step forward required the agreement of qualified majority of the Council, while a step back could be made only if the Council decided to do so unanimously.

³³⁵ Articles 129(3), 308(3) and 129(4) TFEU as well as Articles 40.1 and 41 of Protocol (No 18) on the Statute of the European System of Central Banks and of the European Central Bank

they would be constitutional. In this sense the acts adopted on the basis of these provisions are more akin to those which might be adopted on the basis of paragraphs 2 to 6 of Article 48 TEU which received so much criticism from the German Constitutional Court.³³⁶ It further shows that there is no substantive criterion for the acts resulting from what Article 289 TFEU calls a legislative procedure which criterion would bear upon the procedure being legislative or not (within the meaning of Article 289 TFEU); there are situations in which the constitutive treaties mandate that a non-normative or what would in a nation state be a constitutional act result.

When considering in general questions 2 and 3 formulated above, it should be noted that it has never been suggested that only special legislative procedures should be considered “legislative”. The traditional position is that “legislative procedures” is a group made up of special legislative procedures and ordinary legislative procedures. Less traditional approaches, which do not dispense with the ordinary vs special distinction altogether (as any approach mandating a purely substantive notion of legislation does³³⁷), have been suggested by commentators (for instance by Türk) but they have always included ordinary legislative procedure in the group of “legislative procedures”; it was always (some part of) special legislative procedures which were left out.

While Türk included some special legislative procedures among his “legislative” group,³³⁸ an approach which would seem to deem only ordinary legislative procedures to be “legislative” has been suggested by Eva Nieto-Garrido and Isaac Martin Delgado.³³⁹ Writing about the Constitutional Treaty, they start by opining that

there are not one but several basic legislative procedures, and the adoption of a particular procedure is not based on any systemic logic but seems to depend on diplomatic negotiations during the successive reforms of the Treaties.³⁴⁰

They then divide the normative instruments which the EU could adopt into legislative and non-legislative ones.³⁴¹ They opine that primary law (by which they seem to mean European laws or European framework laws)

will be adopted via the ordinary legislative procedure.³⁴²

Thus

[t]he elimination of the pillar structure and the introduction of the principle of hierarchy of norms has the result that in areas where fundamental rights are at stake, the relevant matter will be regulated by European law or framework law. According to this criterion, norms that may have an impact on fundamental rights will be

³³⁶ The Lisbon Treaty Judgment (BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08)

³³⁷ See, for instance, the paper by Mr Matti Vanhanen, Working document 24 of Working Group IX (15th November 2002) where he advocated substantive approach to the issue of legislative vs non-legislative.

³³⁸ See section 2.3.2 above.

³³⁹ European Administrative Law in the Constitutional Treaty (Hart 2007)

³⁴⁰ European Administrative Law in the Constitutional Treaty (Hart 2007), page 3

³⁴¹ European Administrative Law in the Constitutional Treaty (Hart 2007), page 3

³⁴² European Administrative Law in the Constitutional Treaty (Hart 2007), page 3

established through the ordinary legislative procedure in which the Council and the Parliament will act as co-legislators.

The logic behind the Union's normative system in this field enables us to draw the conclusion that the criterion to be used in deciding which normative instrument should be used in a particular policy will not only depend on whether the act contains a basic policy choice, but also on whether the act may have an impact on fundamental rights.³⁴³

Essentially they seem to conclude that only European laws and European framework laws adopted via an ordinary legislative procedure (co-decision) are "legislative". It is difficult to choose where to commence the criticism of such a position: there are so many possibilities. First, the statement that primary law will be adopted only via ordinary legislative procedure (co-decision) is wrong in law: Article I-34(2) of the Constitutional Treaty enabled its adoption via a special legislative procedure. Not all such procedures required consent of the Parliament (see the aforementioned Article III-126(1) of the Constitutional Treaty); hence the Council and the Parliament are in no way equal.

Second, even if the position of Nieto-Garrido and Delgado should be understood as positing that only those European laws and European framework laws which are adopted via an ordinary legislative procedure constitute primary laws, it still does not follow that norms affecting fundamental rights are adopted only via ordinary legislative procedure. The opposite is true, in fact. In its judgment in case C-501/11P³⁴⁴ the ECJ held that competition law affects fundamental rights. No instrument of competition law is currently adopted via an ordinary legislative procedure or was to be adopted via an ordinary legislative procedure under the Constitutional Treaty (see Articles III-161 to III-166, specifically Article III-163). Thus the logic which Nieto-Garrido and Delgado allege to exist behind the EU's normative system, simply does not exist.

Generalising the problem of their approach, it is the same as that of virtually any other approach which says that only part of legislative procedures (within the meaning of Article 289 TFEU) are "legislative" or result in legislative acts. Such approaches assume some substantive criterion for the acts resulting from a legislative procedure (here the criterion is interference with fundamental rights). However, as we saw Article 289 TFEU lacks any substantive criteria whatsoever for the acts resulting from those procedures. Hence all such approaches are ultimately destined to fail as a matter of positive law.

There is only one way in which a similar approach could be constructed without positing some substantive criterion for the acts resulting from legislative procedures. Essentially it amounts to positing that some procedural aspect is so important that without that aspect the procedure cannot be legislative (that would be one possible understanding of the approach proposed by Türk³⁴⁵). Yet such approaches ultimately fail for at least one of two reasons: (i)

³⁴³ European Administrative Law in the Constitutional Treaty (Hart 2007), page 3

³⁴⁴ *Schindler Holding Ltd and Others v European Commission*

³⁴⁵ See section 2.3.2 above.

the choice of alleged procedural imperative cannot be successfully justified, at least not without reference to some substantive criterion (which is ordinarily, if not always, extra-legal), probably in respect of the acts resulting from the procedure (and Article 289 TFEU lacks any such criteria), or (ii) it is unclear what the approach brings to the table, *e.g.* any approach saying that only a procedure where the Parliament does have an ability to veto particular provisions of the resulting act is legislative. If one discards substantive criteria and substantive explanations of any such approach, any such approach essentially amounts to the same one already employed by the constitutive treaties: it ties “legislativeness” to some procedural step(s); the difference would lie simply in choosing a different place where to put the dividing line between two procedures one of which is called “legislative” and the other not.

For present purposes the lack of approaches advocating that only special legislative procedures are actually “legislative” obviates the need to go into a detailed consideration of subject matters which are regulated by the legal bases mandating special legislative procedures. It would serve no useful purpose here. The objective of the present thesis is to analyse legislative acts of the EU. It has already been demonstrated in section 2.2.2.2 that a legislative procedure (specifically an ordinary legislative procedure) is employed in respect of various subject matters. Any finding in respect of special legislative procedures (whether they are or are not employed in respect of various subject matters) will not change the conclusion reached there: that legislative procedures within the meaning of Article 289 TFEU are employed in respect of various subject matters. A finding specifically in respect of employment of special legislative procedure might have been important had there been a cogent argument to the effect that only special legislative procedures are “legislative”, but no argument to that effect (whether cogent or not) seems to have ever been made, or had the analysis of ordinary legislative procedures shown that they are employed only in respect of some particular subject matters.

The same point may be made *mutatis mutandis* in respect of question 3, *viz.* whether there is a pattern behind the use of different special legislative procedures. In any event, as discussed in section 2.3.3 above it is most likely that the choice of legal bases which mandate a special legislative procedure was political, not motivated by any systematic argument.

2.4. Conclusions

It may be seen that the constitutive treaties currently (probably³⁴⁶) contain 161 legal bases mandating the use of a procedure which is a legislative procedure within the meaning of Article 289 TFEU. 85 of those mandate an ordinary legislative procedure, and 76 – a special legislative procedure. Neither “ordinary legislative procedure” nor “special legislative procedure” is actually a reference to a procedure; they both denote a class of procedures which have the same basic characteristics (in the case of the former set forth in Articles 289(1) and 294 TFEU and in the case of the latter – in Article 289(2) TFEU).

³⁴⁶ As should be evident from this section 2 the concept of special legislative procedure is everything but clear: different competing opinions as to what does and what does not constitute a special legislative procedure are currently possible without it being possible to conclusively decide which of the competing opinions is wrong.

There are only three commonalities between all legislative procedures:

1. consent of the Council is always needed for adoption of the resulting act;
2. the Parliament always participates in any such procedure;
3. there are no substantive criteria whatsoever for the acts resulting from such procedures.

There is no system to the way legal bases mandating different legislative procedures are distributed in the treaties – be it among the various areas of competence or among the subject matters of different importance or seen from the perspective of different versions of legislative procedures.

The term “legislation” seems to have different meanings in Article 2 TFEU,³⁴⁷ Article 289 TFEU and Articles I-33 (specifically sub-paragraphs 2 and 3 of its paragraph 1) and I-34 of the Constitutional Treaty. No commentator has offered an approach capable of bridging the differences.

What may be concluded from the foregoing treatment? It is submitted that four points of importance may be taken away. **First**, “ordinary legislative procedure” and “special legislative procedure” are nothing more than terms of art employed as shorthands for denoting the procedures described in Articles 289(1) and 294 TFEU (ordinary legislative procedure), and 289(2) TFEU (special legislative procedure). Aside from situations where some particular legal basis expressly says otherwise, nothing more may be attributed to or read into those terms. They bear no connotation at all, and certainly none which could somehow, however remotely, be linked with the common understanding of the meaning of “legislation” under national laws. There is no requirement as to the content of the acts resulting from either ordinary or special legislative procedure.

The “shorthand” nature of the terms becomes especially clear if one considers the issue in a historic perspective. It was shown in section 2.2.1 that as far as what is now called “ordinary legislative procedure” is concerned, content-wise essentially nothing changed with the adoption of the Lisbon Treaty. In the EC Treaty that procedure was called “procedure referred to in article 251”. That term is quite clearly a shorthand. Seeing as content-wise nothing changed, the term “ordinary legislative procedure” simply took the place of the term “procedure referred to in article 251”.

Second, there is no system behind the dispersal of various legislative procedures among the legal bases. Which legal basis mandated which particular procedure (even whether a legislative one or not) seems to have been decided when drafting the Constitutional Treaty and later the Lisbon Treaty as a result of political bargaining and/or compromising within committees and among people charged with drafting which compromises had the quality of not being unacceptable to anyone (rather than being acceptable to all).

³⁴⁷ It is possible that it has the same meaning as in Article 289 TFEU, but then all references to “legislating” in Article 2 TFEU are otiose.

Third, the one pattern which may be thought to exist in the constitutive treaties is somewhat counter-intuitive. The more important the issue is, the likelier it is that a “lighter” procedure is mandated by the constitutive treaties;³⁴⁸ the less important the issue, the less likely it is that a “lighter” procedure is mandated by the constitutive treaties. It is exceedingly difficult, and probably impossible altogether, to find a legal basis of lesser importance which mandates a non-legislative procedure altogether (whether the importance is considered from the perspective of the EU or that of a citizen).³⁴⁹ Special legislative procedures, which are normally seen as “lighter” ones than ordinary legislative procedures, are not mandated by any legal basis in the areas where the EU is only competent to support, coordinate and supplement actions of member states, *i.e.* the area where its competence is the least extensive of any it holds. Ordinary legislative procedures are, however, mandated by legal bases in those areas of competence. The changes to Article 64 TFEU (compared to Article 57 EC)³⁵⁰ seem inexplicable until one realises that the “lighter” the procedure, the higher the relative weight of the Council, and hence of the government of each member state, in that procedure. Just like the higher the majority of votes by which the Council is required to adopt an instrument, the higher the relative weight of the government of each member state. Seen thus, the changes to Article 64 TFEU become easy to understand: both Article 64 TFEU and Article 57 EC provide(d) for the step back to be made via a procedure which gave higher relative weight to the position of the government of each member state. The same is true of the pattern discussed in the beginning of this paragraph. The situation is counter-intuitive, because our intuition, based as it is on nation states in this respect, would suggest that the more important the issue is, the “heavier” the procedure for the adoption of an instrument regulating the issue should be, *i.e.* the more parties should be involved and the lesser the relative weight of those entities which are not seen as directly legitimised (which are not directly elected by the citizens).

Fourth, the introduction into EU law of the language of legislation has sapped what little clarity there was in the system in the first place; it has not brought any noticeable benefits. It is difficult, if not impossible, to develop any structured argument in respect of “legislative” procedures of the EU. When dealing with the issue of legislative procedures, the courts of the EU have openly reached expressly contradictory conclusions (with the contradiction not capable of being construed away, in the cases T-121/10 and T-512/12, for instance), and fudged reasoning (in the case C-77/11).³⁵¹ This very chapter shows that “transparency” is

³⁴⁸ If ordinary legislative procedures are deemed the “heaviest” ones

³⁴⁹ See the end of section 2.2.2.2 above.

³⁵⁰ The article deals with further liberalisation of free movement of capital between the EU and third states. According to Article 57 EC liberalisation measures were to be adopted by the Council acting by qualified majority on proposal of the Commission, while the Council had to act unanimously to make a step back from the level of liberalisation reached, *i.e.* a “lighter” procedure was mandated for making a step forward. According to Article 64 TFEU liberalisation measures are to be adopted via an ordinary legislative procedure, while a step back may be made by the Council via a special legislative procedure in which the Parliament is only consulted and hence has no veto, *i.e.* a “lighter” procedure is mandated for making a step back.

³⁵¹ Joined cases C-132-136/14 are an especially stark example in this respect: two institutions and three member states holding four different opinions between them, each of these four opinions differing from each of three opinions of commentators (which, in turn, differed one from the other with two contradicting each other) referred to by the advocate general whose own position differed, in turn, from each of the preceding seven, and the ECJ ultimately avoiding the point entirely in its judgment. See text to footnote 312.

hardly a word which could conscientiously be employed when speaking of legislative procedures of the EU (*inter alia* we have seen that in spite of Article 289(3) TFEU not all acts adopted via a legislative procedure within the meaning of Article 289 TFEU are legislative). At the same time it is difficult to see what the introduction of the language of legislation changed to any considerable extent (let alone to one which could not have been achieved without speaking of “legislation”),³⁵² and how its introduction has benefitted legitimacy of the EU.

That is the **fifth** point to be taken away: comparing EU law as it stands after the Treaty of Lisbon with how it stood after the Treaty of Nice, there is no conceptual difference as far as substance of EU law on this point is concerned. The use of what are now called ordinary and special legislative procedures was extended to more cases and there was some minor “tinkering” with (some of) those procedures themselves. However, these are merely incremental changes which have been taking place at least since the Treaty of Maastricht (long before “the language of legislation” was introduced into the constitutive treaties). They are incapable of producing “a revolution”. In essence, however, the acts of the EU adopted via what are now ordinary and special legislative procedures continue to be adopted in the same way as they were before the Treaty of Lisbon. It truly does seem that, like Dougan suggested,

[t]he desire to bestow upon the Union a clearer hierarchy of norms, for the sake of enhancing the transparency of its activities, has therefore been undermined by a combination of shallow conception and poor execution.³⁵³

If anything, that is an understatement.

3. Delegated acts and implementing acts

3.1. Introduction

Articles 290 and 291 TFEU were introduced into EU law by the Treaty of Lisbon. Article 290 TFEU reads as follows.

³⁵² Aside from making the law less clear and accessible.

³⁵³ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647. To be fair the problems, which the use the phrase “[i]n the specific cases provided for by the Treaties” in the system created by the Lisbon Treaty was liable to create, might have been understood by the initial drafters of the Lisbon Treaty. Article 249a(2) proposed at paragraph 239 of its first draft (of 23rd July 2007, CIG 1/07) did not contain the following phrase.

A special legislative procedure shall consist in the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.

The second draft (of 5th October 2007, CIG 1/1/07 REV 1) did contain the phrase in paragraph 236. Article 249a(2) read the same way as Article 289(2) TFEU. The documents available on the website of the 2007 IGC contain no explanation of the change.

1. 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.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective "delegated" shall be inserted in the title of delegated acts.

Article 291 TFEU reads as follows.

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 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.

The first evident thing about these two provisions is that delegated act may lawfully be adopted only on the basis of a legislative act, while there is no such limitation in case of implementing acts. Second, "delegated" power may lawfully be granted only to the Commission, while both the Commission and the Council may be grantees of implementing power. Third, a delegated act has to be of general application, while there is no such requirement in respect of implementing acts. It should next be mentioned that as far as the subject-matter of the two articles goes, they essentially replaced – some would argue

developed or revolutionised³⁵⁴ – the old Article 202 EC which was repealed by the Lisbon Treaty. That article read as follows.

To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the Member States,
- have power to take decisions,
- 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.

While Article 202 EC did refer only to the Council omitting any reference to the Parliament which by the time the provision became Article 202 EC had obtained significant law-making powers,³⁵⁵ the provision is a relic of olden times. Times when only the Council had any such powers. It was called then Article 155 EEC; it was simply never updated when the provisions surrounding it were. That did not change much in practice. Under Article 202 EC power was conferred on the Commission by acts adopted by the Parliament and Council jointly.³⁵⁶

It should also be mentioned upfront that the acts referred to in Articles 290 and 291 TFEU may be and are juxtaposed with legislative acts referred to in Article 289(3) TFEU.³⁵⁷ Thus delegated and implementing acts are generically referred to as non-legislative acts. It should, however, be stressed that delegated and implementing acts are not the only non-legislative acts recognised by the constitutive treaties. By virtue of article 289(3) TFEU – which defines legislative acts as acts adopted via a legislative procedure – every single act of the EU which is not adopted via a legislative procedure is a non-legislative act. In addition to delegated and implementing acts these would include, for instance, acts setting forth common customs tariff duties (article 31 TFEU), the acts of the Council referred to in article 43(3) TFEU,³⁵⁸ the acts of the Council referred to in article 66 TFEU,³⁵⁹ directives and decisions which the

³⁵⁴ See section 3.4.3 below.

³⁵⁵ Article 251 EC.

³⁵⁶ For a random example see recital 68 and articles 64 and, for instance, 2(3) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. That directive was an instrument adopted by both the Parliament and the Council. In it power was delegated to the Commission in accordance with the 1999 Comitology Decision (Council Decision (1999/468/EC) of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission) – a decision adopted under the last subparagraph of art 202 EC.

³⁵⁷ It should be recalled that the term “legislative act” is a term of art in the TFEU referring to any act adopted by means of a particular procedure.

³⁵⁸ These concern the common agricultural policy and the common fisheries policy.

³⁵⁹ On emergency measures pertaining to capital flows from third countries.

Commission might adopt under article 106(3) TFEU and decisions establishing data-protection rules applicable within the ambit of CFSP (article 39 TEU).

With that out of the way, let us return to the issue which in the context of this thesis arises in relation to Articles 290 and 291 TFEU. How do Articles 290 and 291 TFEU relate to legislative acts and legislative power? Are the powers referred to in both of them legislative? Or only in one of them? In that case which one? Or might neither article be about a power which is legislative? If the power to which set forth is legislative, are the acts adopted on their basis likewise legislative? If no, then why not? Consideration of these issues brings one squarely to the inter-relationship of Articles 290 and 291 TFEU, of delegated and implementing acts, of delegated and implementing power.

3.2. Overview of case law of the ECJ

3.2.1. *Biocides*

The first case in which the ECJ confronted the issue of “competition” of Articles 290 and 291 TFEU bore the number C-427/12 and the rather prosaic name of *European Commission v European Parliament and Council of the European Union*. The case concerned certain powers which the Parliament and the Council granted³⁶⁰ to the Commission in Article 80 of the Biocides regulation,³⁶¹ and was decided by a Grand Chamber of the ECJ. The judgment came to be known as *Biocides*.

The Biocides regulation set up a regime for approval of biocidal products. To obtain an approval for a product and to then market it certain fees would need to be paid.³⁶² Article 80(1) of the Biocides regulation tasked the Commission with setting those fees.

The Commission shall adopt, on the basis of the principles set out in paragraph 3, an implementing Regulation specifying:

- (a) the fees payable to the [European Chemicals] Agency, including an annual fee for products granted a Union authorisation in accordance with Chapter VIII and a fee for applications for mutual recognition in accordance with Chapter VII;
- (b) the rules defining conditions for reduced fees, fee waivers and the reimbursement of the member of the Biocidal Products Committee who acts as a *rapporteur*; and
- (c) conditions of payment.

The Commission argued that setting those fees required delegated power and should thus have been adopted via a delegated act; that those fees could not be set in exercise of implementing power in an implementing act. Thus, said the Commission, the Parliament and

³⁶⁰ For the purposes of neutrality the verb “grant” is employed.

³⁶¹ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products

³⁶² For instance application fees (arts 7 and 13) and annual fees (art 80(2)).

the Council violated the TFEU by conferring on the Commission an implementing power instead of a delegated one.³⁶³

The Commission submitted that

1. unlike implementing power delegated power is quasi-legislative;³⁶⁴
2. the choice between delegated and implementing power is based on objective and clear factors that are amenable to judicial review;³⁶⁵
3. Articles 290 and 291 TFEU have mutually exclusive scope;³⁶⁶
4. under Article 80(1) of the Biocides regulation the Commission essentially had so large a discretion that what it was asked to do went way beyond simple determination of a fee corresponding to a particular step in the process of approval.³⁶⁷

On every single of these points the ECJ disagreed with the Commission. The Commission lost.

The ECJ started by taking the obvious point that in the TFEU there is no definition of implementing act.³⁶⁸ It then decided that the concept of implementing act must be assessed by reference to the concept of delegated act.³⁶⁹ That was followed by a look back into history: in paragraph 36 the ECJ opined that

the expression ‘implementing powers’ in the third indent of Article 202 EC covered the power to implement, at EU level, an EU legislative act or certain EU provisions and also, in certain circumstances, the power to adopt normative acts which supplement or amend certain non-essential elements of a legislative act. The European Convention proposed making a distinction between those two types of power, which is found in Articles I-35 and I-36 of the Draft Treaty establishing a Constitution for Europe. That amendment was ultimately incorporated in the Treaty of Lisbon in Articles 290 TFEU and 291 TFEU.

What the ECJ did not say is whether either of the two powers – delegated and implementing – is “quasi-legislative” as was contended by the Commission.³⁷⁰ The ECJ rather thought 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,³⁷¹

while the purpose of granting an implementing power is

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.³⁷²

³⁶³ Paragraph 21 of *Biocides*

³⁶⁴ Paragraph 22 of *Biocides*

³⁶⁵ Paragraph 23 of *Biocides*

³⁶⁶ Paragraph 23

³⁶⁷ Paragraph 27

³⁶⁸ Paragraph 33

³⁶⁹ Paragraph 35

³⁷⁰ Point 1 above

³⁷¹ Paragraph 38

Thus both Articles 290 and 291 TFEU are about making rules. More importantly still the ECJ went on to hold – in paragraph 40 – that the EU legislature has a discretion when it decides which power to confer, a delegated or an implementing one. As a consequence any judicial review of the choice was limited

to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 needs only the addition of further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.

In paragraphs 41 – 53 the ECJ performed that judicial review. In doing so the ECJ held

- that the Biocides regulation contained a guiding principle of how the fees were to be set (paragraph 43);
- that the fact that the Biocides regulation contained no criteria how various sources of financing of the relevant agency were to be reconciled while requiring that the fees should be sufficient to cover its costs (without creating any surplus) did not in any way indicate that a delegated power was called for (paragraph 44);
- that asking the Commission to undertake a forward-looking exercise likewise did not in any way indicate that a delegated power was called for (paragraph 45);
- that the legislature could have reasonably taken a view that the Biocides regulation provided a complete legal framework to which the ECJ referred in paragraph 40 (paragraphs 48 and 49)
- with the result that the Commission would be exercising its powers “within a normative framework laid down by the legislative act itself, the non-essential elements of which can neither be amended nor supplemented by the implementing act” (paragraph 49);
- that a duty to decide when something (in that case a reduction of fees) is appropriate does not mean that a delegated power is called for, at least not when the considerations by reference to which the appropriateness is to be determined are set out in the basic act (paragraph 51).³⁷³

The ECJ summed up by holding that the EU legislature could reasonably have taken the view that the power at issue was a power to “to provide further detail in relation to the normative content of that act”, thus an implementing power.³⁷⁴ And that its conferral “may be

³⁷² Paragraph 39

³⁷³ The ECJ there held that the Biocides regulation meant that the Commission was to decide whether waivers were appropriate by taking account the financing needs of the relevant agency and specific features of SMEs, the entities whom the Biocides regulation mentioned as those capable of being entitled to a reduction of fees.

³⁷⁴ Paragraph 52

considered reasonable for the purposes of ensuring uniform conditions for the implementation” of the biocides’ approval system in the EU.³⁷⁵

The Commission thus lost on all points it took. The first point the ECJ did not even deem relevant enough to engage with; though it did decide that both Article 290 and Article 291 TFEU are about making rules. The ECJ mentioned no objective and clear factors which would serve as the basis for the EU legislature’s choice between delegated and implementing power. Reference to complete legal framework and the like is not such a factor: in arguing for the choice being based on objective the Commission clearly drew on the case law on “essential elements”.³⁷⁶ Thus the Commission lost on the second point. The Commission’s third point – that Articles 290 and 291 TFEU are mutually exclusive – seems to be contradicted by the ECJ’s finding that there is discretion in choosing between the two. Discretion can come into it only if at a given moment more than one choice is available.³⁷⁷ Finally the Commission’s fourth point was equally erroneous: the ECJ did consider the extent of the discretion left to the Commission,³⁷⁸ yet that consideration did not lead it to conclude that the power should have been delegated.

Thus the decision to employ Article 291 TFEU rather than Article 291 TFEU was allowed to stand.

3.2.2. *EURES*

The next judgment of the ECJ dealing with the matter was handed down in *EURES*.³⁷⁹ The Parliament and the Council had adopted a regulation³⁸⁰ on free movement of workers. Article 38 of the regulation stated that the Commission was to adopt measures for its implementation. The Commission adopted *EURES* decision³⁸¹ as such a measure. The Parliament claimed that the decision went beyond the implementing power conferred on the Commission.³⁸² That was the issue the ECJ purported to deal with.³⁸³

The Parliament effectively relied on four points in support of its claim that the Commission had exceeded its implementing power.

1. The Commission was said to have made policy choices in *EURES* decision: its articles 2(b) and 2(d) were said prioritise certain measures promoting workers’

³⁷⁵ Paragraph 53

³⁷⁶ The ECJ has held that the determination which elements of EU legislation are so essential that their drawing up must not be delegated is based on objective factors amenable to judicial review. See paragraphs 66 and 67 of *Frontex*. That judgment is discussed in more detail in section 3.2.6.

³⁷⁷ It is a separate question whether discretion is available here because of the standard of review which the ECJ decided to apply. See section 3.4.5 for further consideration of the point.

³⁷⁸ Paragraphs 46-49

³⁷⁹ Judgment of the ECJ in case C-65/13 *European Parliament v European Commission*. *EURES* stands for European Employment Services.

³⁸⁰ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

³⁸¹ Commission Implementing Decision (2012/733/EU) of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of *EURES*

³⁸² Paragraphs 24-26

³⁸³ Paragraph 42

mobility and a certain group (young workers). An implementing power was said not to enable the making of policy choices.³⁸⁴

2. Several of the substantive choices in respect of the activities of the EURES network made in the EURES decision were said to have gone beyond what was envisaged by regulation 492/2011.³⁸⁵
3. Article 8(7) of EURES decision provided that the Commission was to consult with the EURES Management Board on certain questions (including on the EURES Charter). Regulation 492/2011 contained no such requirement instead limiting the bodies to be consulted to a technical and an advisory committee. Introduction of a new player into the decision-making process was said to create a new procedural condition. That was said to go beyond the Commission's implementing power³⁸⁶ (at least in the instant case).³⁸⁷
4. Article 10 of EURES decision provided that the Commission was to adopt the EURES Charter in accordance with articles 12, 13, 19 and 20 of regulation 492/2011 (such charter was not mentioned anywhere in regulation 492/2011). That was said to have gone beyond implementing powers. Rather the Commission was said (by article 10 of EURES decision) to have arrogated itself the implementing powers to adopt the charter and to have decided itself the procedure to be used to that end thus interposing EURES decision between the charter and regulation 492/2011.³⁸⁸

As a subsidiary point the Parliament claimed that any implementing power which was granted to the Commission was limited to a strict minimum. That was said to follow from the formulation of the aforementioned article 38 of regulation 492/2011: "The Commission shall adopt measures *pursuant to this Regulation for its implementation*."³⁸⁹

The ECJ ruled for the Commission dismissing the action in its entirety. It started by reaffirming – in paragraph 44 – its pre-existing case law to the effect that within the framework of the Commission's implementing power the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the act conferring on it the implementing power, provided that they are not contrary to it. It should not be forgotten here that the pre-existing case law concerned the old Article 202 EC, *i.e.* the old cases were decided when "implementing" still covered both what are now Articles 290 and 291 TFEU.³⁹⁰ Thus in *EURES* the ECJ effectively stated that the creation of a distinction

³⁸⁴ Paragraph 27

³⁸⁵ Paragraphs 28-30 and 37. These would include opening the network up to private parties, tasking the European Coordination Office with the development of "a general approach to mobility", introduction of the concept of "complimentary services" and the type of information which a member state was, according to EURES decision, required to provide to the Commission and the other member states.

³⁸⁶ Paragraphs 31-35

³⁸⁷ Reading paragraphs 32 and 34 it would seem to be somewhat unclear whether the claim was that implementing power could never suffice to create such procedural conditions or simply that no such power had been granted to the Commission by regulation 492/2011. Paragraph 32 would seem to indicate the former, while paragraph 34 – the latter.

³⁸⁸ Paragraph 36

³⁸⁹ Paragraph 25

³⁹⁰ Paragraph 36 of *Biocides*. In its judgment in case 16/88 *Commission of the European Communities v Council of the European Communities* the ECJ had held (at paragraph 11) that implementation

between delegated and implementing did not in any way narrow down what it was that the Commission (and presumably the Council when it is granted implementing power) could do in exercise of its “new” implementing power. Admittedly *EURES* was not about delegated power,³⁹¹ but presumably the “things” which the Commission is authorised to do under delegated power are the same. “Delegated” is likewise covered by the old case law, and it is difficult to see why in relation to “delegated” the scope should be either narrowed down (thus making delegated power less extensive than implementing one) or widened. There seems to be no case law supporting or academic opinion contending for such narrowing or widening.

In paragraph 45 the ECJ opined that

it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements.³⁹²

The ECJ then went on to formulate perhaps the central statement of law to be taken away from *EURES*.

Having regard to the foregoing, the Commission must be deemed to provide further detail in relation to the legislative act /.../, if the provisions of the implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it.³⁹³

With respect, this statement of principle does not take one much further than Article 291 TFEU. It begs more questions than it answers. The ECJ had already held in *Biocides*³⁹⁴ that when implementing power is conferred on the Commission under Article 291(2) TFEU, it means that the Commission is called on to provide further detail in relation to the content of the act by which the power is granted. Thus it seems that an act adopted via an exercise of power granted in a legislative act is implementing if three conditions are met:

1. the act complies with the essential general aims of the relevant legislative act;
2. the act is necessary *or* appropriate for the implementation of that legislative act;
3. the act does not amend or supplement the legislative act.

First, condition two seems to be circular – implementation is ultimately explained by implementation. Second, condition three takes its cue from Article 290(1) TFEU, *i.e.* a provision governing delegated acts. Leaving aside the fact that the ECJ had stated in paragraph 42 that it would not be dealing with the issues of delimitation of delegated and implementing, the ECJ’s statement is nothing more than a reformulation of the TFEU. It is

comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application.

³⁹¹ Paragraph 42

³⁹² This statement was later approved by the Grand Chamber in paragraph 31 of *Visas* (see section 3.2.3 below for a further discussion of the case).

³⁹³ Paragraph 46

³⁹⁴ Paragraph 39. The statement was repeated virtually verbatim in paragraph 43 of *EURES*.

not an explanation. Third, condition one was taken from the pre-existing case law on Article 202 EC implementing measures (that is demonstrated by the words “having regard to the foregoing” – that foregoing includes paragraph 44 which deals with Article 202 EC implementing measures). But that case law seems equally applicable to delegated acts which makes it difficult to see how condition one would not be applicable to delegated acts.

While applying the foregoing principles³⁹⁵ the ECJ held – in response to Parliament’s points 1 and 2 – that while the actions of which the Parliament was complaining were not expressly provided for in regulation 492/2011, they clearly fell within the scope of the essential general aim pursued by that regulation (the aim being promotion of cross-border geographical mobility of workers).³⁹⁶ The same was held in relation to the Parliament’s points 3 and 4. In paragraph 57 the ECJ said that the creation of the EURES Management Board and the conferral of powers on it as well as adoption of the EURES charter were

intended to improve the operation of EURES and thereby support the clearance of vacancies and applications for employment in the European Union.

Thus the challenged provisions of EURES decision complied with condition 1.

Dealing with condition 2, the ECJ made short shrift of the Parliament’s subsidiary argument that “pursuant to this regulation for its implementation” somehow limits the implementing power to a strict minimum. The words were held not to affect the scope of implementing power at all.³⁹⁷ Having done that, the ECJ observed that appropriateness of the challenged provisions had not been called into question by the Parliament and moved on to condition 3.³⁹⁸

To deal with it the ECJ held that it was necessary to examine whether by adopting the challenged provisions of EURES decision the Commission exceeded its implementing power when implementing that regulation.³⁹⁹ The Commission was held to have been tasked not only with setting up joint action between itself and the member states envisaged by regulation 492/2011, but also with development of operating rules for that action.⁴⁰⁰ The ECJ then considered in turn each group of challenged provisions separately.

Dealing with the Parliament’s point 1 (articles 2(b) and 2(d) of EURES decision) the ECJ held that

[t]he provisions invoked by the Parliament fall within the scope of the cooperation between the Commission and the Member States required by the second subparagraph

³⁹⁵ According to its paragraph 47 the judgment in *EURES* is structured as follows: paragraphs of the judgment coming before paragraph 47 (*i.e.* paragraphs 39-46) contain the principles which the ECJ then applies in the paragraphs following paragraph 47.

³⁹⁶ Paragraph 53. Thus, whether the Commission made policy choices would seem to have been irrelevant.

³⁹⁷ Paragraphs 59 and 60. Admittedly this seems to have resulted from construction of regulation 492/2011. *EURES* would thus not seem to be an authority for impossibility of such limitation. Should any such limitation be possible, it would require clearer wording.

³⁹⁸ Paragraph 61

³⁹⁹ Paragraph 64

⁴⁰⁰ Paragraph 63.

of Article 11(1) of Regulation No 492/2011 and do not supplement or amend the framework established by the legislative act in that regard.⁴⁰¹

What the ECJ left ambiguous here was whether the provisions of EURES decision do not amend or supplement regulation 492/2011 because they fall within the scope of cooperation mandated by the latter or whether these are two independent statements.⁴⁰²

The reference to the framework was taken up in similar terms in paragraph 70 dealing with the Parliament's claim that opening of EURES to private entities amounted to amending or supplementing regulation 492/2011 (which did not even mention any private vs public distinction in this respect). There the ECJ opined that the relevant provision of EURES decision (article 3(c))

does not involve any amendment to the framework established by that regulation.

With respect, that either does not deal with condition 3 at all – or sets the bar extremely high. In condition 3 as formulated in paragraph 46 the ECJ spoke of amending or supplementing the legislative act in question. In paragraphs 67 and 70 – when purporting to verify whether condition 3 was met in the case at hand – the ECJ checked whether the framework created by the legislative act in question was modified. Clearly it is possible to amend or supplement a legislative act without modifying the framework created by it. In fact according to the Grand Chamber in *Biocides* that is precisely what a delegated act is intended to do.

[T]he 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.⁴⁰³

Thus to fail condition 3 as applied by the ECJ in *EURES* the act would need to change the framework created by the legislative act, *i.e.* the Commission would have needed to have done something which delegated power would not have enabled it to do. On the other hand doing what delegated power would have enabled it to do would not have resulted in failing condition 3, *i.e.* would not have made the resulting act not implementing and thus *ultra vires* the grant of power in article 38 of regulation 492/2011. It would thus seem that implementing power is at least as extensive as delegated power.

It should be stressed that it seems to be open to debate whether in paragraph 71 of *EURES*, in which the ECJ purported to explain why article 3(c) of EURES regulation did not involve any amendment to the framework established by regulation 492/2011, the ECJ considered matters relating to the framework established by regulation 492/2011 or simply certain of the rules of that regulation. The ECJ observed there that nothing in regulation 402/2011 reserved the cooperation within the EURES network to public entities holding that

reference to private service providers in the contested decision accordingly constitutes the provision of further detail in relation to the framework established by Regulation No 492/2011.

⁴⁰¹ Paragraph 67

⁴⁰² The ambiguity seems to persist in French, Italian and Estonian language versions of the decision as well.

⁴⁰³ Paragraph 38 of *Biocides*

In dealing with the contention that EURES decision tasked the European Coordination Office with the development of “a general approach to mobility” the ECJ held that upon the true construction of regulation 492/2011 that fell within the scope of the objectives of that regulation. Thus there were no amendments of or supplements to it.⁴⁰⁴ Interestingly in paragraph 78 the ECJ said that

the Commission cannot be deemed to have exceeded the limits of its implementing power by conferring on the European Coordination Office, in Article 4(3)(b) of the contested decision, the task of developing ‘a general approach to mobility in accordance with the European Employment Strategy’, since ***such a general approach may*** be directed merely at preparing for the adoption of the controlling measures envisaged in Article 17 of Regulation No 492/2011 /.../

Quite clearly no general approach had been developed at the time when the case was decided: article 4(3)(b) of EURES decision simply tasked the European Coordination Office with its development. By putting the matter the way it put it the ECJ seems to have said that a measure neither amends nor supplements a legislative act if that measure provides for something to be undertaken on the basis of the measure as long as that something could be undertaken in a way which does not amend or supplement the legislative act. The fact that it could be undertaken in a way which does is irrelevant. It might perhaps be thought that this flows from the duty of harmonious construction. On a different note, paragraph 78 seems to show the ECJ toiling in dealing with condition 3 (no amendments or supplementations): what was dealt with in paragraph 73 seems more like condition one (whether the secondary measure falls within the scope of objectives of the primary one), not condition 3.

The claim in respect of complementary services seems to have turned upon construction of regulation 492/2011: since they were within its scope, their inclusion into and express mentioning in EURES decision did not mean that the Commission took the place of the EU legislature.⁴⁰⁵

In respect of the Parliament’s point 3 the ECJ found that

[t]he establishment of the EURES Management Board and the conferment of a consultative role on it by the provision contested by the Parliament neither supplement nor amend the framework established by Regulation No 492/2011 since they are intended merely to ensure that the joint action required by that regulation operates effectively without encroaching [on the powers of the advisory and the technical committee established by regulation 492/2011 itself].⁴⁰⁶

That means that creation of a new body and its introduction into the decision-making process constitutes neither an amendment of nor a supplement to the relevant legislative act. That may be done in exercise of implementing powers.

⁴⁰⁴ Paragraphs 77 and 78

⁴⁰⁵ Paragraphs 79-82

⁴⁰⁶ Paragraph 87

Finally adoption of the EURES Charter was likewise neither amending nor supplementing regulation 402/2011. What is somewhat unclear is the ECJ's reasoning. The reasoning is contained in paragraphs 91 and 92. The first of them grounds the finding in the fact that the Commission would have been able to adopt the Charter directly under the implementing powers conferred on it by Article 38 of regulation 492/2011 anyway. Yet in the second of them ECJ said that stating in EURES decision that the Commission is to adopt the EURES Charter

neither supplements nor amends the framework established by Regulation No 492/2011 since Article 10 and the action stated therein are intended merely to facilitate the exchange of information within EURES, as required by Articles 12 and 13 of that regulation, and to promote its effective operation.

That seems to be a different basis covering potentially a much wider range of situations (which would not amount to amending or supplementing).

Having thus found that condition 3 was met in respect of every single provision of which the Parliament complained the ECJ dismissed the action.

3.2.3. *Visas*⁴⁰⁷

In this case, once again decided by the Grand Chamber, the Commission claimed that delegated power was improperly conferred on it; the Commission thought that implementing power should have been conferred instead.

The case concerned regulation 1289/2013⁴⁰⁸ which inserted a new mechanism into regulation 539/2001.⁴⁰⁹ The latter governs the EU visa-regime, *i.e.* the question which are those countries whose nationals may enter the EU member states without a visa. Regulation 539/2001 has two annexes. Nationals of the countries listed in annex II need no visa to enter an EU member state. Nationals of the countries listed in annex I do need a visa to enter an EU member state.

Regulation 1289/2013 introduced into regulation 539/2001 a so-called waterfall structure which is intended to deal with situations when a country listed in annex II starts applying a visa requirement to nationals of a member state of the EU. Once that happens the first steps of the EU to remedy the situation are political, economic and commercial,⁴¹⁰ but should they prove fruitless the Commission may – but does not have to – adopt

⁴⁰⁷ Judgment in case C-88/14 *European Commission v European Parliament and Council of the European Union*

⁴⁰⁸ Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

⁴⁰⁹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

⁴¹⁰ Article 1(4)(b) of regulation 539/2001

an implementing act temporarily suspending the exemption from the visa requirement for certain categories of nationals of the third country concerned for a period of up to six months.⁴¹¹

By subsequent implementing acts the Commission may extend the period for further periods of up to six months – up until either the third state drops the visa requirement or the Commission becomes obliged to adopt a delegated act.⁴¹²

If the third country has not dropped the visa requirement once 24 months and further 30 days have elapsed since the moment of its introduction, the Commission must adopt a delegated act

temporarily suspending the application of Annex II for a period of 12 months for the nationals of that third country. The delegated act /.../ shall amend annex II accordingly /.../ by inserting into it a footnote to that effect.⁴¹³

If within six months of the entry into force of that delegated act the visa requirement still persists, the Commission may submit a legislative proposal for amending [regulation 539/2001] in order to transfer the reference to the third country from Annex II to Annex I.⁴¹⁴

Leaving aside the political, economic and financial measures the mechanism works as follows. As a first step an implementing act introducing a visa requirement in respect of some nationals of the third state may be adopted. That may persist for up to two years. If that doesn't work, a delegated act introducing a visa requirement in respect of all nationals of the third state is adopted. If still nothing happens, then six to twelve months later the Commission could submit to the Parliament and the Council a legislative proposal which if adopted would permanently remove the third state from the list of countries whose nationals do not require a visa for entering an EU member state.

In *Visas* the Commission claimed that the power referred to in article 1(4)(f), *i.e.* the power to make the second step, should not be delegated but implementing. Among other things the Commission claimed that since (i) regulation 539/2001 does not contain any list of the third countries which are in a situation of suspension and (ii) those countries are to be identified by application of the criteria laid down in regulation 539/2001, (iii) the adoption of the delegated act referred to in article 1(4)(f) does not have the effect of changing the normative content of regulation 539/2001 (it does not lead to the removal of the name of the third country from annex II). That

⁴¹¹ Article 1(4)(e)(i) of regulation 539/2011

⁴¹² Article 1(4)(e)(i) of regulation 539/2011

⁴¹³ Article 1(4)(f) of regulation 539/2011

⁴¹⁴ Article 1(4)(h) of regulation 539/2001

a delegated act which, on the basis of those criteria, suspends for a limited time the application of the exemption from the visa requirement merely implements the legislative act in question without supplementing or amending it.⁴¹⁵

The ECJ disagreed seemingly for two main reasons.

First, it held that article 1(4)(f) act is delegated because for all nationals of the third country in question it

has the effect of amending, if only temporarily, the normative content of the legislative act in question. Apart from their temporary nature, the effects of the act adopted on the basis of that provision are identical in all respects with those of a formal transfer of the reference to the third country concerned from Annex II to Annex I of Regulation No 539/2001, as amended.⁴¹⁶

Second, according to the ECJ the fact that by means of the delegated act footnote was to be inserted into regulation 539/2001 itself showed

intention of the EU legislature to insert the act adopted on the basis of that provision in the actual body of Regulation No 539/2001, as amended.⁴¹⁷

The ECJ concluded that

[i]n those circumstances, the EU legislature conferred power on the Commission to amend the normative content of that legislative act within the meaning of Article 290(1) TFEU.⁴¹⁸

The fact that the first act (the softest measure) takes the form of an implementing act was held – without further explanation – not to

have the consequence that the act adopted in the second stage of the mechanism must also be classified as an implementing measure.⁴¹⁹

But perhaps the most important statements of law made by the ECJ in *Visas* were contained in paragraphs 32 and 45. They were about what was not relevant in dealing with “competition” of Articles 290 and 291 TFEU. In paragraph 32 the ECJ opined that

neither the existence nor the extent of the discretion conferred on [the Commission] by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU.

This is different from the discretion considered in *Biocides*. There the ECJ held that the EU legislature (the grantor) had a discretion in deciding which article – 290 or 291 TFEU – to employ. Here the ECJ postulated the irrelevance of the extent and indeed the existence of the

⁴¹⁵ Paragraph 20

⁴¹⁶ Paragraph 42

⁴¹⁷ Paragraph 43

⁴¹⁸ Paragraph 44

⁴¹⁹ Paragraph 40

grantee's discretion, *i.e.* in *Visas* it dealt with something which characterises the power granted. This irrelevance was “extended” in paragraph 45 where the ECJ essentially stated that

the characteristics inherent in a delegation of power, such as its limited period, the possibility of revocation and the power of objection of the Parliament and the Council are irrelevant in dealing with “competition” of Articles 290 and 291 TFEU.

Finally a few words should be said about whether the amendments which the Commission was empowered to make were essential to the legislation. The ECJ has consistently held that making decisions in respect of such essential elements cannot be delegated at all.⁴²⁰ One could be excused for thinking that the list of countries whose nationals need no visa to enter an EU member state is the – or at the very least an – essential element of regulation 539/2001.⁴²¹ From that perspective *Visas* could, perhaps, raise eyebrows. In reality the ECJ did not have to deal with the point: the Commission conceded that the elements were not essential⁴²² and the case seems to have proceeded on that basis.⁴²³

3.2.4. *EUROPOL*⁴²⁴

EUROPOL differed from all the cases discussed so far: the act challenged was an implementing decision of the Council, and hence the dispute was between the Parliament and the Council. Article 26 of the *EUROPOL* decision⁴²⁵ provided, among other things, that the Council was to adopt a list of countries with which *EUROPOL* was to conclude agreements with a view to cooperation. The Council adopted the list by decision 2009/935.⁴²⁶ In 2014 it amended the list by decision 2014/269.⁴²⁷ The Parliament sought the annulment of this latter decision.

In support of its claim the Parliament relied on three grounds.⁴²⁸ Only one of them is directly relevant for present purposes.⁴²⁹ As far as relevant the Parliament submitted that

⁴²⁰ See section 3.2.6 below.

⁴²¹ Indeed Jacqu  has taken the point that technical annexes frequently contain the substance of regulations and directives. See *The Evolution of the Approach to Executive Rulemaking in the EU*, in Carl Fredrik Bergstr m and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 27.

⁴²² Paragraph 33

⁴²³ Paragraph 34, see especially the first words: “In those circumstances /.../.” While the ECJ could, perhaps, be criticised for proceeding on the basis of a concession, the ECJ’s doing so seems to be an understandable demonstration of pragmatism.

⁴²⁴ Case C-363/14 *European Parliament v Council of the European Union*. Note paragraph 44 of *EURES* where the ECJ affirmed that its case law on Article 202 EC implementing power was still good law under Article 291 TFEU.

⁴²⁵ Council Decision (2009/371/JHA) of 6 April 2009 establishing the European Police Office (Europol)

⁴²⁶ Council Decision (2009/935/JHA) of 30 November 2009 determining the list of third States and organisations with which Europol shall conclude agreements

⁴²⁷ Council Implementing Decision (2014/269/EU) of 6 May 2014 amending Decision 2009/935/JHA as regards the list of third States and organisations with which Europol shall conclude agreements. Its only substantive provision was article 1 by which four countries were added to the list.

⁴²⁸ Paragraph 16

the list is an essential element of the matter in question and must therefore form part of the legislative act. At the very least, it should be regarded as a normative element which must be the subject of a delegated act within the meaning of Article 290 TFEU rather than an implementing act within the meaning of Article 291 TFEU.⁴³⁰

The issue of whether, perhaps, the list should have taken the form of a delegated act (thus making decision 2014/269 automatically unlawful since only the Commission may adopt such acts) was not considered at all. According to the ECJ the

argument [of the Parliament had to] be understood as criticising the very lawfulness of Article 26(1)(a) of the Europol Decision, on the ground that that provision permits the adoption of an act relating to an essential element of the matter regulated by means of a more flexible procedure than that laid down for that purpose by primary law.⁴³¹

Thus according to the ECJ the ground turned on whether the content adopted by the Council in the challenged decision constituted an essential element of the EUROPOL regulation (in which case the delegation would not have been lawful).⁴³² The judgment could, however, still be considered useful for present purposes: it goes to the distinction between a legislative and an implementing act and specifically to the extent of power which the grantee of an implementing power may lawfully have.

Being guided by the case law on essential elements⁴³³ the ECJ started from the premise that the adoption of essential elements of basic legislation, which adoption requires political choices falling within the responsibilities of the EU legislature, cannot be delegated or appear in implementing acts.⁴³⁴ However it held that while the decision at issue did involve certain technical and political compromises, it nevertheless could not be regarded as requiring the making of political choices falling within the responsibilities of the EU legislature.⁴³⁵ There were two reasons for that. First – as a matter of construction of the EUROPOL decision – the main objective of the EUROPOL decision was intra-EU cooperation; the cooperation with third countries was merely ancillary to that aim.⁴³⁶ Second, according to the ECJ

the EU legislature [had laid] down the principle of the establishment and maintenance of such relations, defined the objective to be pursued by those relations, and defined the framework within which those relations are to take place.⁴³⁷

The fact that the challenged decision could have serious consequences for fundamental rights of individuals did not change that conclusion.⁴³⁸ While the ECJ reiterated that in principle

⁴²⁹ The other two concerned procedural irregularities and invalidity of the legal basis, and ultimately turned on article 9 of protocol no. 36 to the Lisbon Treaty.

⁴³⁰ Paragraph 33

⁴³¹ Paragraph 45, see also paragraph 44

⁴³² *EUROPOL* could thus be seen as a further step in the *Frontex* line of case law. For *Frontex* see section 3.2.6.

⁴³³ In other words, by *Frontex*.

⁴³⁴ Paragraph 46

⁴³⁵ Paragraph 51

⁴³⁶ Paragraphs 48 and 49

⁴³⁷ Paragraph 50

such consequence could change that conclusion,⁴³⁹ it thought that the interference with fundamental rights was not serious enough in the case at hand. The only relevant fundamental rights which the ECJ recognised in the instant case concerned the protection of personal data which would have been transmitted to the third countries which were added to the list.⁴⁴⁰ According to the ECJ the challenged decision did not have serious enough consequences on that data protection for two reasons. First,

the framework within which the transmission must take place [was] laid down by the legislature itself, as Article 23(6)(b) of the Europol Decision and Article 5(4) of Decision 2009/934 provide in particular for an assessment to be carried out of the adequacy of the level of data protection ensured by the third State concerned.⁴⁴¹

Second, listing of the country as one with which EUROPOL was to conclude an agreement did not of itself enable any transfer of personal data to that third country. Only the subsequent agreement would do so. But both the EUROPOL Management Board and the Council itself would have the opportunity to block its conclusion were it to contain unsuitable rules on transfer of personal data.⁴⁴² Yet, that is nothing to the point. The case law on essential elements says that some matters must be reserved for the EU legislature. The point of this rule – as formulated in *Frontex*⁴⁴³ – is that the grantee of implementing power should not be able to make decisions which significantly impact on fundamental rights of individuals. In *EUROPOL* the Council was that grantee, and the management board something lower than even a grantee. How then could that very Council's (or the management board's) subsequent control over the consequences of the implementing decision mitigate the concern underlying the rule? Especially when the legislature is the Parliament and the Council together. The answer is simple: it can't.

Finally the Parliament's submission that the EUROPOL decision did not set any criteria how the Council should exercise its implementing power (*i.e.* which conditions a third state would need to meet for the Council to become empowered to add it to the list) was given short shrift. The ECJ – without further explanation – held that as a matter of law the conditions set in article 23(1) of the EUROPOL decision were sufficiently precise.⁴⁴⁴

Since the Parliament's claim fell on other grounds as well, it was dismissed. Implementing decision 2014/269 was allowed to stand.

3.2.5. *Connecting Europe Facility*⁴⁴⁵

The last case dealing with the issues of delimitation pertaining to Articles 290 and/or 291 TFEU was *Connecting Europe Facility*. This case differed from all the aforementioned ones

⁴³⁸ Paragraph 52

⁴³⁹ Paragraph 53

⁴⁴⁰ Paragraph 54

⁴⁴¹ Paragraph 54

⁴⁴² Paragraph 55

⁴⁴³ See section 3.2.6 below.

⁴⁴⁴ Paragraph 56

⁴⁴⁵ Case C-286/14 *European Parliament v European Commission*

in that it concerned neither “competition” of Articles 290 and 291 TFEU nor a relation of either with legislative acts. *Connecting Europe Facility* was rather about the differences between two types of delegated acts: the ones amending a legislative act and the ones supplementing a legislative act.

Connecting Europe Facility determines the conditions, methods and procedures for providing EU financial assistance to trans-European networks.⁴⁴⁶ It was created by regulation 1316/2013 of the Parliament and of the Council. Article 21(3) of that regulation required the Commission to adopt by 22nd December 2014 a delegated act

detailing the funding priorities to be reflected in the work programmes referred to in Article 17 [of regulation 1316/2013] for the duration of the [Connecting Europe Facility] for eligible actions under Article 7(2) [of regulation 1316/2013].

The Commission adopted the act: delegated regulation 275/2014.⁴⁴⁷ By article 1 of that regulation the Commission purported insert the substantive rules it adopted into annex I of regulation 1316/2013. The Parliament sought annulment of delegated regulation 275/2014 claiming that in adopting that regulation the Commission had exceeded the power conferred on it: the Commission did not have the power to amend regulation 1316/2013; the funding priorities had to remain a separate act.⁴⁴⁸ In other words the Commission was said to have the power to supplement regulation 1316/2013, but not to have the power to amend it.⁴⁴⁹

The ECJ started by stating that Article 290(1) TFEU provides for two delegated powers: power to amend and power to supplement. Just like when dealing with “competition” between Articles 290 and 291 TFEU, it was for the EU legislature to determine which of these two powers was conferred on the Commission; the Commission could not be granted the power to determine which delegated power was granted to it.⁴⁵⁰ Thus the Commission could not be simply granted “delegated power” – it was always granted either power to amend or power to supplement. The ECJ did not deal with the question how the EU legislature was to determine which power to grant. However in view of the decision in *Biocides*⁴⁵¹ it seems safe to assume that at the very least the EU legislature has a wide discretion in that respect.

Which delegated power is actually granted by a particular instrument is a question of construction of that instrument. According to the ECJ the power to supplement is the power to flesh out the basic act, that is

⁴⁴⁶ Article 1 of Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010

⁴⁴⁷ Commission Delegated Regulation (EU) No 275/2014 of 7 January 2014 amending Annex I to Regulation (EU) No 1316/2013 of the European Parliament and of the Council establishing the Connecting Europe Facility

⁴⁴⁸ Paragraph 14

⁴⁴⁹ Paragraphs 19 and 20

⁴⁵⁰ Paragraph 46

⁴⁵¹ Specifically the holding that the EU legislature has a wide discretion in choosing whether to grant delegated power or implementing power.

to [develop] in detail [the] non-essential elements of the legislation in question that the legislature has not specified.⁴⁵²

The power to amend, on the other hand, is the power to modify or repeal non-essential elements laid down in the basic act.⁴⁵³ When exercising the power to supplement the Commission is bound by the entirety of the basic act,⁴⁵⁴ while when exercising the power to amend the Commission is bound only by those of the provisions of the basic act which it is not empowered to amend.⁴⁵⁵

Admittedly at least at first glance this distinction might seem somewhat problematic. First, it has been argued that it is impossible to flesh out any instrument of law without amending it.⁴⁵⁶ This view seems to have merit: speaking purely from the perspective of drafting technique, most contracts are amended by separate instruments without those instruments containing any language to the effect that some specific provision in them is to be inserted into the initial contract. Thus it is easy to see why the point has been taken by commentators.

Second, while the ECJ was not concerned with the “competition” of Articles 290 and 291 TFEU in *Connecting Europe Facility*, “fleshing out the basic act” does seem to come perilously close to provision of “further detail in relation to the content of a legislative act”.⁴⁵⁷ Development in “detail of non-essential elements of the legislation in question that the legislature has not specified” seems nigh indistinguishable from it for. *Connecting Europe Facility* was decided two years after *Biocides*, so the justices deciding it could not have been unaware of *Biocides*. True, in *Biocides* the ECJ said that implementing power is the power 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*,⁴⁵⁸

yet it is difficult to see how that makes much difference. Delegated power was granted to the Commission in regulation 1316/2013 so that it could formulate the financing priorities. That is to formulate something which must by definition be uniform throughout the EU.

In paragraphs 43 and 45 of *Connecting Europe Facility* the ECJ approved paragraphs 34 and 40 of the Commission’s guidelines on delegated acts.⁴⁵⁹ Indeed it relied on them as support and reasoning for the specific distinction between power to amend and power to supplement which it had drawn. According to the ECJ

the Commission explains, in point 40 [of the guidelines], that, where the legislature confers a power to supplement a legislative act on the Commission, it decides not to legislate comprehensively and merely establishes the essential elements, while leaving

⁴⁵² Paragraph 41

⁴⁵³ Paragraph 42

⁴⁵⁴ Paragraph 41

⁴⁵⁵ Paragraph 42

⁴⁵⁶ See, for instance, the opinion of Paul Craig and Gráinne de Búrca, discussed in section 3.4.1 below.

⁴⁵⁷ Which is the meaning which the ECJ gave to “implementing act” in *Biocides*. See *Biocides*, paragraph 39.

⁴⁵⁸ Paragraph 39 of *Biocides*

⁴⁵⁹ Guidelines for the services of the Commission of 24 June 2011 on delegated acts [SEC(2011)855]. The guidelines are discussed further in section 3.3.2.

it to the Commission to ‘flesh out’ those elements. By contrast, paragraph 34 of those guidelines, in the context of the exercise of the power to amend a legislative act’, states that the Commission is to make formal changes to a text by adding new non-essential elements or by replacing or deleting such elements.⁴⁶⁰

While this seems to fit quite well with the distinction the ECJ drew in paragraphs 41 and 42 (discussed above), it would seem to point towards formalistic distinction between the power to amend and the power to supplement. The ECJ explained the distinction further in paragraph 53 stating there that

for reasons of regulatory clarity and transparency of the legislative process, the Commission may not, in the context of the exercise of a power to ‘supplement’ a legislative act, add an element to the actual text of that act. Such an incorporation would be liable to create confusion as to the legal basis of that element, given that the actual text of a legislative act contains an element arising from the exercise, by the Commission, of a delegated power which does not entitle it to amend or repeal that act.

The ECJ went on to say that an integral part of a basic act could be replaced or deleted only in exercise of power to amend,⁴⁶¹ and that the exercise of power to supplement requires the Commission to adopt a separate act.⁴⁶²

Applying the distinction to the case at hand the ECJ held that since the funding priorities were not formulated in any way in regulation 1316/2013, “the detailing” which Article 21(3) of regulation 1316/2013 required the Commission to undertake was a power to supplement, not a power to amend.⁴⁶³ There simply were no relevant elements in regulation 1316/2013 which could be amended; the Commission had to flesh out the funding priorities by developing details which regulation 1316/2013 did not contain.⁴⁶⁴ Thus the Commission was held to have infringed the rule on delegation contained in Article 21(3) of regulation 1316/2013 by exercising the wrong delegated power. In paragraph 61 the ECJ decided that such infringement of Article 290 TFEU (and specifically of a rule of competence contained therein) entailed the annulment of the infringing act. The Commission lost, and its implementing regulation was annulled.

As a last point it is perhaps worthy of note that of the five cases in which the ECJ has expressly considered the issues of Articles 290 and 291 TFEU (and which have been discussed above) this was the only one where the challenged act was annulled.

⁴⁶⁰ Paragraph 45

⁴⁶¹ Paragraph 55

⁴⁶² Paragraphs 56 and 57

⁴⁶³ Paragraphs 47, 49 and 50

⁴⁶⁴ Paragraph 50

3.2.6. *Smoke Flavourings*⁴⁶⁵

Smoke Flavourings concerned the lawfulness of the tobacco directive.⁴⁶⁶ The litigation before the ECJ spanned many a question of EU law, but for present purposes two points are of importance. In paragraph 63 of its judgment the ECJ suggested that when the constitutive treaties empower an EU institution to adopt “measures of approximation”, they confer on that institution

a discretion /.../ as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.

The statement was specifically made when speaking of the power of the Council and the Parliament to adopt acts via ordinary legislative procedure under Article 114 TFEU. The statement is important for present purposes for two reasons. First, it would seem to confirm that something being “technical” in no way takes the matter out of “legislative” ambit. Technical rules may still be created by means of legislative acts. As such it casts certain doubts on the rationale (if not the conclusions) of *ESMA*.⁴⁶⁷ Second, the extent of that discretion is to be noted.

The claimant (a tobacco company) complained, *inter alia*, of the fact that the directive banned all characterising flavourings of cigarettes.⁴⁶⁸ Submitting that at least some flavours could (and should) be permitted it was argued on behalf of the claimant that the ban failed the proportionality test because there was a less restrictive measure available to the EU: establishment of lists of prohibited and permitted flavours. Such lists could have been established and maintained by means of acts adopted either Article 290 TFEU or Article 291 TFEU. The ECJ gave short shrift to that contention.

So far as the adoption of lists of prohibited or permitted flavourings is concerned, such a measure could result in the introduction of unjustified differences of treatment between the various types of tobacco products with a characterising flavour. Moreover, such lists may quickly become out of date because of continuing developments in the manufacturers’ commercial strategies and are readily susceptible to circumvention.

The Court therefore finds that the prohibition on the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary to achieve the objective sought.⁴⁶⁹

These statements of the ECJ essentially go to the extent of the discretion of the Council and the Parliament mentioned in 63 of *Smoke Flavourings*. The point which the ECJ made in

⁴⁶⁵ Judgment of the ECJ in case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health*

⁴⁶⁶ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC

⁴⁶⁷ See section 3.2.8 below.

⁴⁶⁸ Paragraph 168 of *Smoke Flavourings*

⁴⁶⁹ Paragraphs 183 and 184 of *Smoke Flavourings*

paragraph 183 of its judgment could essentially be made in respect of any act adopted either under Article 290 TFEU or Article 291 TFEU. For instance, the list of third countries at issue in *EUROPOL* and discussed in section 3.2.4. Indeed, as discussed in section 3.2.3 above in the instrument at issue in *Visas* there was a mechanism for updating just such a list, a mechanism which was already in existence by the time *Smoke Flavourings* was handed down (or indeed the tobacco directive adopted). Against that background the point taken by the ECJ in paragraph 183 is too strong – it could be made in respect of virtually any act adopted under Articles 290 and 291 TFEU which act was adopted to maintain a list of some sort thus rendering the act unlawful. The only way to avoid that unlawfulness is by reading paragraph 183 as saying that not only does “the legislature” have discretion to decide to which of Articles 290 and 291 TFEU to resort in a given case, it also has a (virtually) unfettered discretion whether to resort to any of them at all – even in a case when “the legislature” itself has decided not to include into the legislative act the content which could have been adopted in a delegated or an implementing act (the content being a list of permitted flavourings).⁴⁷⁰ Paragraph 184 would then confirm that any discretion of “the legislature” whether to grant Article 290 or 291 TFEU power either is not subject to the principle of proportionality at all or always passes the test or that the test is not “going beyond what is necessary”, but “going manifestly beyond what is necessary” with that latter test having been passed in *Smoke Flavourings*. Admittedly in the latter case it would be very difficult – nigh impossible – to imagine a situation where the test would have been failed.

For present purposes it is important to note that *Smoke Flavourings* ties in nicely with *Biocides*. Both postulate “a manifestness” test, *i.e.* a light review by the ECJ of the discretion exercised by “the legislature”. More importantly still, *Smoke Flavourings* is on all fours with the way discretion was approached in *Biocides*. If anything, *Smoke Flavourings* would seem to represent a gradual and indeed wholly coherent development of the approach formulated in *Biocides* and indeed *Visas* and *Connecting Europe Facility*. In *Biocides* the ECJ held that the legislature had discretion which article to resort to (290 or 291 TFEU), in *Visas* it expounded this by stating that the extent of discretion of grantee of power was irrelevant for the choice between Articles 290 and 291 TFEU, in *Connecting Europe Facility* it moved further stating that the grantee could not decide which power was granted to it (that that decision lay in the discretion of the grantor) and finally (for now) in *Smoke Flavourings* it first stated that whether to resort to either article (290 or 291 TFEU) or regulate an issue in a legislative act lay within the discretion of “the legislature” and then that even if “the legislature” chose not to regulate it in the legislative it, it still lay in its unfettered discretion whether to resort to either of Article 290 and 291 TFEU at all.

⁴⁷⁰ That the EU legislature could have done so is not in doubt. See the judgment of the ECJ in case C-359/92 *Federal Republic of Germany v Council of the European Union*, and in particular its paragraph 37 where the ECJ held that what is now Article 114 TFEU could serve as a legal basis for “down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products”.

3.2.7. *Frontex*⁴⁷¹

Frontex concerns a different issue from the foregoing cases. It does not deal with Articles 290 and 291 TFEU as such, but with what determinations are such that they must be made in a legislative act. It is the most recent leading judgment in a long line of case law going back at least to *Köster*,⁴⁷² although some commentators have argued that even as far back as *Meroni*.⁴⁷³

In *Frontex* the ECJ reaffirmed its prior position to the effect that the adoption of rules essential to the subject-matter envisaged by a legislative act is reserved to the EU legislature. Thus the rules must be laid down in a legislative act; power to adopt them cannot be granted to anyone else.⁴⁷⁴ The ECJ then went on to opine that provisions which require for their adoption the making of political choices falling within the responsibilities of the European Union legislature necessarily constitute such essential elements.⁴⁷⁵

In general, however, which elements are essential is to be decided on a case-by-case basis by construing the relevant provisions of the legislative act at issue.⁴⁷⁶ The decision must be based on objective criteria and it is amenable to judicial review by the CJEU.⁴⁷⁷

In applying those rules to the case at hand the ECJ opined that weighing of conflicting interests on the basis of several assessments constitutes a political choice at least if the following three conditions are met:

- depending on the political choices on the basis of which the rules are created, the outcome (in *Frontex*: the powers border guards end up having) could vary significantly;
- the jural relations needed for or stemming from those outcomes could vary significantly (in *Frontex*: the exercise of the powers might or might not be an obligation, might or might not require authorisation etc.);
- those outcomes could interfere with international relations (in *Frontex*: powers would be exercised in relation to ships, including ones sailing under flags of third states).⁴⁷⁸

If all these conditions are met, the adoption of the relevant rule would constitute a major development of the relevant field of law.⁴⁷⁹ Finally the ECJ opined that interference with

⁴⁷¹ Judgment in case C-355/10 *European Parliament v Council of the European Union*

⁴⁷² Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co.* See section 3.2.9 below for treatment of other aspects of *Köster*.

⁴⁷³ Judgment of the ECJ in case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* and in case 10/56 *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*. The suggestion was made by Robert Schütze in 'Delegated' Legislation in the (New) European Union: A Constitutional Analysis (2011) 74 *Modern Law Review* 661, footnote 89

⁴⁷⁴ Paragraph 64

⁴⁷⁵ Paragraph 65. It could well be argued that that statement has been narrowed down or qualified in *EUROPOL* discussed in section 3.2.4 above.

⁴⁷⁶ Paragraph 69

⁴⁷⁷ Paragraph 67

⁴⁷⁸ Paragraph 76

⁴⁷⁹ Paragraph 76

fundamental rights which exceeds a certain threshold does require the involvement of the EU legislature.⁴⁸⁰ No general guidance was provided on the threshold, but border guards' powers to stop apprehended person, to seize vessels and to conduct apprehended persons to a specific location were said to exceed it.⁴⁸¹ Thus the rules granting such powers to the border guards would need to be adopted by the EU legislature.

3.2.8. *ESMA*⁴⁸²

In *ESMA* the UK sought the annulment of Article 28 of regulation 236/2012.⁴⁸³ That article enabled an EU agency, the European Securities and Markets Authority, under certain conditions

- to require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position and
- to prohibit or impose conditions on the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument (other than debt instruments issued by the EU or its member states or derivatives referencing such debt instruments) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.

The UK claimed that that amounted to circumvention of Articles 290 and 291 TFEU⁴⁸⁴ by constituting a grant of power not sanctioned by either of those articles. The ECJ disagreed holding that Article 28 of regulation 236/2012 did not undermine Articles 290 and 291 TFEU.⁴⁸⁵ The reasons for that were the following.

- Article 28 of regulation 236/2012 granted decision-making powers “in an area which requires the deployment of specific technical and professional expertise”⁴⁸⁶ which meant that the conferral did “not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU”⁴⁸⁷ and
- the actions which Article 28 of regulation 236/2012 authorises are (in view of the integration of international financial markets and the contagion risk of financial crises) unavoidably necessary in practice (in order to safeguard the financial stability of the EU and market confidence).⁴⁸⁸

⁴⁸⁰ Paragraph 77

⁴⁸¹ Paragraph 76

⁴⁸² Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*

⁴⁸³ Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps

⁴⁸⁴ Paragraph 69

⁴⁸⁵ Paragraph 86

⁴⁸⁶ Paragraph 82

⁴⁸⁷ Paragraph 83

⁴⁸⁸ Paragraphs 84 and 85. Reference to practice as a ground for some action of the EU the legality of which might otherwise seem doubtful first appeared in *Scheer*, discussed in section 3.2.9 below.

Articles 290 and 291 TFEU were thus held not to constitute

a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission⁴⁸⁹

with the result that

other systems for the delegation of such powers to [EU] bodies, offices or agencies may be contemplated by the [EU] legislature.⁴⁹⁰

This could be argued to amount to a considerable departure from the pre-existing position of law. That position was stated in *Romano*.⁴⁹¹

[I]t follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular by Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law. Whilst a decision of the Administrative Commission may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules.

Thus according to *Romano* grant of power to adopt acts having the force of law outside the ambit expressly foreseen by the constitutive treaties, *i.e.* to someone other than the Commission, was not possible. (Conferral on the Commission was envisaged in article 155 EEC.) According to *ESMA* it is possible.

3.2.9. *Köster, Scheer*⁴⁹² and *Rey Soda*⁴⁹³

All these cases concern the legality of comitology. Comitology is the system where exercise of the powers delegated to the Commission under a constitutive treaty is “supervised” by various committees staffed with representatives of member states and initially established by the Council.⁴⁹⁴

In *Köster* it was held that the old Article 155 EEC by providing that

the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter,

⁴⁸⁹ Paragraph 78

⁴⁹⁰ Paragraph 87. In fact the TFEU itself provides just such a system in Article 311 TFEU. See footnote 130 above.

⁴⁹¹ Judgement of the ECJ in case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, paragraph 20

⁴⁹² Case 30/70 *Otto Scheer v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*

⁴⁹³ Case 23/75 *Rey Soda v Cassa Conguaglio Zucchero*

⁴⁹⁴ Robert Schütze in ‘Delegated’ Legislation in the (New) European Union: A Constitutional Analysis (2011) 74 *Modern Law Review* 661, 669

“enabled the Council to determine any detailed rules to which the Commission is subject in exercising the power conferred on it”.⁴⁹⁵ The comitology procedure at issue was held to

[form] part of the detailed rules to which the Council may legitimately subject a delegation of power to the Commission.⁴⁹⁶

Since the relevant committee did not have the power to actually adopt an act in the stead of the Commission,⁴⁹⁷ there was no distortion of the structure of the EEC or of its institutional balance.⁴⁹⁸ It enabled the Council to delegate to the Commission “an implementing power of considerable scope”.⁴⁹⁹ Thus comitology was lawful.⁵⁰⁰ It had the effect,⁵⁰¹ and indeed the function,⁵⁰² of enabling the Council to substitute its own action for that of the Commission, *i.e.* to override the determination made by the Commission.

In *Scheer*, which was handed down on the same day as *Köster*, it was held that when power to implement⁵⁰³ a provision of what would now be a legislative act is granted to the Commission, it is lawful to grant to the member states the power to implement that same provision pending the adoption of the implementing measure by the Commission.⁵⁰⁴ At least when the member states are informed – through comitology committees – of the intentions of the Commission.⁵⁰⁵

The ECJ put it thus:

[i]n view of the experimental nature of the first system of the organization of the markets, crystallized in Regulation No 19, and of the shortness of the time which elapsed between the entry into force of the basic regulation and that of implementing Regulation No 87, it was legitimate, in the interests of a rapid implementation of the organization of the markets, to confer temporarily on the Member States functions which, at a more advanced stage of development, have been taken over by the common institutions.⁵⁰⁶

Such an intervention by the member states would amount to nothing more than an

⁴⁹⁵ Paragraph 9

⁴⁹⁶ Paragraph 9

⁴⁹⁷ The committee at issue could only issue opinions. If the committee issued a contrary opinion, “the only obligation on the Commission [was] to communicate to the Council the measures taken”. The Council could then adopt a measure replacing the one adopted by the Commission. The Commission could adopt immediately applicable measures regardless of the content of the opinion of the committee. See paragraph 9.

⁴⁹⁸ Paragraph 9

⁴⁹⁹ Paragraph 9

⁵⁰⁰ Paragraph 10

⁵⁰¹ Paragraph 12

⁵⁰² Paragraph 9

⁵⁰³ In the old Article 202 EC sense, not within the meaning of Article 291 TFEU.

⁵⁰⁴ Paragraphs 6-9

⁵⁰⁵ Paragraph 9

⁵⁰⁶ Paragraph 8

implementation of the general obligation [of loyal cooperation] expressed in article [4(3) TFEU].⁵⁰⁷

It should be noted that the temporary re-delegation to the member states was contained in Regulation No 87 – a regulation adopted by the Commission in exercise of the old Article 202 EC (or rather Article 155 EEC) style implementing power conferred on it in Regulation No 19.⁵⁰⁸

In *Rey Soda* it was explicitly spelled out that the part of the old Article 155 EEC quoted in the beginning of this section allowed

the Council to determine any conditions to which it may subject the exercise by the Commission of the power granted to it.⁵⁰⁹

Interestingly in paragraph 26 the ECJ held that

under the system established by Article 37(2) of the basic regulation⁵¹⁰ it is for the Commission, when it decides after consultation with the Management Committee to require certain holders of sugar of a Member State to pay a tax on the stocks, itself to determine in a precise manner the essential basic rules.⁵¹¹

The essential basic rules which the Commission was – by virtue of Article 37(2) – empowered to adopt were the rules determining the tax base, the tax rate and the persons liable.⁵¹²

The question which the ECJ was dealing with in *Rey Soda* was, admittedly, whether a member state's determination of those essential basic rules was lawful. Rather than set them itself the Commission had – in a regulation adopted in exercise of the power granted to it by Article 37(2) of the basic regulation – (re-)delegated the power to do so to a member state (Italy).⁵¹³ Thus the Commission set none of the essential basic rules.⁵¹⁴ The ECJ opined that

by not specifying the bases of the calculation of the tax in the provision in question and leaving Italy to choose them, the Commission discharged itself of its own responsibility to adopt the basic rules and to submit them by way of the Management Committee procedure to the approval if need be of the Council.⁵¹⁵

⁵⁰⁷ Paragraph 8

⁵⁰⁸ Paragraph 6

⁵⁰⁹ Paragraph 12

⁵¹⁰ The basic regulation at issue was regulation 1109/67. Article 37(2) read as follows: “The requisite provisions to prevent the sugar market from being disturbed as a result of an alteration in price level at the change-over from one marketing year to the next may be adopted in accordance with the procedure laid down in Article 40’ (that is to say, according to the so-called Management Committee procedure).” See paragraph 17 of the judgment.

⁵¹¹ Paragraph 26

⁵¹² Paragraphs 27-29

⁵¹³ Paragraph 31

⁵¹⁴ Paragraphs 45-48

⁵¹⁵ Paragraph 48

Nevertheless *Rey Soda* does beg a question as to its relationship with the essential elements doctrine discussed above when dealing with *Frontex*. That is especially so considering that the doctrine had already been introduced in *Köster*, some five years before *Rey Soda*.⁵¹⁶

It cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure in Article 43 [EEC]. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision.⁵¹⁷

3.3. Other EU instruments

3.3.1. 2009 Communication

Chronologically the earliest other instrument dealing with “competition” of Articles 290 and 291 TFEU is the 2009 Communication of the Commission.⁵¹⁸ In it the Commission set out its understanding of how Articles 290 and 291 TFEU should be applied. It should be noted that the date of the 2009 Communication is 9th December 2009, *i.e.* nine days after the entry into force of the Lisbon Treaty. Thus no practice in relation to Articles 290 and 291 TFEU had yet come into existence.

The Commission started by saying that Article 290 TFEU itself does not require any secondary legislation for its implementation.⁵¹⁹ Its text is sufficient and contains all elements required for defining, on a case by case basis, the scope, the content and the practical arrangements pertaining to delegated power.⁵²⁰ Yet two pages later⁵²¹ the Commission suggested that it was around Articles 290 and 291 TFEU that a legal framework was to be constructed to replace the pre-Lisbon Treaty comitology regime. The statement seems understandable as far as it concerns Article 291 TFEU: the latter expressly provides for such a legal framework. As far as it refers to Article 290 TFEU it is less comprehensible, not to say contradictory of the introductory point taken on page 1 of the 2009 Communication to the effect that Article 290 TFEU provided itself the complete code regulating the issue in question.

The Commission went on to draw the evident parallel between Article 290 TFEU and regulatory procedure with scrutiny⁵²² opining that the similarity does not mean that they will be implemented in the same way.⁵²³

⁵¹⁶ See the text to footnote 895 for further consideration of this point.

⁵¹⁷ Paragraph 6 of *Köster*

⁵¹⁸ 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]

⁵¹⁹ Page 1

⁵²⁰ Page 1

⁵²¹ Page 3

⁵²² See the Council Decision (2006/512/EC) of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁵²³ Page 3

As far as the “competition” between Articles 290 and 291 TFEU is concerned one of the two of the Commission’s principal propositions have been overtaken by events. Its opinion that the scope of the two articles is mutually exclusive⁵²⁴ was, as discussed in section 3.2.1, one of its unsuccessful submissions in *Biocides*.⁵²⁵ The ECJ held there that the EU legislature had discretion in choosing between the two. That implies that situations where recourse could be made to either of them might arise.

The proposition contained in the 2009 Communication which has not been overtaken by events stands is this.

The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale – the need for uniform conditions for implementation.⁵²⁶

If anything, this would seem to lead to the same position which was adopted by the ECJ in respect of the “exclusivity” contention.⁵²⁷ What the Commission was saying was that the acts referred to in Article 290 TFEU and those referred to in Article 291 TFEU do not have the same genus (as in genus in genus and differentia definition). According to the Commission one speaks of scope and effect, the other of rationale. It is not difficult to imagine an act meeting both formulations. Indeed it has been argued that most pre-Lisbon Treaty implementing acts meet both definitions.⁵²⁸

The Commission did opine, however, that whether what it is that the Commission does with the power granted to it is technical or not has no bearing on whether Article 290 TFEU or Article 291 TFEU is engaged.⁵²⁹

On the subject of the meaning of “amend” in Article 290 TFEU the Commission opined that

by using the verb "amend" the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument. Such a formal amendment might relate to the text of one or more articles in the enacting terms or to the text of an annex that legally forms part of the legislative instrument.⁵³⁰

Broadly speaking that would seem to correspond with the position ultimately taken by the ECJ in *Connecting Europe Facility*.

⁵²⁴ Page 3

⁵²⁵ Paragraph 23 of *Biocides*

⁵²⁶ Page 3

⁵²⁷ Other commentators have drawn the same conclusion. See Thomas Christiansen and Mathias Dobbels, Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts (2013) 19 *European Law Journal* 42, 55

⁵²⁸ Jürgen Bast, Is There a Hierarchy of Legislative, Delegated and Implementing Acts?, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 171.

⁵²⁹ Page 4

⁵³⁰ Page 4

Finally the Commission noted that neither Article 290 TFEU nor Article 291 TFEU actually says anything about the procedure by which the Commission is to adopt the respective acts.⁵³¹

3.3.2. 2011 Guidelines

Chronologically the next instrument are the 2011 Guidelines.⁵³² The 2011 Guidelines are basically the instructions the Commission gave to its officials on how to use Articles 290 and 291 TFEU in everyday work. As was mentioned in section 3.2.5, paragraphs 34 and 40 of the 2011 Guidelines were approved by the ECJ in *Connecting Europe Facility*.

The Commission stated in the 2011 Guidelines that drawing up abstract instructions on the distinction between “supplement” and “amend”, on the one hand, and “implement”, on the other, would be rather complicated and probably fruitless. It thought that there was no scientific or magic formula which would mechanically allocate acts between Articles 290 and 291 TFEU. It rather advocated a case by case approach.⁵³³

Dealing with the “competition” of Articles 290 and 291 TFEU the Commission observed that Article 291 TFEU contained no actual definition of implementing acts. It only contained a reference to “uniform conditions for implementing binding Union acts” which was not a definition but constituted rather a trigger for the need to confer implementing powers on the Commission.⁵³⁴ This seems to have taken up and developed further the idea, expressed already in the 2009 Communication, that delegated acts and implementing acts were formulated in the TFEU in terms of different things (in case of former – the scope and consequences, in case of latter – rationale).

Developing this idea further yet it could very well be said that Article 290 TFEU is likewise trigger-based. Its paragraph 1(1) does not so much attempt to define a delegated act as to set forth the situation in which a delegated act could be called for. The situation would be one where there is a need to supplement or to amend certain non-essential elements of the legislative act. On this view it would be open to discussion whether delegated acts and implementing acts are formulated in terms of different things. On the one hand, it could be claimed that both Article 290 and Article 291 TFEU take their cue from rationale. Thus the point about different formulation would seem to fall by the wayside. On the other hand, it could still be argued that the terms in which delegated and implementing acts are defined are different. The difference simply resides at a lower level of abstraction. While both would be about rationale, they are about different rationales, and there are great many different rationales.⁵³⁵ Implementing acts would, on this view, be defined in terms of uniformity of application of basic acts, while delegated acts – in terms of ease of amendment of basic acts.

⁵³¹ Page 6. This is repeated in paragraph 85 of the Guidelines (for the Guidelines see section 3.3.2).

⁵³² Implementation of the Treaty of Lisbon: Delegated Acts (Article 290, Treaty on the Functioning of the European Union). Guidelines for the Services of the Commission. [SEC(2011)855]. They were adopted on the 24th June 2011 thus again pre-dating all the case law.

⁵³³ Paragraph 22

⁵³⁴ Paragraph 27

⁵³⁵ Which means that the rationales of Articles 290 and 291 TFEU do not exhaust all possible rationales.

Should this view be taken, it would likewise not support the exclusivity contention: one act could, quite evidently, have more than one rationale.

The point made in the 2009 Communication on irrelevance (for deciding whether an act comes under Article 290 or 291 TFEU) of whether the Commission does something technical or not was likewise further fleshed out in the 2011 Guidelines. In paragraph 33 the Commission took the position that

there is no link between the political importance of a decision and the nature of the powers to be given to the Commission for its adoption.

It all came down to conditions set forth in Articles 290 and 291 TFEU.⁵³⁶ Highly political decisions could take the form of an implementing act if the conditions of Article 291 TFEU were met, and very technical and non-controversial measures could take the form of delegated acts if the conditions of Article 290 TFEU were met.⁵³⁷ That is supported by the case law of the ECJ.⁵³⁸

As far as differentiation between amendments and supplements goes, the 2011 Guidelines would seem to be broadly in line with the ECJ subsequent decision in *Connecting Europe Facility*. They too seem to imply that the distinction is a formal one. The Commission thought that “to amend”

means to make formal changes to a text by deleting, replacing or adding non-essential elements.⁵³⁹

A supplementing act would, by contrast,

remain a separate act and will not formally change the basic act.⁵⁴⁰

Additionally, the Commission tackled head-on the relation of supplementing and implementing (something the ECJ has not, thus far, undertaken). This attempt is contained in paragraphs 39 – 44. The statement of principle seems to be contained in paragraphs 40 and 41.⁵⁴¹

40. As already acknowledged by the communication the word “supplement” is not readily or easily defined. Basically, a delegated act which supplements a legislative act takes the form of a separate act imposing new non essential rules, new norms. The premise of a delegation is that the legislators have decided not to legislate comprehensively: they have established the essential elements and thereafter, by way of delegated powers, they leave it to the Commission to “flesh out” these essential

⁵³⁶ That would seem to confirm that both of them are trigger-based.

⁵³⁷ Paragraph 33

⁵³⁸ See the judgment of the ECJ in case C-133/06 discussed in the text from footnote 906 onwards. See also *EUROPOL* (text to footnote 438 above).

⁵³⁹ Paragraph 34 (approved by the ECJ in *Connecting Europe Facility*)

⁵⁴⁰ Paragraph 34 (approved by the ECJ in *Connecting Europe Facility*)

⁵⁴¹ Paragraph 40 was approved by the ECJ in *Connecting Europe Facility* as a formulation of supplementing acts when trying to distinguish those from the amending ones. In that context paragraph 40 is perfectly useful.

elements, to supplement them. A delegated act will always deal with the content, the substance of the legislation.

41. In contrast the verb ‘implement’ envisages the situations in which there is no need to establish any new rules or norms; the legislative act is complete and the sole purpose of any subsequent implementing act is to give effect to the rules which have already been laid down. An implementing act brings into life the legislation without changing its contents; it merely gives effect to the rules.

This attempt at a distinction would seem to be doomed: it amounts to no more than mincing words. First, as commentators have observed, it is impossible to make implementing rules without changing the content of the rules being implemented.⁵⁴² Second, while the Commission postulates that a delegated act is called for when the legislation is not comprehensive, and that in case of its comprehensiveness the act must be implementing, that distinction runs into at least four difficulties. On a theoretical level the distinction seems to assume that Articles 290 and 291 TFEU are mutually exclusive, that no situation may fall within the purview of both. The ECJ clearly refuted that in *Biocides*. Likewise, on a theoretical level the distinction seems to assume existence of something “below” non-essential elements.

According to *Frontex* a legislative act must contain all essential elements of the subject-matter envisaged by a legislative act. Thus – as the Commission says in paragraph 40 of the 2011 Guidelines – a legislative act need not be comprehensive. Non-essential elements may be adopted by the Commission in a secondary act. Since every implementing rule necessarily changes the main act, if essential elements are reserved to legislative acts and non-essential ones to delegated acts, what would implementing acts contain? It would seem that the distinction which the Commission purports to make simply does not fit into a *Frontex*-mandated classification. Yet in its judgments dealing with the “competition” of Articles 290 and 291 TFEU the ECJ has not sought to amend that framework by somehow adding to it.

The Commission’s attempt to get out of this predicament by postulating that “‘implement’ envisages the situations in which there is no need to establish any new rules or norms” cannot succeed. Surely if that were true, no implementing acts would be called for at all. Or – to the extent that that could be countered by a suggestion that the reference “establishing any new rules or norms” would not seem to cover an individual decision – at least no *in abstracto* normative implementing acts would be called for. Yet, implementing acts are only adopted if there is something in the relevant field which a basic does not deal with. A suggestion that “‘implement’ envisages the situations in which there is no need to establish any new rules or

⁵⁴² See, for instance, the opinion of Craig and de Búrca discussed in section 3.4.1 (specifically in the text to footnote 635 as well as that footnote itself) or of Jacqu e discussed in section 3.4.6. Thomas Cottier has offered what is, perhaps, one of the clearest formulations of this lack of distinction.

The formulation of norms always includes delegation of powers to a greater or lesser degree to those implementing the rules. In reality there is no fundamental methodological distinction between rule-making and rule-applying.

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norms” and the ensuing implication that “implementing” is something which is available only when the legislation is comprehensive is simply wrong as a matter of fact.⁵⁴³

The final theoretical difficulty with paragraphs 40 and 41 of the 2011 Guidelines lies in the fact that they seem to require making distinctions between two different “comprehensivenesses”. The comprehensiveness referred in paragraph 40 seems to be a different animal from the one implied in Article 2(2) TFEU. According to the latter provision member states may exercise a competence which they share with the EU to the extent that the EU has not exercised its corresponding competence. This brings one to the question whether the EU regulates comprehensively a particular subject-matter falling within standard shared competence. If yes, member states must exercise no own competence in respect of that subject matter; if no, they can exercise it. Paragraphs 40 and 41 of the 2011 Guidelines would however seem to be looking at comprehensiveness of a legislative act in respect of the things which it – somehow – covers comprehensively within the meaning of Article 2(2) TFEU (so that member states cannot exercise their own competence) without actually setting forth elements pertaining to regulation of some of those things. To put it differently, there seem to be two subject-matters (neither of which seems to be defined) the comprehensive regulation of which must be looked at: one for Article 2(2) TFEU, another for the purposes of distinction between Articles 290 and 291 TFEU.⁵⁴⁴

The final difficulty is more practical: even if it is maintained on paper that a delegated act is called for when the legislation is not comprehensive, and that in case of its comprehensiveness the act must be implementing, such criterion is incapable of application in practice for the very reason that making of any rule assumes that there is something which either was not regulated (thus no comprehensiveness) or that something is being changed.

In paragraphs 42 – 44 of the 2011 Guidelines the Commission gives examples of attempts at practical application of the principle stated in paragraphs 40 and 41. In paragraph 42 the Commission gives the example of authorisation of a chemical product on the basis of pre-established criteria, and contrasts it with a situation where it is entitled to establish further criteria on account of technical and scientific progress. The former is said to be implementing while the latter – delegated. What of a criteria such as “adequate level of data protection”?⁵⁴⁵ Would its application require an implementing or a delegated power on this analysis?⁵⁴⁶ Especially considering that the content of the criteria is liable to change because of technical and scientific progress. No clear answer would seem to exist.

⁵⁴³ It would be very difficult, if at all possible, to argue that the first step act – the implementing one – forming part of the waterfall structure considered in *Visas* was not normative.

⁵⁴⁴ There is a third one still: the *Frontex* one. Although it might be the case that it would coincide with one or the other. There is no case law on which that would be.

⁵⁴⁵ That was the criteria which the ECJ deemed sufficient for limiting implementing power in *EUROPOL*. See paragraph 54 of *EUROPOL* and article 23(6)(b) of the *EUROPOL* decision and article 5(4) Council Decision 2009/934/JHA of 30 November 2009 adopting the implementing rules governing Europol’s relations with partners, including the exchange of personal data and classified information.

⁵⁴⁶ The ECJ in *EUROPOL* thought that implementing power was okay in the situation, but it did not apply the criteria set forth in paragraphs 40 and 41 of the Guidelines for the purposes of making this determination.

And if that was difficult, what of the following criteria (or rather criterion) which a third country must satisfy before the Council, in exercise of its implementing power, may add it to the list of countries with which EUROPOL is to conclude an agreement?

In so far as it is necessary for the performance of its tasks, Europol may also establish and maintain cooperative relations with third states.⁵⁴⁷

In paragraph 56 of *EUROPOL* the ECJ held that that provision defined the conditions of exercise of implementing power sufficiently.

In paragraph 43 of the 2011 Guidelines the Commission suggests that it could be possible to apply the principle by asking whether the power granted to the Commission enables it to decide what the addressees are to do or how they are to do it. If “what”, then additional substantive rules are said to be established and the power is said to be delegated. Deciding on “how”, on the other hand, is said

in principle not [to] alter [or] modify the core obligations established by the legislation.⁵⁴⁸

Thus, the power is said to be implementing. First, that seems a rather stark departure from paragraph 41 which spoke of lack of any need to establish “any new rules” as a precondition to the act being implementing. Paragraph 43, by contrast, says only that core obligations are to remain unchanged – and even that only “in principle”. Thus “how” admits establishment of new rules and therefore seems – in Commission’s own words – to be closer to the acts considered in paragraph 40, *i.e.* delegated acts.

Second, disregarding this difficulty the distinction between what and how might be clear-cut on paper,⁵⁴⁹ but is impossible to maintain in practice. The question depends on the way the issue is put and the level of abstraction at which it is approached. Suppose the grantee of power is to define firewall requirements to ensure “adequate level of protection”. On the one hand, it would seem to be a “how”: how the addressee is to ensure an adequate – say high – level of data protection. Yet, isn’t it just as well a “what”? Because determination of the requirements for the firewall tells the addressee in detail (as opposed to in a generalised manner expressed by “adequate – or high – level of data protection”) what it is to do.⁵⁵⁰

Finally, in paragraphs 85 – 123 of the 2011 Guidelines, the Commission discusses the preparation of delegated acts. Taking the fact that the TFEU remains silent on the issue as its starting point⁵⁵¹ the Commission concentrates on comitology. In paragraph 86 it postulates (without any argumentation) that

⁵⁴⁷ Article 23(1)(a) of the EUROPOL decision.

⁵⁴⁸ Paragraph 43

⁵⁴⁹ As evidenced by the example the Commission gives in paragraph 44 of the 2011 Guidelines.

⁵⁵⁰ Thus Bast’s point, discussed in section 3.4.9 below, that substantive criteria are mostly useless for any delimitation seems to be borne out.

⁵⁵¹ Paragraph 85

the legislator cannot impose a mandatory consultation of representatives of the Member States. “Comitology procedures” or any other similar systems are clearly excluded from the scope of Article 290.⁵⁵²

However in the ensuing paragraphs it mollifies that stance considerably.⁵⁵³ It starts by saying – in paragraph 87 – that it, the Commission, needs to consult the experts of all the member states in preparing a delegated act. Then it purports to limit that statement by saying that

these experts have no institutional role in the decision-making process.⁵⁵⁴

It goes on to say that consultation of experts should be systematic (not just of experts of member states), and then stresses again that the consultations must involve experts of all member states.⁵⁵⁵ This seems to make its statement in paragraph 86 – to the effect that the EU legislature cannot impose on it a duty to consult experts of member states in preparing a delegated act – moot. There is no need for such imposition since the Commission believes that it is already under such a duty. There is no explanation of its source in the 2011 Guidelines.

The Commission then states – further eroding the difference between consultation of experts and “classical” comitology – that

[i]t is not excluded to consult experts who often participate in a given comitology committee. An "expert meeting" could be held on the same day and with the same composition as a comitology committee meeting. However the services must clearly distinguish between these two meetings: different agendas, different documents /.../⁵⁵⁶

With respect, this is not a difference of note. What the Commission seems to have said is that for practical intents and purposes there is no difference, but that one will be shown on paper.

While the 2011 Guidelines state that the experts are to take no vote and are not to issue any formal opinion, they nevertheless seem to require the Commission to obtain from experts of member states both technical and political feedback on the text of a proposed delegated act, and to inform those experts about the conclusions the Commission draws from the experts’ discussions and about the next steps the Commission proposes to take.⁵⁵⁷ The only actual differences from the advisory procedure set forth in the comitology regulation⁵⁵⁸ are that in case of delegated acts the experts issue no formal opinion and that experts other than those of

⁵⁵² Paragraph 86 of the Guidelines. This would not seem to sit well with the recent inter-institutional agreement on better lawmaking (see section 3.3.4).

⁵⁵³ That does sit rather well with the inter-institutional agreement on better lawmaking (see section 3.3.4).

⁵⁵⁴ Paragraph 88. If that is meant to exclude decision-making powers, then that is so in case of comitology as well. As we saw in section 3.2.9 the ECJ said as much in *Köster*.

⁵⁵⁵ Paragraphs 91 and 92

⁵⁵⁶ Paragraph 94

⁵⁵⁷ Paragraphs 100 and 102

⁵⁵⁸ Article 4 of 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

member states could be involved in addition to experts of member states.⁵⁵⁹ Otherwise the two procedures as set forth in the comitology regulation and in the 2011 Guidelines seem to be identical.

3.3.3. Parliament's 2014 resolution⁵⁶⁰

In this instrument the Parliament sought to set out its understanding of Articles 290 and 291 TFEU and of their relationship. It again predated all the relevant judgements of the ECJ – and it shows.

In the 2014 resolution the Parliament opined that the decision whether to confer delegated or implementing power must be based on objective factors.⁵⁶¹ That is a statement which the ECJ has steadfastly refused to make in its judgments dealing with Articles 290 and 291 TFEU. Thus there is – at present – no such obligation. Another point which has been “overruled” by the ECJ⁵⁶² is the suggestion that delegated acts should be used where the basic act leaves considerable margin of discretion to the Commission, and that an implementing act should not leave any significant margin of discretion.⁵⁶³

More interesting is the Parliament's contention that

delegated and implementing acts are intended to address different needs and cannot therefore be substituted one for another.⁵⁶⁴

If it stands for mutual exclusivity of delegated and implementing acts, the statement is clearly wrong.⁵⁶⁵ Yet, it corresponds nicely to the Commission's point that Articles 290 and 291 TFEU have been drafted differently, that – as shown in section 3.3.2 – they have different rationale.

What does tie in nicely with paragraph 40 of *Biocides* where the ECJ found that the choice whether to grant delegated or implementing power was discretionary and postulated only a

⁵⁵⁹ In connection with this latter point it should perhaps be noted that the 2011 Guidelines deal with the information provided to the Parliament and the Council, *i.e.* the institutions which are actually mentioned in article 290 TFEU, only after dealing in detail with experts of member states. See paragraph 104.

⁵⁶⁰ 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))

⁵⁶¹ Paragraph D

⁵⁶² *Visas*, paragraph 32

⁵⁶³ Paragraph 1. The Parliament also stated when expressing its opinion in respect of implementing acts that implementing acts should not add any further political orientation. That would not seem to sit well with *Visas*, especially paragraphs 32 and 45 thereof. Nor would it seem to agree with the judgment of the ECJ in case C-133/06, which admittedly predated the Lisbon Treaty, but according to *Biocides* the pre-Lisbon Treaty case law on implementing acts is applicable to Article 291 TFEU implementing acts (see text following footnote 906 and section 3.2.1 above). On the other hand, it could be seen as a confirmation of the doctrine of essential elements and thus be a repetition of paragraph 65 of *Frontex* (which had been already handed down by the time the Parliament adopted the resolution).

⁵⁶⁴ Paragraph 4

⁵⁶⁵ *Biocides*, paragraph 40. Commentators, for instance Bradley (see section 3.4.8 below) have concluded from that difference the opposite – that an act could be both delegated and implementing at the same time, or at least that it could simultaneously meet the criteria for both.

very light review of exercise of that discretion,⁵⁶⁶ is paragraph E of the Parliament's resolution. The Parliament stated there that

the delegation of power to the Commission is not merely a technical issue but can involve questions of considerable political importance for Union citizens and consumers, enterprises and entire sectors, on account of their possible socio-economic, environmental and health impacts.

While this does contradict the aforementioned paragraph D of the Parliament's resolution (which, as mentioned, was effectively overruled by the ECJ) it seems to provide a possible reason⁵⁶⁷ for the ECJ's decision. The choice is – to a large extent – political, *i.e.* extra-legal.

3.3.4. Inter-institutional agreement on better law-making

The last instrument to be considered here is the most recent one: inter-institutional agreement on better law-making.⁵⁶⁸ It is the only relevant EU instrument which post-dates at least some of the ECJ's judgments on Articles 290 and 291 TFEU.

The first issue which should be taken up in respect of the agreement is its legal force. Is it binding? According to Article 295 TFEU it could be binding just as well as not: depends on the agreement. Unfortunately the agreement itself is silent on the point. On the basis of the wording of article 295 TFEU it could, perhaps, be argued that the agreement is not binding. According to Article 295 TFEU the Parliament, the Council and the Commission may conclude inter-institutional agreements “which may be of a binding nature”. Thus, it could be argued that by default inter-institutional agreements are not binding.

What seems to be clear is that even if the agreement is not binding, should one of its signatories decide to depart from it, it will have to explain its reasons for doing so.⁵⁶⁹ If a signatory fails to duly explain the reasons, the relevant act will probably be annulled by the ECJ⁵⁷⁰ (should someone apply for annulment).

Finally, as far as the binding or non-binding character of the agreement is concerned, one must not fail to mention the standard recital contained in the annexe to the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts which itself is the annex of the agreement. The standard recital is proposed to be inserted into every legislative act which grants the Commission delegated or implementing power. It contains the following language.

⁵⁶⁶ As well as with *Smoke Flavourings*.

⁵⁶⁷ Which the ECJ did not expressly subscribe to. However one would be amiss not to state that the Parliament's resolution was adopted less than a month before the judgment in *Biocides* was handed down. Bradley explains the ECJ's choice of the standard of review in similar terms. See section 3.4.8 below.

⁵⁶⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14

⁵⁶⁹ Judgment of the ECJ in case C-378/00 *Commission of the European Communities v European Parliament and Council of the European Union*, paragraph 50

⁵⁷⁰ Paragraphs 62, 69 and 72

It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

In addition to the standard recital the annexe also contains several standard exercise-of-delegation-articles. One of the articles⁵⁷¹ contains the following paragraph.

Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.

Should such a recital or such an article be inserted into a legislative act, the agreement would at least in part⁵⁷² become binding – by virtue of the *renvoi* to it in the recital or exercise-of-delegation-article of the legislative act – for the adoption of all delegated acts under that legislative act.⁵⁷³

The substance of the agreement is, in many respects, unremarkable. It incorporates the legal position as stated by the ECJ in its case law. For instance, in respect of “competition” of Article 290 and 291 TFEU the agreement has this to say.

It is the competence of the legislator to decide whether and to what extent to use delegated or implementing acts, within the limits of the Treaties.⁵⁷⁴

That statement was essentially lifted from paragraph 40 of *Biocides*.

In one respect the substance of the agreement is however quite remarkable. The system it creates for the adoption of delegated acts has been called “weak comitology”.⁵⁷⁵ In essence, the agreement takes the 2011 Guidelines and makes them a bit more like comitology.

In the agreement the Commission commits to gathering, prior to the adoption of delegated acts, all necessary expertise. That includes consultations with experts of member states and with the public at large. That does not differ much from the Commission’s duty in case of implementing acts: there too it is to use expert groups and certain stakeholders – whenever early expertise is needed in the early preparation of draft implementing acts. The agreement further grants the Parliament and the Council access (i) to all documents which experts of

⁵⁷¹ Paragraph 4 of option 3 of article [A] “Exercise of delegation”

⁵⁷² In the part which ends up being referred to in the legislative act.

⁵⁷³ The judgment of the ECJ in case C-399/12 *Federal Republic of Germany v Council of the European Union*, paragraphs 61 – 65

⁵⁷⁴ Paragraph 26

⁵⁷⁵ Carlo Tovo, I nuovi equilibri tra potere esecutivo e legislativo nell’Unione europea: l’accordo interistituzionale “Legiferare meglio” (2016) Eurojus No. 3.1, at 2; available at <http://rivista.eurojus.it/i-nuovi-equilibri-tra-potere-esecutivo-e-legislativo-nellunione-europea-laccordo-interistituzionale-legiferare-meglio/>

member states receive at the same time as they receive them and (ii) to meetings of the Commission's expert groups to which experts of member states are invited as long as they deal with preparation of delegated acts.⁵⁷⁶

In paragraph 30 the agreement purports to somewhat limit the input of comitology committees in preparation of delegated acts. Yet all that the agreement says is that those committees "should not, in that capacity, be called upon to exercise other functions". The other functions presumably include input in preparation of delegated acts. Thus, this does not seem to change much, if at all, what was provided in paragraphs 85 – 102 of the 2011 Guidelines. The hat on the head of every expert needs to change, that is all. If anything, the agreement makes a further step: comitology committees only "should not", not "shall not" participate as comitology committees in preparation of delegated acts.

The procedure for preparation of delegated acts is set out in more detail in the annexe to the agreement.⁵⁷⁷ Its paragraph 4 obliges the Commission to consult the member states' experts in a timely manner and to do so on each draft delegated act. If the material content of the draft undergoes any change at all, those experts must be given the opportunity to react to that change, and where necessary to do so in writing.⁵⁷⁸ The Commission is further under an obligation to explain itself to the experts of member states: it must state the conclusions it has drawn from the consultations, how it took the experts' views into account and how it intends to proceed.⁵⁷⁹ The statement, contained in the 2011 Guidelines,⁵⁸⁰ to the effect that the member states' experts are to take no vote and are to issue no opinion, is omitted from the agreement.

At the same time the Parliament and the Council merely may send their experts to the meetings of the relevant group of experts of member states.⁵⁸¹ As such it would seem to essentially amount to the reversal of the tendencies of Article 290 TFEU. That provision mentions only the Parliament and the Council; it does not mention member states at all. The agreement however leaves the distinct impression of putting the member states before the Parliament.⁵⁸²

To sum up, the parallel between this procedure and advisory procedure provided for in the comitology regulation⁵⁸³ is, if anything, even stronger than under the 2011 Guidelines (*e.g.* omission of ban on opinions). Effectively nothing is left of the statement (if that statement

⁵⁷⁶ For everything in this paragraph see paragraph 28 of the agreement.

⁵⁷⁷ *I.e.* in the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts

⁵⁷⁸ Paragraph 7 of the annexe

⁵⁷⁹ Paragraph 5 of the annexe

⁵⁸⁰ Paragraph 100 of the 2011 Guidelines

⁵⁸¹ Paragraph 11 of the annex

⁵⁸² When talking about "impressions" it seems improper to say that the agreement is putting member states before the Council: on that level (of impressions) the Council would seem nothing more than the member states collectively. However, see Bradley's opinion who argues that the Parliament still maintains the control over adoption of delegated acts via its power to dismiss the Commission (discussed in section 3.4.1 below).

⁵⁸³ Article 4 of 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

ever meant anything) in paragraph 86 of the 2011 Guidelines that comitology procedures are excluded in case of delegated acts. To be fair, it was unclear why the Commission took that view in the first place. The only relevant difference between Article 290 TFEU and that part of Article 155 EEC which was construed in *Köster* is paragraph 2 of the former.

Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.⁵⁸⁴

Yet that paragraph starts with a saving provision: legislative acts are to lay down conditions of delegation. Just like in Article 155 EEC, no limits are placed on the conditions. Article 290 TFEU merely gives some examples of possible conditions. Thus, it stands to reason that *Köster*, *Scheer* and *Rey Soda* discussed above are still good law. The ECJ has not overruled them. Article 290 TFEU has not abolished them. Thus, establishment of comitology, whether weak or strong, for the adoption of delegated acts would seem to be perfectly lawful even now, *i.e.* post-Lisbon Treaty, under *Köster*, *Scheer* and *Rey Soda*. Except that this time it is the Parliament and the Council together which are entitled to establish any conditions to which they subject the grant of delegated power.

Thus there is even no need to refer to Articles 4(3) and 11(3) TEU as possible bases for the “weak comitology”. True, they provide for extensive consultations by the Commission, but the latter does not differentiate between the consultees. Thus, recourse at least to the latter of these two provisions as a basis for such comitology might be more fraught with risks of accusation of misuse of power, the more evident it is that the objective is to ensure control by the member states rather than broad consultation where member states are just some of the parties consulted without being in any sense in a considerably more privileged position. In the light of the agreement that inequality is painfully evident. In contrast with the way the agreement regulates consultations with experts of member states, as regards others it simply says that

[t]he preparation and drawing-up of delegated acts may also include consultations with stakeholders.⁵⁸⁵

As a last point it should be mentioned that the agreement provides no criteria, not even indicative ones, for deciding whether Article 290 TFEU or Article 291 TFEU should be chosen in a particular situation. Earlier drafts did contain such criteria, but they were removed

⁵⁸⁴ By comparison article 155 EEC read in relevant part as follows: “With a view to ensuring the functioning and development of the Common Market, the Commission shall exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.”

⁵⁸⁵ Paragraph 6 of the annex

from the text which was adopted by the three institutions.⁵⁸⁶ One suspects that *Biocides* might have been the catalyst for that.

3.4. Academic literature

After consideration of various “primary sources” it is useful to see what has been made of them, and indeed of the issue in general, by academic commentators. The following consideration of academic literature shall start with the views expressed in textbooks. These are usually more conservative than the views expressed in articles, and give an idea of what is understood as capable of being taken for granted (textbooks state the law with their potential users, students, in mind). The consideration of the views expressed in textbooks will be followed by an overview of opinions expressed elsewhere. That overview shall be chronologic.

3.4.1. Textbooks

Chalmers, Davies and Monti⁵⁸⁷ term delegated and implementing powers “quasi-legislative”, and dedicate a large part of the discussion of them to the doctrine of essential elements, *i.e.* to delimitation of those “quasi-legislative” powers from legislative ones.⁵⁸⁸ When speaking of delegated and implementing powers themselves the book mostly rehashes Articles 290 and 291 TFEU and the common understanding which has by now become the annexe to the inter-institutional agreement on better law-making discussed in section 3.3.4.⁵⁸⁹ The authors do, however, opine that the distinction between delegated and implementing powers is obscure.⁵⁹⁰ More importantly they subscribe to the view that it is left obscure deliberately.⁵⁹¹ Nevertheless they think that the distinction does matter: it subjects the Commission to different institutional controls which they consider to be less restrictive in case of Article 291 TFEU and more restrictive in case of Article 290 TFEU (considering comitology).⁵⁹² They suggest that the

obscurity allows the legislature a freedom over the control to which it can subject the Commission.⁵⁹³

Thus the authors seem to uncannily “foresee” at least in part the position the ECJ would end up taking in paragraph 40 of *Biocides*.

In another book pre-dating all the case law on “competition” of Articles 290 and 291 TFEU, Steiner and Woods on EU Law,⁵⁹⁴ the authors place the issue of Articles 290 and 291 TFEU

⁵⁸⁶ Carlo Tovo, I nuovi equilibri tra potere esecutivo e legislativo nell’Unione europea: l’accordo interistituzionale “Legiferare meglio” (2016) Eurojus No. 3.1, at 2; available at <http://rivista.eurojus.it/i-nuovi-equilibri-tra-potere-esecutivo-e-legislativo-nellunione-europea-laccordo-interistituzionale-legiferare-meglio/>.

⁵⁸⁷ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 68. The book pre-dates all the case-law dealing with “competition” of articles 290 and 291 TFEU.

⁵⁸⁸ Pages 68-71

⁵⁸⁹ Pages 68, 71 and 72

⁵⁹⁰ Page 71

⁵⁹¹ Page 71

⁵⁹² Pages 71 and 72

⁵⁹³ Page 71

⁵⁹⁴ Lorna Woods and Philippa Watson, *Steiner & Woods on EU Law* (12th ed., 2014 OUP)

into the context of comitology and the way it functioned before the Lisbon Treaty.⁵⁹⁵ After a brief explanation of reasons for the existence of comitology⁵⁹⁶ and of problems which were said to have plagued pre-Lisbon Treaty comitology,⁵⁹⁷ Articles 290 and 291 TFEU are rehashed. The authors then opine that the “power for ‘delegated acts’” introduced by Article 290 TFEU is new.⁵⁹⁸ That does not seem to fit at all well with the Commission’s view that Article 290 TFEU provides for something which is very similar to regulatory procedure with scrutiny under decision 2006/512 and the old Article 202 EC.⁵⁹⁹ What does fit well with opinions expressed by the Commission⁶⁰⁰ is the authors’ suggestion that Article 290 TFEU does not require any implementing rules. Unlike the Commission the authors, however, stop short of suggesting that comitology is excluded under Article 290 TFEU. The authors merely state in that respect that Article 290 TFEU provides for no duty to consult representatives of member states, but that the Commission has indicated that it would.⁶⁰¹ In respect of implementing acts the authors opine that

Lisbon brought changes to the system, limiting the circumstances in which comitology-style procedures will operate in relation to “implementing acts” under Article 291 TFEU (see Chapter 3).⁶⁰²

On the “competition” of Articles 290 and 291 TFEU, the authors suggest that delegated and implementing acts are mutually exclusive.⁶⁰³ This statement is made together with another one: that delegated acts and implementing acts are subject to different levels of oversight. Yet it is unclear whether that is the reason why the authors think that delegated acts and implementing acts are mutually exclusive, or whether the suggestion of mutual exclusivity was simply postulated.⁶⁰⁴

In yet another 2014 book, *European Union Law*,⁶⁰⁵ Robert Schütze opined that Article 290 TFEU contains political safeguards of democracy, and that Article 291 TFEU creates a less-democratic system of “executive law-making”.⁶⁰⁶ His explanation for that is that the constitutional logic of Article 291 TFEU

is not to protect the powers of the EU legislator but rather to protect the Member States within the Union’s system of executive federalism (ie the principle that, in

⁵⁹⁵ Pages 72 and 73

⁵⁹⁶ Page 72. These are said to include precluding legislative process from being clogged-up by details, need for expertise and the member states’ desire to oversee the rulemaking.

⁵⁹⁷ Page 72. These are said to include lack of transparency and access and the undermining of the Parliament.

⁵⁹⁸ Page 73.

⁵⁹⁹ See section 3.3.1 above.

⁶⁰⁰ Page 1 of the 2009 Communication.

⁶⁰¹ Page 73

⁶⁰² Page 40. There seems to be no relevant discussion in chapter 3.

⁶⁰³ The account pre-dates *Biocides*.

⁶⁰⁴ Page 73

⁶⁰⁵ Catherine Barnard and Steve Peers (eds.), *European Union Law* (2014 OUP)

⁶⁰⁶ Page 86

accordance with Article 291 TFEU, the power to implement EU law in principle belongs to the Member States).⁶⁰⁷

Kieran St C Bradley considers, in the same book, delegated and implementing measures both to be derived normative acts.⁶⁰⁸ He likewise believes that Article 290 TFEU requires no implementing measures.⁶⁰⁹ Speaking of differences between delegated and implementing acts, he notes the fact that a delegated act may be adopted only on the basis of a legislative act (there are no such limitations in respect of implementing acts)⁶¹⁰ and that power may be granted to the Commission or to the Council under Article 291 TFEU (it may only be granted to the Commission under Article 290 TFEU).⁶¹¹ He likewise notes the illusory nature of the exclusion of the Council and of the Parliament from the control over the Commission's adoption of implementing acts. The former is illusory because Article 291(3) TFEU provides for control by member states, the latter – because the Commission remains answerable to the Parliament (via the latter's power to dismiss it⁶¹²) even when adopting an implementing act.⁶¹³

Speaking of the border between Article 290 TFEU and Article 291 TFEU, he thinks that the border is unclear, perhaps intentionally so.⁶¹⁴ He then goes on to say

[i]t is impossible to imagine a secondary measure which is a delegated act as to its content, but which is required in order to lay down uniform conditions for implementing legally binding Union acts.⁶¹⁵

Finally he opines that

the principal parties responsible for classifying such derived measures have diametrically opposing interests.⁶¹⁶

That suggestion might have been overtaken by events, at least in part. His reasoning for that is that the Parliament is largely excluded from the adoption of implementing acts, while the Council has considerably less of a power in relation to delegated than to implementing acts. Thus the Parliament would favour delegated, while the Council implementing acts. Yet, the inter-institutional agreement on better law-making (discussed in section 3.3.4 above) would seem to largely erase for all practical intents and purposes part those differences.

⁶⁰⁷ Page 86

⁶⁰⁸ Page 124

⁶⁰⁹ Page 125

⁶¹⁰ Page 126

⁶¹¹ Page 126

⁶¹² Article 234 TFEU and Article 17(6) TEU

⁶¹³ Pages 126 and 127

⁶¹⁴ Page 130

⁶¹⁵ Page 130. It should be stressed that either there is a typo in the book and the quote should say that it is *not* impossible to imagine that, or Bradley subsequently changed his opinion. Writing later he stated that it was not impossible – see section 3.4.8 below. All in all, the better opinion would seem to be that the quote contains a typo.

⁶¹⁶ Page 130

Marianne Dony, still writing before *Biocides*,⁶¹⁷ starts by suggesting that delegated acts are a Lisbon Treaty innovation,⁶¹⁸ yet quickly back-pedals in the same paragraph by discussing (quite extensively for a textbook) the origins of delegated acts in comitology: the regulatory procedure with scrutiny in decision 2006/512. Aside from rehashing Articles 290 and 291 TFEU, she opines that Article 290 TFEU gives the Commission a wide margin of discretion in deciding the procedure for adoption of delegated acts.⁶¹⁹ If anything, that is an understatement: the Lisbon Treaty simply does not deal with that procedure at all. She also dedicates some space to the controls existing over the Commission's delegated acts.⁶²⁰

Speaking of implementing acts she notes first that their subject matter is something which *prima facie* lies within the competence of member states with the Commission entering into the picture only if implementation needs to be uniform.⁶²¹ She explains that to be the basic reason for the development of comitology under the old Article 202 EC.⁶²² Finally she mentions that pre-Lisbon Treaty comitology committees were “emanations” of the Council, while under the Lisbon Treaty they are emanations of member states.⁶²³ Nothing is said on “competition” of Article 290 and 291 TFEU.

Finally let us consider a textbook which was published after *Biocides*. Paul Craig's and Gráinne de Búrca's textbook⁶²⁴ also contains what is probably the most extensive treatment of the issue in a general textbook on EU law. The authors initiate their discussion by stating that both delegated and implementing acts are “below” legislative ones. They then consider the rationale for dividing the pre-Lisbon Treaty implementing acts into the two categories: delegated and implementing. They see it in the tensions between the Council and the Parliament over the prior comitology: the Council wished it to exist because

it realized that regulatory choices and contentious issues could be resolved through [pre-Lisbon Treaty implementing] measures, the devil being in the detail.⁶²⁵

Yet the Parliament was unhappy with that comitology deeming it too dominated by member states. Articles 290 and 291 TFEU resulted. In that connection, the authors state that

[c]omitology in its pre-Lisbon form therefore no longer operates in relation to delegated acts, although some “advisory” committees composed of national experts continue to exist in relation to delegated acts, and a revised form of Comitology operates in relation to implementing acts.”⁶²⁶

⁶¹⁷ Marianne Dony, *Droit de l'Union européenne* (5th ed., Editions de l'Université de Bruxelles 2014). This allows one “to get a feel” whether a non-English language textbook might somehow differ from English ones.

⁶¹⁸ Paragraph 351

⁶¹⁹ Paragraph 353

⁶²⁰ Paragraph 354

⁶²¹ Paragraph 356

⁶²² Paragraph 357

⁶²³ Paragraph 358. It would seem not to create very considerable a difference in practice.

⁶²⁴ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP)

⁶²⁵ Page 115

⁶²⁶ Page 115. The book pre-dated the interinstitutional agreement in better law-making discussed in section 3.3.4 above.

This seems to be markedly different from any of the foregoing treatments: effectively the thing which used to be called “comitology” still exists, even in relation to delegated acts, just not in its prior form.⁶²⁷ That seems to be in line with the authors’ suggestion⁶²⁸ that the veto over delegated acts granted to the Council and the Parliament by Article 290 TFEU might – without comitology – be much less useful than it would seem, especially since in their opinion neither the Parliament nor the Council has the power to amend a delegated act, only to veto it. That lesser usefulness is caused by the simple fact that neither the Council nor the Parliament might have the expertise to make sense of the content of a given delegated act.

It is interesting to note in this respect that the difficulties with controlling the power granted to the Commission were precisely one of the reasons why comitology was held lawful in *Köster*.

The function of the Management Committee is to ensure permanent consultation in order to guide the Commission in the exercise of the powers conferred on it by the Council and to enable the latter [the Council, that is] to substitute its own action for that of the Commission. The Management Committee does not *therefore* have the power to take a decision in place of the Commission or the Council. *Consequently*, without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary.⁶²⁹

Thus the explanation given by the authors effectively amounts to a ground – accepted by the ECJ – for the legality of comitology under Article 290 TFEU.

The authors opine that the difficulties with the divide created by Articles 290 and 291 TFEU

were however never fully thought through in the deliberations on the Constitutional or Lisbon Treaty, and it is doubtful whether the objective has been realized.⁶³⁰

The objective, according to the authors, was to distinguish between secondary measures of legislative nature and those which could be regarded more executive.⁶³¹ No reasoning is provided as to why the authors believe that to have been the objective.

Speaking of implementing acts the authors note that the old Article 202 EC implementing acts covered both the current implementing acts and the current delegated acts, as well as the

⁶²⁷ The authors further opined (on page 140) that while Article 290 TFEU makes no reference to comitology, “[i]t is unlikely that the Member States appreciated the possible demise of Comitology in the terrain where it has been used for nearly fifty years.” Yet, writing elsewhere Paul Craig has opined that comitology committees are not permitted in relation to delegated acts. See Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains, in Carl Fredrik Bergström and Dominique Ritleng, Rulemaking by the European Commission: The New System for Delegation of Powers (OUP 2016), page 197.

⁶²⁸ On page 141

⁶²⁹ *Köster*, paragraph 9

⁶³⁰ Page 115.

⁶³¹ Page 115

fact that an implementing act could, in theory, be adopted under a delegated act.⁶³² They then state that implementing acts are normally of general application⁶³³ (according to Article 290 TFEU delegated acts must be of general application), and consider the key to distinguishing delegated and implementing acts to lie in the fact

that implementing acts execute the legislative acts without amendment or supplementation.⁶³⁴

Yet they consider that there are three difficulties with this “key”. First, all secondary measures necessarily involve some addition to the primary one.⁶³⁵ According to the authors that means that an assessment of the extent of discretion is called for: lots of discretion means a delegated act, little discretion – an implementing act.⁶³⁶ While it should be stressed that the authors do not actually opine that the extent of discretion is a relevant criteria here, merely that it necessarily must be if that “key” is used, it should be stated that by now this contention has been shown to be wrong.⁶³⁷ The authors actually regard that distinction as unsatisfactory, one which is certain to create numerous inter-institutional disputes and

calls into question the normative foundation of the differential controls that operate in relation to delegated and implementing acts.⁶³⁸

Second, the first difficulty is exacerbated by the fact that it might often not be possible to decide whether an act is delegated or implementing before it has been adopted.⁶³⁹ That seems eminently reasonable considering that the criteria, however it is formulated, seems to ultimately turn on the content of the act.⁶⁴⁰ Yet the decision which one it is – delegated or implementing – must be taken at the beginning of the adoption procedure. That is dictated by the fact that the procedure for the adoption of delegated acts differs (at least formally) so much from that for the adoption of implementing acts that if the wrong procedure were used, the act would be annulled for infringement of essential procedural requirements.⁶⁴¹

The authors see the ECJ’s unwillingness to become embroiled in such disputes as the third difficulty. For the authors *Biocides* demonstrates that unwillingness.⁶⁴²

⁶³² Pages 116 and 117

⁶³³ Page 117

⁶³⁴ Page 117

⁶³⁵ Page 118. Writing elsewhere Paul Craig has opined that both delegated and implementing acts imbue normative content of the basic act with greater specificity. See Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains, in Carl Fredrik Bergström and Dominique Ritleng, Rulemaking by the European Commission: The New System for Delegation of Powers (OUP 2016), page 178.

⁶³⁶ Page 118

⁶³⁷ Paragraph 32 of *Visas*

⁶³⁸ Page 118. They continue: “There will inevitably be instances where juxtaposition of acts reveals some reason as to why “supplementation” of the legislative act in the one instance should be regarded as a “new” non-essential element, such that a delegated act is required, while in other instances this is not so, such that an implementing act can be used.”

⁶³⁹ Page 118

⁶⁴⁰ Page 144

⁶⁴¹ Pages 118 and 119

⁶⁴² Page 118

In spite of that and indeed of *Biocides* the authors still consider that the categories of delegated and implementing acts should be exclusive.⁶⁴³ When considering *Biocides* the authors are fairly critical. They suggest that in saying that the EU legislature has discretion in choosing whether to use delegated or implementing acts the ECJ

elides two distinct issues, these being the legislature's power to use both delegated and implementing acts, and whether the conditions for the application of the respective types of act have been met.⁶⁴⁴

The authors claim that while the EU legislature does have discretion, albeit in a “reductionist” sense, as to the former, there is none as to the latter.⁶⁴⁵ They go on to suggest that the ECJ's decision in *Biocides* was a pragmatic choice: that it held that discretion to exist, because any other solution would have opened the floodgates of litigation. The authors end with formulating what they see as a paradox: the distinction between delegated and implementing was adopted because it was felt to be constitutionally and pragmatically important,⁶⁴⁶ yet the very nature of the distinction lead the ECJ to sidestep it altogether by applying the standard of manifest error.⁶⁴⁷ The authors conclude that the distinction between delegated and implementing remains fragile.⁶⁴⁸

With respect, on the one hand, the criticism of *Biocides* seems to miss a crucial point made earlier by the authors themselves. One could speculate that this miss might be caused by the belief that the categories of delegated and implementing acts are mutually exclusive. The point is this: “all secondary measures involve some addition to the primary act.”⁶⁴⁹ If that point is understood, it is easy to see that the distinction which is said to have elided the ECJ is not a distinction at all. In other words: if that point the authors made on page 118 is understood, the discretion would arise when the conditions set forth in both Article 290 and 291 TFEU are met at the same time. Admittedly it is possible to criticise the ECJ for its slack review of when that is the case, but, respectfully, that is a different point entirely. On the other hand, the criticism seems to start from a premise that the judgment of the ECJ could somehow be overruled. It can't. Thus there is the discretion – in actual sense – simply because the ECJ said so and declined to perform any howsoever stringent review.⁶⁵⁰

What conclusions could be drawn from this overview of textbooks? – First, every textbook mentions Articles 290 and 291 TFEU being about controls over the power granted (usually to the Commission). That is hardly surprising. Second, every textbook admits that the distinction between delegated power and implementing power, or delegated acts and implementing acts (depending on how the issue is approached) is unclear. Some do so

⁶⁴³ Page 116. They do not actually say that they are.

⁶⁴⁴ Page 120

⁶⁴⁵ Page 120

⁶⁴⁶ Like all others who make similar statements the authors provide no reasoning as to why that is the case. Indeed the suggestion would seem to be indirectly contradictory of the opinion the authors expressed on page 140. See footnote 627.

⁶⁴⁷ Page 120

⁶⁴⁸ Page 120

⁶⁴⁹ Page 118

⁶⁵⁰ And not only once, but on all occasions when it has been confronted with the issue.

expressly, some tacitly by treating the two in similar terms and failing to say anything about the distinction. Third, although several textbooks suggest that the creation of the distinction was desired, none explain why that is so nor who desired it, rather discussing comitology instead.⁶⁵¹ The bottom line is that no workable explanation of how to distinguish delegated acts from implementing acts or delegated power from implementing power is provided.

3.4.2. Justus Lipsius

It has been suggested⁶⁵² that the proposal to make in EU law the distinction along the lines of the one currently engendered by Articles 290 and 291 TFEU was first made by a member of the legal service of the Council in an article published under a pseudonym of Justus Lipsius in 1995.⁶⁵³

On page 256 of the article it is suggested that the Parliament

is even trying to get a role in the conduct of diplomatic and external relations and the adoption of implementing and regulatory measures under legislative Community acts.

In conjunction with saying that the Amsterdam IGC might have to deal with the issue of hierarchy of norms in the EU, the author opines, just like Paul Craig and Gráinne de Búrca,⁶⁵⁴ and Thomas Cottier⁶⁵⁵ some twenty years later, that

it is not easy to distinguish clearly where is the border between a principle and its implementation, or between the law and its implementing regulations. It might be more simple to reserve certain important subjects to the highest degree of norms, as is the case in the 1958 French Constitution (Arts. 34 and 37). Such a division would make it possible to reserve the heaviest procedure (co-decision) for the adoption of these last norms.⁶⁵⁶

While this might be seen as suggesting some distinction akin to the one between legislative acts on the one hand, and delegated and implementing acts together, on the other, this is hardly a suggestion to distinguish delegated acts from implementing ones.

Dealing with comitology Justus Lipsius had this to say.

On the comitology problem, the Treaty should state clearly that the implementing procedures of legislative acts come within Commission powers and cannot be reserved to the Council; the “Comitology” Decision of July 13, 1987, should be simplified, in particular by deleting procedure III, and should be transformed in a protocol annexed to the Treaty; the European Parliament should be informed of any

⁶⁵¹ Schütze has attempted to explain that. For his attempt see section 3.4.3.

⁶⁵² Jean Paul Jacqué, *The Evolution of the Approach to Executive Rulemaking in the EU*, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 28

⁶⁵³ Justus Lipsius, *The 1996 Intergovernmental Conference* (1995) 20 *European Law Review* 235

⁶⁵⁴ See section 3.4.1 above.

⁶⁵⁵ See footnote 542 above.

⁶⁵⁶ Page 263

implementing rules adopted on this basis, but should not be involved at all in the process of adoption of implementing measures.

Again, hardly a distinction between delegated and implementing acts. The three quoted passages are the closest the article comes to suggesting the distinction. The proposition that the distinction stems from it is thus clearly erroneous. What would seem to be capable of stemming from that article is the inclusion of “delegated acts” and of “implementing acts” into the TFEU. Justus Lipsius essentially suggested that grant of power to the Commission and comitology be dealt with in the treaties.

As noted by the Commission and several commentators delegated acts are essentially “a spiritual successor” to acts adopted via a comitological procedure, regulatory procedure with scrutiny. Article 291 TFEU, dealing with implementing acts, expressly provides for establishment of comitology. Both Article 290 TFEU on delegated acts and Article 291 TFEU on implementing acts deal with the power granted to the Commission. Thus today these suggestions of Justus Lipsius are – to some extent at least – *lex lata*. However, it should be stressed this does not mean that the distinction between delegated and implementing acts may likewise find its source in Justus Lipsius’s article: no suggestion to split what were then Article 202 EC implementing acts into several categories was made in the article.

3.4.3. Robert Schütze

Perhaps the most thorough treatment of the relationship between Articles 290 and 291 TFEU has been offered by Robert Schütze in his 2011 article “‘Delegated’ Legislation in the (new) European Union: A Constitutional Analysis”.⁶⁵⁷ Unfortunately the article predates all the case law in point. In spite of this disadvantage, the points taken therein make it worth considering it in some detail.

The conclusion which the author reaches is stated in the abstract on the very first page.

Article 290 of the Treaty on the Functioning of the European Union (TFEU) henceforth governs delegations of legislative power, while Article 291 TFEU establishes the constitutional regime for delegations of executive power.

Schütze starts by considering the question of delegation of power in the US constitutional law, and then moves on to the EU. Consideration of the position in EU law starts with *Köster* and the doctrine of essential elements. Schütze then deals with the pre-Lisbon Treaty hierarchy of norms coming to the conclusion that secondary legislation was hierarchically subordinate to the enabling act on which it was based, but that

this relative subordination would be suspended where the enabling act expressly envisaged the subsequent amendment of the basic act. There was hence no clear

⁶⁵⁷ 74 *Modern Law Review* 661

distinction between delegated “legislative” and delegated “executive” power within the Community legal order.⁶⁵⁸

The treatment of the Lisbon Treaty is started by the following statement.

The Lisbon Treaty revolutionises the constitutional principles governing executive legislation.⁶⁵⁹

What prompted this statement? How does the Lisbon Treaty revolutionise executive legislation? Before dealing with that it is necessary to explain what Schütze means by “executive legislation”. According to Schütze delegated acts are said to concern a delegation of legislative power to the Commission, while implementing acts are intended to regulate the delegation of executive power to the Commission or the Council.⁶⁶⁰ Thus executive legislation essentially means delegated acts. If that is simply a choice of terminology, it is hardly reprehensible. However, if the reader is asked to read more into it – if the terminology implies somehow that Article 290 TFEU acts are legislative while Article 291 TFEU acts are executive – questions arise. Particularly since Schütze does not explain why it is that delegated acts are said to concern delegation of legislative power and that implementing acts are intended to regulate the delegation of executive power.⁶⁶¹ Or indeed who it is that says so or intends that. Let alone what evidence there is of such intention.

Turning back to how the Lisbon Treaty revolutionises executive legislation, Schütze argues that Article 290 TFEU sets out

[t]he novel constitutional regime for delegation of power to the Commission to amend primary legislation.⁶⁶²

Article 290 TFEU is then said to both continue and discontinue the constitutional *status quo*.⁶⁶³ On the side of the continuance Article 290 TFEU is said to

- confirm the hierarchical position of delegated legislation: the latter will be able to amend primary legislation and must therefore enjoy at least relative and limited hierarchical parity;
- codify the non-delegation doctrine: the EU legislature cannot delegate the power to adopt essential elements of the legislative act; and

⁶⁵⁸ Page 671. The possibility – amendment of a basic act by a secondary one – continues to exist in Article 290 TFEU. As will be seen Schütze comes to the conclusion that the rules contained in supplementing acts are hierarchically on the same level as the rules contained in the legislative act being supplemented. See the text to footnote 675. An argument which could be developed on this basis to the effect that the distinction between delegated and implementing acts constitutes a vertical divide has been refuted by Bast. He comes to the conclusion that delegated and implementing acts are hierarchically equal. See *Is There a Hierarchy of Legislative, Delegated and Implementing Acts?*, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 158.

⁶⁵⁹ Page 681

⁶⁶⁰ Page 663

⁶⁶¹ Indeed, on page 690, he opines that from the perspective of morphology of norms the two are identical.

⁶⁶² Page 682

⁶⁶³ Page 683

- codify the specificity principle in that the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act.⁶⁶⁴

On the side of discontinuance Article 290 TFEU is said to restrict the constitutional options previously available under Article 202 EC. Schütze puts it thus:

Article 290 TFEU also restricts the constitutional options previously available under Article 202 EC. Henceforth only the Commission, and no longer the Council, may adopt delegated acts. And these Commission acts must be of “general application” that is constitute material legislation.⁶⁶⁵

Since continuance cannot be revolutionary, it is this discontinuance which must constitute the novelty. Schütze makes two arguments for the contention that Article 290 TFEU revolutionises EU law: a historical one and one based on the language of the TFEU. Starting with the historical one, according to Schütze the revolution began with the Commission’s white paper on European governance⁶⁶⁶ and the suggestion there that

[t]he Commission should remain the principal agent for executive legislation, whose powers should be checked by “a simple legal mechanism allow[ing] Council and European Parliament as the legislator to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation”.⁶⁶⁷

This is said to mean that the need to maintain existing comitology committees, notably regulatory and management committees, would be put into question. Thus the issue would touch on the balance of power between the EU institutions.⁶⁶⁸ Schütze then argues that these ideas were taken up by Working Group IX on Simplification of the Convention on the Future of Europe which proposed “delegated acts” since at the time there was

no mechanism which enable[d] the legislator to delegate the technical aspects or details of legislation whilst retaining control over such legislation.⁶⁶⁹

At the time it was only possible to

entrust to the Commission the more technical or detailed aspects of the legislation as if they were implementing measures.⁶⁷⁰

⁶⁶⁴ Page 683

⁶⁶⁵ Page 683

⁶⁶⁶ European Governance: A White Paper COM(2001) 428

⁶⁶⁷ Page 681

⁶⁶⁸ Page 681. It is ironic that tinkering with comitology affects the balance of power within the EU when in paragraph 9 of *Köster*, which blessed the comitology in the first place, the comitology received the ECJ’s blessings because it was held not to affect balance of power within the EU.

⁶⁶⁹ Page 682. It is useful to note here that both the Commission (sections 3.3.1 and 3.3.2) and the Parliament (section 3.3.3) have opined that Articles 290 and 291 TFEU were in no way about any technical vs non-technical distinction. They thought that grant of power in relation to both technical and political issues could occur. That position has been confirmed by the ECJ in *Smoke Flavourings* (see section 3.2.6 above) and in case C-133/06 (see the text following footnote 906).

According to Schtze the distinction between delegated and implementing was constructed on the basis of views of Koen Lenaerts. Schütze puts it thus.

The view of [Koen Lenaerts] had the greatest impact on the Working Group. Lenaerts had advocated “a clear distinction between the legislative and executive acts of the Union” according to the type of procedure followed. Within the category of “executive acts”, a distinction was made between “delegated legislation” and “executive acts *sensu stricto*”. The former allowed the Commission to modify a legislative act and it was therefore “necessary to provide for a ‘heavy’ comitology (intervention of a regulatory committee or of a management committee comprising representatives of the Member States) and of strict control by the European Parliament, which could include a right of call back for the legislator in certain cases”. For executive acts *sensu stricto* “a ‘light’ comitology will suffice (assistance of a consultative committee, for instance) leaving the final word to the Commission, under the control of the European Parliament”.⁶⁷¹

This view was, according to Schütze, taken up by the Constitutional Treaty and retained by the Lisbon Treaty⁶⁷² where it resulted in the following novelty.

Under the old regime, the wide concept of “implementing power” had comprised acts that amended and acts that merely implemented primary legislation. The Treaty on the Functioning of the European Union now distinguishes between a delegation of “legislative” power – that is the power to amend primary legislation – and a delegation of “executive” power – that is the power to implement primary legislation.⁶⁷³

Moving to the argument based on the language of the TFEU Schütze compares the scope of Article 290 TFEU with the scope of decision 2006/512, *i.e.* with the scope of the regulatory procedure with scrutiny. Since the scope of Article 290 TFEU is confined to situations where an act of the Commission amends or supplements primary legislation, he asks whether that was

a conscious departure from the formulation within the 2006 regulatory procedure with scrutiny; or should “supplementation” continue to be seen as a species of “amendment”.⁶⁷⁴

Along with the Commission, he opts for the second alternative.

Supplementation /.../ ought to mean amendment through the inclusion of additional rules having the same status as primary legislation.⁶⁷⁵

⁶⁷⁰ Page 682

⁶⁷¹ Footnote 135. Notes omitted from the text quoted.

⁶⁷² The Lisbon Treaty had, according to Schütze, as one of its principal aims the encouragement of delegation of more “legislative” power to the Commission. See footnote 154.

⁶⁷³ Page 682. Footnote omitted from the text quoted.

⁶⁷⁴ Page 684

Considering that Article 290 TFEU grants some control to the Parliament, Schütze comes to the conclusion that Article 290 TFEU represents a constitutional revolution from a democratic point of view.

The Rome Treaty had never acknowledged Parliament's constitutional right to control executive legislation; and even if the 2006 Comitology Decision had provided for parliamentary involvement, this had been a legislative concession by the Council.

/.../

Moreover, unlike the 2006 Comitology Decision, parliamentary objection is now left in the institution's political discretion: Parliament no longer needs to point to special legal grounds to veto the Commission measure.⁶⁷⁶

He concludes his discussion of delegated acts by opining that Article 290 TFEU contains, unlike Article 202 EC, no legal basis for comitology. Schütze thinks that this absence is deliberate; that the "may" in Article 290(2) TFEU does not amount to a *carte blanche* of the EU legislature to determine the conditions of delegation in each legislative act separately.⁶⁷⁷ In a footnote Schütze argues that such a case-by-case approach would be a clear retrogression compared to the SEA, which in the amendment it made to article 145 EEC required the conditions imposed on delegated legislation to be set in advance. *Carte blanche* without a case-by-case approach is said to be impossible because there is simply no legal basis for an Article 290 TFEU comitology regulation.⁶⁷⁸ Thus Article 290(2) TFEU is a *numerus clausus* of permitted political safeguards.⁶⁷⁹ In this respect he stresses the Commission's point, made in its 2009 Communication, that the experts consulted will have a consultative rather than an institutional role in the decision-making process.⁶⁸⁰

Schütze starts his treatment of implementing acts from a premise that they are about conferral of executive power, and then wonders why it is that Article 291 TFEU fails to mention any substantive limits of the conferral of that executive power.⁶⁸¹ Schütze concludes that Article 291 TFEU is not based on

the traditional logic of the past according to which the Union legislator was entitled to control implementing legislation because it delegated "its" power to the executive. Now, its new rationale – inspired by the philosophy of executive federalism – is that the responsibility for implementing of European law lies principally with the Member States. Not only are the Commission's powers thus subsidiary to those of the Member

⁶⁷⁵ Page 684. In a footnote (145) he quotes the Commission's opinion that measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures.

⁶⁷⁶ Page 685

⁶⁷⁷ Page 685

⁶⁷⁸ Footnote 149

⁶⁷⁹ Page 686

⁶⁸⁰ Footnote 152. The relevance of this statement would seem questionable: according to *Köster* the role of the comitology committees was ultimately likewise consultative.

⁶⁸¹ Page 687

States; it is the Member States, not the European legislator, that will control the exercise of these powers.⁶⁸²

This is said to be borne out by the comitology regulation which abandons management committees and regulatory committees in favour of advisory committees and examination committees. The novelty of the latter is said to be that it is the committee itself (*i.e.* the member states) which may veto an implementing act – meaning that the member states take direct part in the decision-making process.

On distinguishing delegated and implementing acts, Schütze starts by opining that the authors of the TFEU clearly wanted them to be mutually exclusive.⁶⁸³ Starting from the same premise as the Commission⁶⁸⁴ that delegated and implementing acts are defined in different terms (the former – in terms of scope and consequences, the latter – in terms of rationale), he wonders whether Articles 290 and 291 TFEU could nevertheless overlap, whether the EU legislature has a free choice which one to employ.⁶⁸⁵ After all, while delegated acts and implementing acts

are, from the formal perspective of the hierarchy of norms, different acts; they are, from the substantive perspective of the morphology of norms, identical.⁶⁸⁶

He thus admits the risk of overlap of the two in practice. The key to avoiding it lies in insisting

that it is not in the discretion of the European Union automatically to exercise its implementing power under Article 291. The exercise of implementing power under Article 291 must depend on something “outside” the will of the EU executive; and that “outside” is/has to be – nothing other than the Member States. Only where the Member States fail to execute European law in a sufficiently uniform manner will the Commission (or the Council) be entitled to exercise the Union’s own executive power.⁶⁸⁷

Thus, argues Schütze, avoidance of the overlap is only possible if Article 290 TFEU and Article 291 TFEU are seen from a different institutional perspective: Article 290 TFEU is first and foremost a safeguard of democracy, while Article 291 TFEU – of federalism.⁶⁸⁸ Therein lies the difference between the two.

The European legislator can freely “delegate” power to the Commission under both provisions. However, while the Commission has the right to use its delegated powers under Article 290 immediately as the principle of legislative subsidiarity will have been satisfied by the basic legislative act, it would not be automatically able to act

⁶⁸² Pages 688 and 689

⁶⁸³ Page 690

⁶⁸⁴ Discussed and criticised in sections 3.3.1 and 3.3.2 above.

⁶⁸⁵ Pages 690 and 691

⁶⁸⁶ Page 690

⁶⁸⁷ Page 691

⁶⁸⁸ Page 691

under Article 291 as every exercise of “delegated” implementing power under Article 291(2) will be subject to the principle of executive subsidiarity.⁶⁸⁹

While the Schütze’s argument that Article 290 and 291 TFEU are about acts which must be seen from different institutional perspectives (democracy in case of Article 290 TFEU and federalism in case of Article 291 TFEU) is interesting, it would seem to run into several difficulties.

First, it doesn’t explain why nothing akin to the reverse pre-emption⁶⁹⁰ he contends for has been applied in respect of implementing acts. The ECJ has by now dealt with the issue of delegated and implementing acts or power in four judgments: *Biocides*, *EURES*, *Visas* and *EUROPOL*. In none did it check whether member states had unsuccessfully attempted to implement the basic act at issue before the Commission adopted its act. Such contention was not pleaded in any of those cases (if that is thought relevant), but then neither was the very wide discretion – which the ECJ held the EU legislature to have in choosing between delegated and implementing acts – pleaded in *Biocides*.⁶⁹¹ And the reverse pre-emption is central to Schütze’s argument: that is how one avoids the overlap between delegated and implementing acts which are otherwise “morphologically identical”. If there is no distinction between the acts, the acts overlap and they thus form part of one group. Then there would seem to be no reason for seeing some acts of that one group from one, and others from another institutional perspective. Avoidance of overlap would not be possible.

Second, if the reverse pre-emption did apply, how would it help, for instance, to decide what the listing of a third country at issue in *Visas* was? Was it implementing or delegated? The means of avoiding an overlap are not necessary in situations which are clear and where everyone acts lawfully. They are needed when someone challenges the choice made. Schütze does not offer any test for applying of his theory.⁶⁹² And it is difficult to imagine what that test might be. For instance feasibility, *i.e.* whether something is at all feasible if member states were asked to do it, would not work: virtually everything can, theoretically, be done via international cooperation. That would be impractical, but not unfeasible. Thus it would seem that Schütze’s theory offers no test to decide whether the act at issue in *Visas* should have been implementing instead of delegated. Let alone to provide the decision which the ECJ ultimately held correct: that the act is lawfully delegated in spite of the fact that a similar earlier act in the waterfall structure was implementing. Thus – even after reading all 33 pages of the article – there is still no way to avoid an overlap between Articles 290 and 291 TFEU.

Third, the Schütze’s argumentation seems occasionally less than sound. The contention that Article 290 TFEU brought about a constitutional revolution was based on a historical and a textual argument. One part of the historical argument was that the TFEU took up the proposals Koen Lenaerts made in the working group of the Convention on the Future of

⁶⁸⁹ Page 691

⁶⁹⁰ That the EU may act under Article 291 TFEU only when member states have failed to implement the basic act in a uniform manner across the EU.

⁶⁹¹ Based on the reading of the judgment and the opinion of the advocate general. On the wide discretion see further section 3.5 below.

⁶⁹² If there is no test, then Schütze’s theory remains just that: a theory without a way to apply it.

Europe. With respect, that is simply not true. What – on Schütze’s own account – Lenaerts proposed was a division of Article 202 EC implementing acts into two: delegated legislation and executive acts *stricto sensu*. The former would allow modification of legislation and entail “heavy” comitology, the latter would entail only “light” comitology. Yet under the TFEU on Schütze’s own argument – that there is no basis for Article 290 TFEU comitology – the delegated legislation entails no comitology at all,⁶⁹³ while executive acts *stricto sensu* entail heavy comitology. That is not simply not being based on Lenaerts’s proposal; that is adopting something which is the exact opposite of that proposal.

In addition to that Lenaerts envisaged that both acts would remain under the control of the Parliament. Only Article 290 TFEU mentions that control; Article 291 TFEU does not.⁶⁹⁴ Finally, according to the proposal only delegated legislation should enable modification of legislative acts. On Schütze’s own argument that is not the case: he opines that from the substantive perspective of morphology of norms delegated acts and implementing acts are identical. Combined with his opinion that delegated acts must constitute material legislation, it follows that so must implementing acts. Thus both modify legislative acts.⁶⁹⁵

The other part of the historic argument is made up of tracing the alleged revolution back from the Lisbon Treaty through the Constitutional Treaty through the working group of the Convention on the Future of Europe to the statement of the Commission in 2001. The latter was a statement of intention. Why would it matter in construing the TFEU? It was an intention of someone who had no control over what ultimately happened (was adopted) – the Commission played no role in the adoption of the Lisbon Treaty. The same could be said of the working group, as for the Constitutional Treaty, that was explicitly rejected by those who adopted the Lisbon Treaty. Is it not a stretch too far to try and impute the intention of the Commission or the working group, for instance, to the participants in the Irish referendum? How many of those participants had any knowledge of the content of Articles 290 and 291 TFEU at all?

Thus the historical argument falls by the wayside.

The first difficulty with the textual argument is that it seems to assume that the TFEU distinguishes between delegation of legislative power and delegation of executive power.⁶⁹⁶

⁶⁹³ Or only something very light in that the Commission manifested an intention to consult experts.

⁶⁹⁴ If it were argued that such controls could be created via secondary legislation, then so could comitology under Article 290 TFEU: there is no relevant difference between these situations.

⁶⁹⁵ As has been argued by Craig and de Búrca, and by Thomas Cottier. See footnotes 654 and 655.

⁶⁹⁶ See, for instance, page 682. Perhaps Schütze would like to argue that the source of the opinion that Article 291 TFEU is about delegation of executive power, while Article 290 TFEU is about delegation of legislative power is this: requirement of generality, doctrine of essential elements and the specificity principle as well as the political veto apply only in relation to Article 290 TFEU acts. See pages 692 and 693. But that simply recreates the question further down the line. Why does requirement of generality, doctrine of essential elements and the specificity principle as well as the political veto applying only to Article 290 TFEU and not to Article 291 TFEU mean that the former is about legislative, while the latter about executive delegation? Indeed, is it actually true that all those requirements apply only to the former? After all, implementing acts are frequently general: see the one at issue in *Biocides*. Doctrine of essential elements would seem to be applicable equally to all grants of power: there is no distinction in *Frontex*, which, lest we forget, was decided after the Lisbon Treaty came into force. Similar points could be made in relation to specificity (if scope and content of grant of power

There is no explanation why that is so. Such an explanation would seem to be particularly called for in the light of the contention that from the substantive perspective of morphology of norms delegated acts and implementing acts are identical. In effect that could be the end of the criticism: by assuming the distinction, one assumes the conclusion reached by Schütze.⁶⁹⁷ If one doesn't assume the distinction, one does not reach the conclusion reached by Schütze.

However, the problem would seem to run deeper. What is the difference between the Articles 290 and 291 TFEU on the one hand, and the 1999 comitology decision as it stood after the 2006 amendment on the other? What is the difference between Article 290 TFEU and the regulatory procedure with scrutiny? On Schütze's own argument the 1999 comitology decision as it stood after the 2006 amendment provided for a veto of the Parliament, but only in respect of those measures which are "quasi-legislative".⁶⁹⁸ That seems to be still the case under Article 290 and 291 TFEU – at least if one adopts Schütze's own position that only Article 290 TFEU acts are "delegated legislation". Thus, there is no difference between pre-Lisbon Treaty comitology and the TFEU – at least if the TFEU is looked at in its entirety, *i.e.* one considers both Article 290 TFEU and Article 291 TFEU.

TFEU was said to discontinue the pre-existing *status quo*.

Article 290 TFEU also restricts the constitutional options previously available under Article 202 EC. Henceforth only the Commission, and no longer the Council, may adopt delegated acts. And these Commission acts must be of "general application" that is constitute material legislation.⁶⁹⁹

What is it that Article 290 TFEU discontinues? The Council's ability to adopt delegated acts? Even if that were the case, it would seem more of an evolutionary than a revolutionary step. The old regulatory procedure with scrutiny which Article 290 TFEU essentially replaces did foresee the possibility that it would be the Council to adopt the measures.⁷⁰⁰ But the Parliament had the power of veto over the Council's measures in such a case. Thus, the change – were it to exist – would in practice be minor. However, according to *Biocides* the EU legislature has discretion in deciding whether to use Article 290 or 291 TFEU. The latter permits grants of power to the Council. The constitutional options are not restricted.⁷⁰¹ The requirement of general application in Article 290 TFEU is likewise not novel: regulatory

under Article 291 TFEU was not determined in the act granting the power, the grantee could do anything it pleased) and veto (Bradley's point that the Commission still ultimately remains responsible to the Parliament; see section 3.4.1).

⁶⁹⁷ That "Article 290 of the Treaty on the Functioning of the European Union (TFEU) henceforth governs delegations of legislative power, while Article 291 TFEU establishes the constitutional regime for delegations of executive power." See the abstract on page 661.

⁶⁹⁸ Page 680

⁶⁹⁹ Page 683

⁷⁰⁰ Article 5a(4) of decision 1999/468

⁷⁰¹ The only restriction would seem to be the Council's inability to make an orthographical change in the actual text of a legislative act. That cannot seriously be considered relevant: the same effect could be achieved by saying in a separate act that, for instance, from day X provision Y of legislative act Z no longer applies. Unless so considerable a difference could be found between supplementing and implementation that it must have been manifestly evident to the Parliament and the Council that they could not have chosen the latter over the former, there is nothing stopping the Council from having that ability. See section 3.4.5 in respect of the requirement of manifest evidence.

procedure with scrutiny was also available for measures of general scope only.⁷⁰² And just like Article 290 TFEU, regulatory procedure with scrutiny was available only for acts adopted under what are now legislative acts and were then acts adopted under Article 251 EC.⁷⁰³

That is not to say that the Lisbon Treaty did not introduce some innovations. Under the 2006 version of the 1999 comitology decision the Parliament would have to justify vetoing an act being adopted via regulatory procedure with scrutiny by indicating that the proposed measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality.⁷⁰⁴ But surely “concocting” some reasoning on those grounds is not all that taxing?⁷⁰⁵

The statement that the EC Treaty did not acknowledge the Parliament’s control over executive legislation with that control being based on the Council’s concession in a comitology decision⁷⁰⁶ is correct, but that argument goes only so far. Nothing actually changed.

Finally, the suggestion that Article 290 TFEU is not subject to comitology is, with respect, simply wrong in fact. The inter-institutional agreement on better law-making institutes comitology in relation to Article 290 TFEU (and the Commission’s 2009 Communication and its 2011 Guidelines did that before Schütze’s article was published). That also answers Schütze’s contention that there is no legal basis for such comitology in the treaties: Article 295 TFEU would seem such a basis, not to mention articles 4(3) and 11(3) TEU and indeed Article 290 TFEU itself. First and second paragraphs of the latter read as follows.

1. 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.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;

⁷⁰² Recital 7a and Article 2(b) of decision 1999/468

⁷⁰³ Recital 7a and Article 2(b) of decision 1999/468. It is not a serious argument that the revolution lies in the fact that in Article 290 TFEU supplements are referred to on par with amendments, while under the 2006 version of the 1999 comitology decision they were a type of amendments. See page 683.

⁷⁰⁴ Articles 5a(3)(b) and 5a(4)(e) of decision 1999/468

⁷⁰⁵ Cf. with the position of the Commission at issue in case C-409/13. See text to footnote 240.

⁷⁰⁶ Page 685

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

Article 155 EEC read in relevant parts as follows.

With a view to ensuring the functioning and development of the Common Market, the Commission shall exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter.

The latter was – according to *Köster, Scheer* and *Rey Soda* – a sufficient legal basis for comitology. Why isn't the former? Schütze argues that that cannot be the case because it specifies some controls and hence “may” in the first sentence of the second paragraph does not actually mean “may” but “must”.⁷⁰⁷ He offers three reasons: comitology was not mentioned in Article 290 TFEU was a deliberate choice, the lack of legal basis for Article 290 TFEU comitology and illegality of a case-by-case determination of conditions of grant of power.

The first does not fit at all with Schütze's own suggestion that Article 290 TFEU should trace its roots to the Lenaerts's proposal: he did propose comitology. In any event an argument that long standing case law (on permissibility of comitology without a need for an express permission in the constitutive treaties) could be overruled by omission would seem to be rather far-fetched.

The second is clearly erroneous in the light of the inter-institutional agreement and indeed the Commission's 2009 Communication which Schütze himself quotes: it mustn't be forgotten that comitology developed once “in the undergrowth of EU law”. That communication in committing the Commission to consultations with national experts could do so again. In any event the lack of a(n express) legal basis seems to assume that *Köster, Scheer* and *Rey Soda* are no longer good law. No argument to that effect has been presented. If anything, Schütze treats *Köster* as still good law in some respects at least.⁷⁰⁸ Thus the point of the legality of case-by-case choice simply does not arise.

Therefore the textual argument for revolution seems to likewise fall by the wayside. Articles 290 and 291 TFEU are simply not revolutionary. They did amend to a certain limited extent the pre-existing *status quo*,⁷⁰⁹ but by and large the position in law as interpreted by the ECJ and as applied did not change. Looked at as a whole, the TFEU (its Articles 290 and 291) does not seem to discontinue anything.

⁷⁰⁷ Page 685

⁷⁰⁸ See page 671

⁷⁰⁹ For instance, acknowledgement of the Parliament's powers of control in a treaty, excluding grant of power to the Council under what was regulatory procedure with scrutiny and became Article 290 TFEU, removing the duty of the Parliament to give reasons for its vetoes of acts adopted under the procedure just mentioned.

As for implementing acts the basic problem with Schütze's account – aside from the glaring one of the reverse per-emption – is that it assumes that the Parliament and the Council can in law confer on the Commission (or the Council) the power which they do not hold. He suggests that under the TFEU the member states have controls under Article 291 TFEU because the power to implement is theirs and not the Parliament and the Council's.⁷¹⁰ How is it possible then that the power is granted to the Commission (or the Council) by the Parliament and the Council? As to the “novelty” that under Article 291 TFEU the comitology committees themselves may veto Commission's implementing acts, what changed? Those committees are made up, vote and operate just like the Council does. Finally, perhaps the most evident point of all: if implementing power under Article 291 TFEU is somehow purely executive and that is the power member states have, then the the member states' power to transpose and implement EU law is also always purely executive. There is no provision in the constitutive treaties which would grant them any different power; not unless one breaks coherence with Schütze's account. Yet this latter proposition is probably something considerably more experts would have difficulty subscribing to even without a deeper analysis.

Thus it would seem that Schütze's article is incapable of providing either an answer to the question about “competition” of Articles 290 and 291 TFEU or a solid understanding of either of those articles. The contention that TFEU introduced in this respect some novel system does not withstand scrutiny and neither does the suggestion that there is no legal basis for comitology under Article 290 TFEU.

3.4.4. Thomas Christiansen and Mathias Dobbels⁷¹¹

The article of Christiansen and Dobbels is interesting in that unusually for a pre-*Biocides* article its authors contend that Articles 290 and 291 TFEU are not mutually exclusive.⁷¹² They start by stating that the Lisbon Treaty

created an entirely new instrument of ‘delegated acts’ that are directly scrutinised by the legislative institutions, without any use of comitology (Article 290 TFEU).⁷¹³

They then purport to grapple briefly with the distinction between delegated and implementing acts merely succeeding in restating the TFEU without offering anything further.

The focus to make the distinction, therefore, lies in the verbs ‘amend’, ie making formal changes to a text (deleting, replacing or adding non-essential elements), and ‘supplement’, ie adding new non-essential rules or norms, as opposed to ‘implement’, where no new rules or norms are established and the act is supposed to give effect to the rules that have been laid down in the basic legislative act. In other words, the main difference is whether there is simply a need to adopt acts to give effect to the rules set

⁷¹⁰ See the text to footnote 685 above.

⁷¹¹ Non-legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts (2013) 19 European Law Journal 42

⁷¹² Pages 54 and 55

⁷¹³ Page 43. This contention would seem suspect in light of the parallels between article 290 TFEU and regulatory procedure with scrutiny created by decision 2006/512.

by the legislator or whether it is necessary that the Commission has the power to change (amend) or add (supplement) some of the rules of the legislation that are of a non-essential nature.⁷¹⁴

The authors base the contention of non-exclusivity on the suggestion – repeated several times above in this thesis – that Articles 290 and 291 TFEU are formulated by reference to different things (allegedly scope vs rationale, although the better opinion would seem to suggest that by reference to different rationales⁷¹⁵). In such a situation they conclude that

decisions on whether a basic act is to be implemented through delegated or implementing acts are made on a case-by-case basis in the context of legislative bargaining.⁷¹⁶

Thus there are no criteria for choosing between Article 290 and 291 TFEU.⁷¹⁷ They see that as a step back compared to the pre-Lisbon Treaty position. Before the Lisbon Treaty the comitology decision contained criteria for deciding which procedure should apply. They stress that those procedures included the regulatory procedure with scrutiny – “the forerunner to the delegated acts”.⁷¹⁸

In spite of that the authors support the contention that

delegated acts are fundamentally different as they ‘will be subject to more inter-institutional discussions much earlier in the legislative process given that the objectives, scope, duration and conditions to which the delegation is subject can change in every legislative act’.⁷¹⁹

Comparing the way delegated and implementing acts are adopted the authors conclude that while adoption of the latter is much proceduralised (especially in view of the comitology regulation), there still was no system in relation to the adoption of the former.⁷²⁰ It might perhaps be argued that by now such a system has been put in place – or at least that the EU has started moving towards it: see the inter-institutional agreement on better law-making.⁷²¹ That however would only further support their contention that the actual implementation of Article 290 TFEU relies very much on soft law and informal procedures.⁷²² At the time when the article was written these were the ones set out by the Commission in its 2009 Communication and in the 2011 Guidelines as well as those contained in the Common Understating which has by now become an annex to the inter-institutional agreement on

⁷¹⁴ Page 44

⁷¹⁵ See section 3.3.2 above.

⁷¹⁶ Page 55

⁷¹⁷ Page 54

⁷¹⁸ Page 55

⁷¹⁹ Page 46

⁷²⁰ Pages 53 and 54

⁷²¹ Christiansen and Dobbels were writing before the inter-institutional agreement on better law-making was adopted (see section 3.3.4 above).

⁷²² Page 53

better law-making. We may now add that agreement itself to the list.⁷²³ In other words Article 290 TFEU does not provide the entire picture; to understand the situation one has to look behind the law. They thus opine that

[t]he Common Understanding is, therefore, a prime example of non-legislative rule making, in that it constitutes a non-legally binding political agreement on common practices, such as the procedure during recess or the use of a standard recital, model articles to be used by the institutions for the preparation of delegated acts, and modalities to exercise the rights of revocation and objection, which were not defined by the treaty.

The conclusion which the authors make is that their

analysis not only demonstrates the need to go beyond the treaty provisions in understanding the nature of non-legislative rule making in the EU, but also emphasises the importance of informal procedures and non-binding agreements in fully assessing the nature of non-legislative rule making in this area.⁷²⁴

Thus, while Christiansen and Dobbels make some interesting points – the need to go beyond Articles 290 and 291 TFEU themselves to understand their meaning, for instance – they are ultimately unable to explain how Articles 290 and 291 TFEU differ.

3.4.5. Dominique Ritleng⁷²⁵

Ritleng's article takes the form of an extended case note on *Biocides*, a judgment which he clearly does not approve of. Ritleng starts his criticism by making some postulations (without explaining or substantiating them):⁷²⁶

- the distinction between delegated and implementing acts refers to the division of powers between EU institutions and to the institutional balance;
- the distinction between delegated and implementing acts also refers to the distinction between legislative and executive functions;
- the distinction between delegated and implementing acts finally refers to different mechanisms of control;
- the constitutional significance of the new system introduced by Articles 290 and 291 TFEU depends on the criterion for their distinction and on the ECJ's judicial review of its application.

In view of those postulations Ritleng is disappointed with *Biocides*: the ECJ is said to have backed away from addressing the critical issue of the criterion for distinction. What the ECJ did say⁷²⁷ is said to be

⁷²³ It will be recalled that it is as yet an open question whether the inter-institutional agreement on better law-making is binding or not.

⁷²⁴ Page 42

⁷²⁵ The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)* (2015) 52 Common Market Law Review 243

⁷²⁶ Page 250

of very little help if one goes no further than the wording, for a measure which provides further detail to the content of a legislative act sets up rules completing the regulatory framework defined by the legislative act.⁷²⁸

That is said to be all the more so since implementation is a normative activity, which makes it very difficult to imagine an implementing act which does not entail some addition to the legislative framework and hence does not supplement the basic act.⁷²⁹

While he criticises the ECJ for not opting expressly for the extent of discretion as the criterion for choosing between delegated and implementing acts, Ritleng sets out to show that the ECJ nevertheless applied that criterion.

After having examined the enabling provision, viz. Article 80(1) of Regulation 528/2012 in its legal context, the Court indeed came to the conclusion that the Regulation had established a complete legal framework as regards waivers and reimbursements of fees, payment conditions, and possible reductions in favour of small and medium-sized enterprises, which is tantamount to acknowledging that it did not leave the Commission such a margin of discretion that would mandate recourse to delegated acts. One might therefore have expected that, for the sake of clarity, the Court would identify explicitly the measure of discretion as the dividing criterion.⁷³⁰

He performs a similar exercise in relation to the leeway which the ECJ is said to have given to the EU legislature (the leeway to decide whether to resort to Article 290 TFEU or Article 291 TFEU) and the standard of review chosen by the ECJ (manifest error).⁷³¹ He holds both propositions undesirable. The latter in particular because there is no such limitation of judicial review either when the chosen legal basis of a measure is contested or when it is contended that determination of essential elements has been delegated. In both cases the review is more extensive and by reference to objective factors.⁷³² Nevertheless, just like when dealing with the criterion of discretion, Ritleng argues that

the criticism should be mitigated since in the present case the Court of Justice did actually, under the veil of a control limited to manifest errors of assessment, exercise full review of the question as to whether the EU legislature could lawfully opt for implementing acts, as is shown by the fact that twelve paragraphs of the ruling were dedicated to assessing whether Regulation 528/2012 had laid down a complete legal framework leaving only room for further details (paras. 41–52).⁷³³

⁷²⁷ That an implementing act tends to provide further detail to the content of a legislative act whereas, purportedly “by contrast”, a delegated act aims at setting up rules coming within the regulatory framework defined by the legislative act. See page 251.

⁷²⁸ Page 251. Thus he essentially claims that the distinction the ECJ purported to draw between delegated and implementing power in paragraphs 38 and 39 of *Biocides* is, in fact, illusory.

⁷²⁹ Page 251. As mentioned above, other commentators would seem to agree. See, for instance, text to footnotes 654 and 655 above.

⁷³⁰ Page 252

⁷³¹ Page 252

⁷³² Pages 252 and 253

⁷³³ Page 253

Ritleng concludes by wondering how much *Biocides* will end up contributing to the disruption of what he sees as the logic of Article 290 and 291 TFEU. Like Schütze he thinks that

[t]he control mechanisms of legislative and executive delegation set out respectively in Articles 290 and 291 TFEU have been designed to fit [theoretical narratives of executive federalism], by ensuring that the body which normally holds the power in question will be the only body that exercises control over its delegation.⁷³⁴

He adds that

[i]t is this constitutional significance and meaning that the self-restraint displayed by the Court in the instant case calls into question, since it allows the choice between delegated and implementing acts to be largely determined by political considerations and inter-institutional struggles.⁷³⁵

Based on subsequent experience (and even on *Biocides* itself) it would seem that those theoretical narratives have been quite significantly disrupted. And subsequent developments would not seem so easy to fit into one's pre-existing notion of what Articles 290 and 291 TFEU are – which is, with respect, what Ritleng seems to have sought to do with *Biocides* in his article.

The contention that the ECJ nevertheless applied a criterion of discretion of the grantee of power has been shown to be wrong by *Visas*. The ECJ there stated that neither discretion⁷³⁶ nor any other characteristic of similar kind⁷³⁷ matters at all for determining whether a power is delegated or implementing. Speaking in terms of *Biocides* itself if the ECJ did apply the criterion of discretion, one could be pardoned for wondering how wide would the discretion have to be for the act to be held delegated? Presumably – on Ritleng's assumptions – delegated act mandates wider discretion than an implementing one. In *Biocides* the following provision was deemed a complete legal framework not leaving “the Commission such a margin of discretion that would mandate recourse to delegated acts”.⁷³⁸

The Commission shall adopt, on the basis of the principles set out in paragraph 3, an implementing Regulation specifying:

(a) the fees payable to the Agency, including an annual fee for products granted a Union authorisation in accordance with Chapter VIII and a fee for applications for mutual recognition in accordance with Chapter VII;

⁷³⁴ Page 255. As suggested in section 3.4.3 it would seem that this contention is wrong. Implementing power is not delegated to the Commission (or the Council) by member states under Article 291 TFEU. Thus either the control set forth in Article 291 TFEU – being by member states – is not by the body which holds the power or Article 291 TFEU mandates delegation of power by someone who does not hold it (if the power is held by member states after all).

⁷³⁵ Page 255

⁷³⁶ Paragraph 32

⁷³⁷ Paragraph 45

⁷³⁸ Page 252

(b) the rules defining conditions for reduced fees, fee waivers and the reimbursement of the member of the Biocidal Products Committee who acts as a rapporteur; and

(c) conditions of payment.

That implementing Regulation shall be adopted in accordance with the examination procedure referred to in Article 82(3). It shall apply only with respect to fees paid to the Agency.

The Agency may collect charges for other services it provides.

The fees payable to the Agency shall be set at such a level as to ensure that the revenue derived from the fees, when combined with other sources of the Agency's revenue pursuant to this Regulation, is sufficient to cover the cost of the services delivered. The fees payable shall be published by the Agency.⁷³⁹

Thus statements in the basic act to the effect that

- there is to be partial reimbursement of a fee if the applicant fails to submit the information requested within the specified time-limit;
- the specific needs of SMEs are to be taken into account, as appropriate, including the possibility of splitting payments into several instalments and phases;
- the structure and size of fees are to take into account whether information has been submitted jointly or separately;
- in duly justified circumstances, and where it is accepted by the [European Chemicals] Agency, the whole fee or a part of it may be waived and
- the deadlines for the payment of fees are to be fixed taking due account of the deadlines of the procedures provided for in the regulation,

were sufficient to constitute that complete legal framework. That leaves quite a lot to be decided; so much in fact that it would not seem to support the contention that the discretion of the Commission was narrowed down in any considerable sense.

The contention that the ECJ did in *Biocides* something more than look for a manifest error has been criticised in these terms.

The suggestion that in *Biocides* the Court concluded that ‘the more specific the “criteria and conditions” established by the EU legislature ... the more reasonable a delegation of implementing powers’ appears to be predicated on the notion that the legality of a choice of secondary act is in some way a matter of degree. To succeed under the ‘manifest error’ test, however, the party challenging the choice of secondary act must demonstrate that the error or abuse is obvious; here the Commission had not been able to establish that the legislative framework was manifestly incomplete. The suggestion that ‘the Court did actually, under the veil of a control limited to manifest errors of assessment, exercise full review’ of the legality of the choice of an

⁷³⁹ Article 80 (1) of regulation 2012/528 – at issue in *Biocides*.

implementing act is also unconvincing. The number of paragraphs the Court required to establish the absence of any such errors reflects the completeness of the Commission's arguments and the thoroughness of the Court's reasoning, rather than the putative soundness of the arguments in question. Thus, to take the Commission's submissions concerning its duty to take account of the specific needs of SMEs as an example, the mere fact that the basic regulation provided that the fees must be set at a level which ensures that the Agency's costs are covered and takes account of the specific features of SMEs, and that SMEs may pay by instalments, was adjudged to comprise a 'complete legal framework' in this regard. This appears to fall some way short of 'full review'.⁷⁴⁰

In fact one could go further in the criticism of Ritleng's attempt to fix the review in *Biocides* up as "full review of the question as to whether the EU legislature could lawfully opt for implementing acts".⁷⁴¹ Let us start by reminding ourselves what it is that the ECJ said about the review in *Biocides*.

[J]udicial review is limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 needs only the addition of further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.⁷⁴²

It seems curious that the object of review has generated little if any comment. Yet, the ECJ is clearly saying that it is not reviewing whether the legal framework laid down by the basic act needs only further detail without its non-essential elements having to be amended or supplemented. It is reviewing whether the EU legislature could reasonably have taken the view that the legal framework laid down by the basic act needs only further detail without its non-essential elements having to be amended or supplemented. That this was no slip in formulating the test in paragraph 40 seems to be shown by the conclusion being formulated in the same terms.⁷⁴³ And when the test was being applied the ECJ likewise spoke specifically of the EU legislature having been able to take the view that implementing power was called for.⁷⁴⁴ The ECJ did not actually say anywhere that the power called for was implementing. It is simply too consistent a use to disregard it. Thus we are speaking of a doubly loosened judicial review: manifest error of whether the EU legislature could reasonably have thought that Article 290 or 291 TFEU, as the case may be, should be employed.

⁷⁴⁰ Kieran St C Bradley, Delegation of powers in the European Union: political problems, legal solutions?, in Carl Fredrik Bergström and Dominique Ritleng, Rulemaking by the European Commission: The New System for Delegation of Powers (OUP 2016), pages 80 and 81

⁷⁴¹ Page 254

⁷⁴² Paragraph 40

⁷⁴³ Paragraph 52

⁷⁴⁴ Paragraph 48

The practical implications are evident: there might be situations where the power called for would be, for instance, delegated, but the entire situation was such that it was not unreasonable for the EU legislature to have taken the view that the power should have been implementing. The fact that the standard is of manifest error of assessment does not change that. For instance, it could be manifest in view of an ECJ's judgment in year X that, say, delegated power was called for in instrument Y. Yet if that Y had been adopted at a moment of X-1, there would have been no "unreasonableness" about the EU legislature's opinion at the time of adoption to the effect that an implementing power was called for nor would it then have been "manifest". It could be submitted that the more "precise" an object, the easier it is for an error in respect of that object to be manifest. Here reasonableness of opinion of the majority of two collegial bodies (most of whose members are not lawyers) is probably a more imprecise an object than whether a particular legal framework is complete or not. Finally, the question about completeness of a framework is a question of law while the question of reasonableness of opinion is – at least in part – a question of fact.

Thus, even if one could call the review performed in paragraphs 41 – 52 of *Biocides* a full one (a very doubtful proposition in the light of Bradley's able argument), it would have been a review not of whether the EU legislature could lawfully opt for an implementing act, but of whether it could reasonably have thought that it could have lawfully opted for it.⁷⁴⁵

Therefore the review in *Biocides* really was not searching at all, and the discretion of the grantee of power was not used in *Biocides* as a criterion for determining whether the power is delegated or implementing. To this one could add that reference to objective criteria has been consistently omitted by the ECJ from all cases dealing with competition of Articles 290 and 291 TFEU, including *Biocides*. From this it would seem reasonable to conclude that the choice between Article 290 TFEU and Article 291 TFEU is not based on objective criteria.

All that together would seem to indicate that, perhaps, in the opinion of the ECJ⁷⁴⁶ the logic behind Articles 290 and 291 TFEU is not at all that for which Ritleng contends. To sum up, Ritleng seems unable to offer either a workable distinction between or explanation of Articles 290 and 291 TFEU, or even a(n unworkable) distinction which would comply with the judgments of the ECJ (or even the one which he critiques – *Biocides*).

⁷⁴⁵ Returning to the issue of discretion of the grantee of power as the criterion for choosing between delegated and implementing, one might try to argue that what was decided was that the legal framework was complete (one extreme) or that it was not manifest that the EU legislature could not reasonably have held it to be incomplete (the other extreme). (The in-between possibilities would be having decided (i) that the EU legislature could have reasonably held that framework to be complete and (ii) that it was not manifest that the legal framework was incomplete.) However, for the purposes of legal reality this issue is moot: unless somehow a more stringent review could be forced upon the ECJ, such a framework is sufficient for implementing acts, since the ECJ will not annul them. Thus in practice it seems that for instance circumstances in which a waiver of a fee is justified (in a situation where the fee is to be levied for something which is the central issue regulated by the basic act) are not something without which the legal framework of the fees is incomplete. Those circumstances may be determined in exercise of an implementing power in an implementing act.

⁷⁴⁶ Which is ultimately virtually the only one that matters.

3.4.6. Jean Paul Jacqué

According to Jacqué the difficulty with the “competition” between Articles 290 and 291 TFEU lies in distinguishing supplementing from implementing.⁷⁴⁷ Like many other commentators he goes on to say⁷⁴⁸

- that Article 290 TFEU sets a complete legal framework for delegated acts – no implementing measures being required;
- that regulatory procedure with scrutiny essentially established the same conditions as Article 290 TFEU; and
- that every implementing act supplements the act which it implements.

The latter, in his view, creates a risk that a wide interpretation of “supplementing” will suppress the recourse to “implementing”.⁷⁴⁹ He thinks that the criterion for making the distinction between the two could only be a material one.⁷⁵⁰ Like Ritleng he considers that the distinction should lie in the extent of discretion: if the Commission as the grantee of power has a wide of discretion, the power is delegated; if it has a narrow(er) discretion, the power is implementing.⁷⁵¹ Unlike Ritleng he does not purport to show that his position agrees with *Biocides*. He simply contends himself with saying that it does.⁷⁵²

The ruling of the Court in *Biocides* does not depart fundamentally from that vision.⁷⁵³

He does not discuss *Visas* where the ECJ expressly stated that discretion of the grantee of power was irrelevant and which was decided some nine months before the volume in which Jacqué gave his opinion was published. The only thing which he does add to Ritleng’s account is the suggestion that the institutions had agreed that under the regulatory procedure with scrutiny (the precursor of Article 290 TFEU) the extent of discretion was the criterion.

If the Commission was left a very large margin that was not limited by precise criteria set in the legislative act, it was agreed that supplementation of the legislative act was at stake.⁷⁵⁴

If anything, that statement would seem to be ill-conceived for at least two reasons. First, no argument or evidence was presented to support it. Second, even if it had been correct, its relevance would have been overtaken by events – specifically, *Visas* – by the time it was published.

⁷⁴⁷ The Evolution of the Approach to Executive Rulemaking in the EU, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), pages 28 and 29

⁷⁴⁸ Page 29

⁷⁴⁹ Page 29

⁷⁵⁰ Page 29. Compare that to the argument of Jürgen Bast discussed in section 3.4.9 below.

⁷⁵¹ Page 30

⁷⁵² Without offering any explanation, although admittedly referring in a footnote to Ritleng’s article discussed in section 3.4.5.

⁷⁵³ Page 30

⁷⁵⁴ Pages 29 and 30

Unlike the distinction between supplementing and implementing, the distinction between amendment and supplement Jacqué considers to be clear without further explanation. That is so, because the notion of amendment is clear.⁷⁵⁵ While it is possible to agree with that, the clarity would assume that the distinction is purely formalistic, not material in any way.⁷⁵⁶ Admittedly that formalism would seem to be supported by both the judgment in *Connecting Europe Facility* and the Commission's 2011 Guidelines.

It should be recalled that in *Connecting Europe Facility* the ECJ held that amending (as used in Article 290 TFEU) means tweaking the actual text of the legislative act.⁷⁵⁷ In doing so it expressly approved the Commission's 2011 Guidelines which stated that amending means making "formal changes to a text by deleting, replacing or adding non-essential elements."⁷⁵⁸ Thus "amend" essentially covers orthographical changes in the legislative act. They may or may not bring about a material change; that simply plays no part in the meaning of "amend". Whether desirable or not, this construction does have the merit of making the distinction between "amend" and "supplement" easy to determine – just like Jacqué suggested. Furthermore, it would seem to be coherent with the way "legislative act" is defined Article 289 TFEU: that definition is likewise formalistic. Hence a formalistic meaning of a term employed in the context of EU law-lawmaking is nothing uncommon to current EU law.

Jacqué is ultimately unable to offer a distinction between Articles 290 and 291 TFEU. In addition to attempting to do so he also deals directly with the question of who holds implementing power in the EU coming – like Schütze – to the conclusion that the Lisbon Treaty made fundamental changes to EU law in this respect. According to Jacqué implementing power was initially to be held by the Council.⁷⁵⁹ He draws this conclusion from Article 155 EEC suggesting that the amendment made to Article 145 EEC by the SEA did not change anything in this respect.⁷⁶⁰ Thus the Commission had no implementing power of its own – it could exercise it only when it had the power granted to it by its holder; the Commission was not the holder of the implementing power.⁷⁶¹ According to Jacqué

[t]he Lisbon Treaty confirmed this situation by bestowing on the Commission the power to adopt implementing acts on the sole basis of delegation from the legislator. In principle, the Commission has implementing power, but only where a 'legislative act' so provides. The Council could only wield it, according to Article 291 TFEU, on the basis of legislative authorization and solely in specific instances for special reasons. There is little chance, politically, that such a state of affairs should occur in cases other than those for which the Council is the sole lawmaker. The Lisbon Treaty

⁷⁵⁵ Page 29

⁷⁵⁶ See section 3.2.5 above.

⁷⁵⁷ Paragraph 53 of *Connecting Europe Facility*

⁷⁵⁸ Paragraph 34 of the 2011 Guidelines

⁷⁵⁹ Jean Paul Jacqué, *Lost in Transition: The European Commission between Intergovernmentalism and Integration*, in Dominique Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (2016 OUP), pages 41 and 42

⁷⁶⁰ Thus the conclusion concerns the old implementing power, *i.e.* the one which covers both the current implementing and the current delegated power.

⁷⁶¹ *Lost in Transition*, page 42

therefore fundamentally alters the situation by making the Commission the holder of implementing power whenever it benefits from legislative delegation.⁷⁶²

This raises a question: how is it possible that the Lisbon Treaty at the same time confirms the pre-existing *status quo*⁷⁶³ and fundamentally changes it?⁷⁶⁴ Trying to solve this conundrum, it would seem that the claim for fundamental change is based on a subtle modification of object. The *status quo* was expressed in relation to direct holding of implementing power, while the fundamental change was formulated in terms of holding delegated (not direct) implementing power (“making the Commission the holder of implementing power whenever it benefits from legislative delegation”). Yet how does the position under the Lisbon Treaty differ from prior *status quo*? Jacqué himself argued that before the Lisbon Treaty the Commission had no implementing power of its own, that the Council held the implementing power and that the Commission had it only when the Council delegated it to the Commission. The situation persists under the Lisbon Treaty: “the Commission has implementing power, but only where a ‘legislative act’ so provides”.

Looking at things practically, rather than strictly legally, in that it is said that post-Lisbon Treaty there is little chance of grant of implementing power to the Council, the ECJ had already in 2005 made the point that in the normal course of events it would be the Commission which would have implementing powers. The normal rule

under the system established by the Treaty, [was that] when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power.⁷⁶⁵

Thus there was no change in respect of practice either. It used to be the case that what is now Article 291 TFEU implementing power was not held by the Commission, that it could be – but strictly legally speaking did not have to be – granted to it and that it normally was granted to it. That is still the position. The only difference is that we now speak of grant of that power by the Parliament and the Council jointly. That is occasioned by changes elsewhere in the Lisbon Treaty: the power which is granted is no longer held by the Council alone (in which case it might seem absurd to speak of grant to the Council – grant to itself?), but by the Parliament and the Council jointly.

Concurrently with the foregoing Jacqué’s has claimed that the Lisbon Treaty modified the pre-existing *status quo*

by indicating that the control of the implementation, when it is entrusted to the Commission, should be performed by the Member States, meaning that the Council,

⁷⁶² Lost in Transition, page 42

⁷⁶³ See the first sentence of the quote.

⁷⁶⁴ See the last sentence of the quote.

⁷⁶⁵ Judgment of the ECJ in case C-257/01 *Commission of the European Communities v Council of the European Union*, paragraph 51. See further the judgment of the ECJ in case C-133/06 discussed in text to footnote 906.

as an institution, is excluded from a process where it could earlier be called upon to play a major role.⁷⁶⁶

The reason why this was done was said to lie in the fact that the power to implement (within the meaning of Article 291) normally belongs to member states, and that this amendment would permit member states to actually participate in its exercise when it is exercised at the level of the EU.⁷⁶⁷ With respect, that seems to contradict Jacqué's other opinion that the power to implement (within the meaning of Articles 155 EEC and 202 EC, which would encompass the power to implement within the meaning of Article 291 TFEU) belonged to the Council, not the member states. The reasoning Jacqué offers as to why the power to implement (within the meaning of Article 291 TFEU) normally belongs to the member states does not seem to shed any light on this conundrum:

execution at the Union level is only subsidiary in case of specific circumstances that have to be motivated in the legislative act.⁷⁶⁸

It would seem to be possible to solve this conundrum by implying that when Jacqué speaks of the Council's own power to implement under Article 155 EC he means only that part of what is now the power to implement within the meaning of article 291 TFEU where "execution at the Union level" is justified under the principle of subsidiarity. Yet that would seem to make the explanation of why Article 291 TFEU grants the control over implementation to member states not an explanation for that change at all. The explanation was that member states were granted that control because the control was essentially over the exercise of their own power. Yet such solution of the conundrum tells us that – by virtue of the principle of subsidiarity – it was not a power of member states after all; it was a power of the EU all along.⁷⁶⁹

Thus one is left with either a contradiction in Jacqué's accounts of who holds the original implementing power (within the meaning of Article 291 TFEU) or with an incorrectness of his account as to why it was that the change of the controller occurred in Article 291 TFEU.⁷⁷⁰ The only other solution would seem to be that the change was not in any way principled at all. In any event Jacqué would seem ultimately to be able neither to determine the holder of implementing power nor explain why that determination is important.

⁷⁶⁶ The Evolution of the Approach to the Executive Rulemaking in the EU, page 26

⁷⁶⁷ The Evolution of the Approach to the Executive Rulemaking in the EU, page 26

⁷⁶⁸ The Evolution of the Approach to the Executive Rulemaking in the EU, page 26

⁷⁶⁹ "[T]he matters on which the regulatory power can be delegated to the Commission are those which fall in principle within the legislature's decisional ambit, and that in these circumstances delegation is a choice and not a duty": Kieran St C Bradley, Delegation of powers in the European Union: political problems, legal solutions?, in Carl Fredrik Bergström and Dominique Ritleng, Rulemaking by the European Commission: The New System for Delegation of Powers (OUP 2016), page 65

⁷⁷⁰ In any case there is no explanation of why the purported change might be relevant: the comitology committees which act under Article 291 TFEU are made up, work and vote just like the Council does. See Article 5 of regulation 182/2011.

3.4.7. Paolo Ponzano⁷⁷¹

Ponzano, seemingly unlike Jacqu , considers that for the purposes of the distinction introduced by Articles 290 and 291 TFEU it is

futile and useless to refer to the situation before Lisbon Treaty (in which the measures of implementation adopted through comitology procedure had covered a very large spectrum of provisions) or to the old case law (which took a broad view of the term ‘implementation’ with the aim to legitimate delegation of power to the Commission).⁷⁷²

He starts with considering what the distinction is in substance. In a nutshell, he suggests that

the Lisbon Treaty for the first time introduced the distinction between *legislative delegation* and *executive delegation*. In this way, the Lisbon Treaty aligned the European Union’s primary legislation with the practices of the national legal systems, which recognize three different legal situations: a) cases where the legislator acts in its own sphere of competence (legislative acts); b) cases where the executive acts in its own sphere of competence (ministerial decrees); c) cases where the executive acts in the legislator’s sphere of competence (either by virtue of an explicit delegation of powers, or on its own initiative in urgent cases): in the French legal system, these acts are called ‘*ordonnances*’ (in Italian *decreti legislativi* or *decreti-legge*). The Lisbon Treaty recognizes therefore that it is inappropriate to equate the executive amending the existing legal framework with that same executive simply implementing EU legislation. For this reason, the Treaty introduced a category of delegated acts that the Commission is responsible for adopting under the direct scrutiny of the EU legislator (Council and European Parliament) without any comitology procedure.⁷⁷³

He does not use the terms “legislative delegation” and “executive delegation” elsewhere, but it would seem justified to conclude that the former stands for Article 290 TFEU delegation, and the latter – for Article 291 TFEU delegation. With that being the case, let us attempt to align the system created by the TFEU with the national legal systems as presented by Ponzano. Group (a) would seem to include legislative acts within the meaning of Article 289 TFEU.

What about delegated acts? – Their adoption requires explicit grant of power to that effect in a legislative act. In addition they expressly include acts “tinkering” with the text of a legislative act, *i.e.* an act created by the legislature. It stands to reason that they thus constitute action in the sphere of competence of the legislature. Paragraphs 20 – 23 of the common understanding set out in the annex to the inter-institutional agreement on better law-

⁷⁷¹ The Reform of Comitology and Delegated Acts: An Executive’s View, in Carl Fredrik Bergstr m and Dominique Rittleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016)

⁷⁷² Page 47. The correctness of the statement may be seriously doubted in the light of paragraphs 44 and 46 of *EURES*.

⁷⁷³ Page 43

making even sets out an urgency procedure⁷⁷⁴ – just like Ponzano mentioned in respect of group (c). Therefore they would seem to belong to group (c).

That leaves group (b) for implementing acts. To belong to that group they would need to comprise “cases where the executive acts in its own sphere of competence”. Is that so? Jacqué’s answer would clearly be “no”. He attributes implementing power either to the Council⁷⁷⁵ (acting as the legislature within the meaning of Ponzano’s classification) or to the member states (which cannot have implementing power under Article 291 TFEU), never to the Commission which is the body which mostly exercises implementing power within the meaning of Article 291 TFEU. Even if Jacqué’s account is left aside, it is still unclear how one could get around the explicit wording of Article 291 TFEU to the effect that the Commission or the Council – the executive for the purposes of this group (b) – may only implement a basic act when so expressly empowered by a basic act.⁷⁷⁶ First, they may do nothing aside from implementing a basic act. So the extent of their actions is limited by the basic act. Second, in implementing a basic act they may not act on their own motion. To be fair, it is true that once there is a mandate in a basic act, what they may do is very wide indeed. It goes beyond simple execution of the mandate. As long as they take

such actions [which] clearly fall within the scope of the essential general aim pursued by [the basic act],⁷⁷⁷

they are deemed to be implementing the basic act, *i.e.* they have not exceeded the limits of their mandate. Yet, this is nothing to the point. That statement of the ECJ goes to the extent of a mandate granted under Article 291 TFEU, it does carve out “an own sphere” for the grantees of a mandate where they would need no mandate to act. The Commission cannot adopt an implementing act unless a basic act expressly permits it to do so.

In fact, it could be argued that implementing acts likewise fit group (c). A mandate is required for an implementing act. Its recipient would seem to always act in what is normally somebody else’s sphere of competence: either the sphere of competence of the author of the basic act (there is nothing stopping the author from regulating an issue to the fullest extent which EU’s conferred competence permits) or of the member states (if one subscribes to the idea that implementation lies naturally with member states or deals with a situation where the principle of subsidiary has been violated).⁷⁷⁸ The *Frontex* doctrine of essential elements applies both to Article 290 TFEU and to Article 291 TFEU acts – in neither case may the grantee of power adopt essential elements of the rules regulating a particular field of activity.

⁷⁷⁴ The lawfulness of that procedure is a separate issue – if one adheres to the position that Article 290 TFEU provides a complete legal framework for delegated acts and delegated power (which, lest we forget, is the *conditio sine qua non* for the contention that Article 290 TFEU permits of no comitology), one would be justified in wondering what is the legal basis of the urgency procedure? The text of Article 290 TFEU clearly does not mention such a possibility.

⁷⁷⁵ Or rather the Parliament and the Council jointly: the attribution was made under Article 155 EEC. Under the Lisbon Treaty the corresponding position and the corresponding power are held by the Parliament and the Council jointly.

⁷⁷⁶ This seems more akin to the two-partite distinction adopted in Estonian constitutional law rather than the tripartite distinction Ponzano argues for. See footnote 783 below for the position under the Estonian constitution.

⁷⁷⁷ *EURES*, paragraph 53

⁷⁷⁸ Advanced by Schütze and Jacqué

And, finally, most all of academic commentators agree on the point that implementation does in fact amend the basic act⁷⁷⁹ – it thus amounts to interference with the sphere of competence of the authors of the basic act.

Furthermore Ponzano seems to forget *sui generis* non-legislative acts. Let us take articles 105(3) and 106(3) TFEU as an example. Both deal with competition law.

Article 105(3): The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

Article 106(3): The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Where would these provisions fit Ponzano’s account of national systems with which the Lisbon Treaty aligned the EU law-making? It would either require accepting that under those articles the Commission was acting as the legislature – in which case the Commission acting under article 105(3) TFEU or article 106(3) TFEU would fall within group (a) – or, especially if we are to maintain Ponzano’s further contention that the Lisbon Treaty is about separation of powers,⁷⁸⁰ they would have to fit within group (b). The conditions would seem to be met: Articles 105(3) and 106(3) TFEU do give the Commission its own sphere of competence, no mandate is required and no other institution may interfere with that sphere. Furthermore, even if it could be argued that article 106(3) TFEU should fit into group (a) as primary legislation, group (a) would not seem available – at least not without making quite convoluted an argument – for Article 105(3) TFEU. For Article 105(3) TFEU to be engaged, there must be a prior act of the Council.⁷⁸¹ Surely that would be the group (a) act. Yet that act need not grant any power to the Commission for the latter to act under Article 105(3) TFEU; that article itself permits it to do so once the prior act has been adopted.

Both these provisions – Articles 105(3) and 106(3) TFEU – have been part of EU law for a while – long before the Lisbon Treaty.

Thus it would seem that the system of EU law might well be capable of being aligned with national legal systems as presented by Ponzano. However, it was not the Lisbon Treaty which “for the first time” resulted in that alignment. The alignment, if any, pre-existed the Lisbon Treaty. What seems impossible is to align the system created by the Lisbon Treaty – legislative, delegated and implementing acts – with national legal systems as presented by Ponzano. Both delegated and implementing acts fall within group (c) and group (b) remains empty (if we consider only legislative, delegated and implementing acts). Thus Ponzano’s conclusion – based on the alleged alignment – that

⁷⁷⁹ Admittedly Ponzano seems to disagree with that contention – see page 49.

⁷⁸⁰ Page 37

⁷⁸¹ Adopted after consulting the Parliament, see article 103(1) TFEU.

[t]he Lisbon Treaty recognizes therefore that it is inappropriate to equate the executive amending the existing legal framework with that same executive simply implementing EU legislation,⁷⁸²

simply does not follow.⁷⁸³ Thus Ponzano seems to fail to establish the distinction which he alleges Articles 290 and 291 TFEU to make.

After considering the substance of the distinction Ponzano moves on to the question how to determine whether an act is delegated or implementing. In spite of writing after *Biocides* he initially maintains that the categories are mutually exclusive.⁷⁸⁴ He sees *Biocides* as supporting that contention.

The Court does not appear to question that Articles 290 and 291 TFEU each have their own scope with no overlap between them. This can be deduced in particular from paragraph 35 of the judgment, according to which ‘the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from Article 290 TFEU’.⁷⁸⁵

Despite this he admits that

[t]he delimitation between delegated and implementing does become to a certain extent—that is, within the limits of the manifest error of assessment—a matter of political choice.⁷⁸⁶

With respect, that would seem to fly in the face of contention of mutual exclusivity. If Articles 290 and 291 TFEU are mutually exclusive, political desire or choice simply does not matter. Admittedly political choice is easier to reconcile with paragraph 40 of *Biocides* where the ECJ held that the EU legislature had discretion in choosing between Articles 290 and 291 TFEU. Conspicuously, Ponzano fails to explain how that paragraph is reconcilable with the contention of mutual exclusivity. Let alone with the fact that the judicial review which the ECJ performs permits situations where something which should – as a matter of law – be an implementing act, but takes the form of a delegated act, is nevertheless allowed to stand.⁷⁸⁷

⁷⁸² Page 43

⁷⁸³ There is another problem with Ponzano’s argument. In presenting his tri-partite division of national practices he seems to have failed to consider the possibility that some member states may not adopt such a division. That would seem to weaken the argument for alignment. For instance Estonia does not adopt such a tri-partite division: any regulation of the government (or of an individual minister) requires a corresponding mandate in an Act of Parliament; any regulation adopted by the government (or by an individual minister) without such a mandate would automatically be unconstitutional. Hence no group (b) exists. See the judgment of the National Court in case no. 3-4-1-3-96, paragraph III.

⁷⁸⁴ Page 47

⁷⁸⁵ Page 49

⁷⁸⁶ Page 50

⁷⁸⁷ See the text to footnotes 743 to 745. At the end of the day it does not really matter whether Articles 290 and 291 TFEU are or are not mutually exclusive. Thus, arguing that they are mutually exclusive in principle, but not at all mutually exclusive in practice because of a procedural choice made by the ECJ (opting for manifest error of the reasonableness of the EU legislature’s appreciation of the situation as the standard of review) is nothing to the point.

On the other hand, paragraph 35 of *Biocides* on which Ponzano relies would hardly seem difficult to reconcile with the contention of lack of mutual exclusivity. Even if Articles 290 and 291 TFEU are not mutually exclusive, (i) delegated and implementing acts would seem to occupy the same space,⁷⁸⁸ (ii) each of Article 290 and 291 TFEU formulates certain hard limits⁷⁸⁹ and (iii) especially if they are not mutually exclusive, the choice between the two is a question of looking at both provision and deciding which to apply. Thus assessment of a concept of implementing act in relation to the concept of delegated act would be called for if they were not mutually exclusive.

Dealing with how to distinguish implementing acts from the delegated ones Ponzano opines that *Biocides*

does not provide for clear and easily applicable criteria for the delimitation between delegated and implementing acts.⁷⁹⁰

Nevertheless he thinks that

[f]rom a theoretical point of view, it should be quite easy to distinguish between measures which *change* the *legal framework* of a legislative act (by amending formally one or several provisions of the act or by supplementing it with other provisions that the legislator could have adopted at the same time) and measures aiming only to *implement* the same act.⁷⁹¹

He gives the example of a genetically modified product:

if a legislative act were to grant the Commission the power to establish or amend the criteria according to which a genetically modified product could be authorized or prohibited on the market, this would clearly be a delegated act. If, on the other hand, the Commission were to receive the power to authorize or prohibit a genetically modified product on the basis of the criteria contained in the delegated act, this would be an implementing act.⁷⁹²

These statements fail grasp the practical problems: that ultimately the question often turns on the level of abstraction of criteria. If the Commission is granted power to adopt an act with “adequate level of protection”⁷⁹³ serving as the criterion set forth in the legislative act, would

⁷⁸⁸ In that they both add something to a basic act. Bast has argued that they are in a horizontal relationship. See footnote 658.

⁷⁸⁹ For instance amendment of actual wording of a legislative act lies within the ambit of Article 290 TFEU. Thus the claim that the concept of implementing act must be assessed in relation to the concept of delegated act would mean that since Article 290 TFEU (on delegated acts) deals with amendment of the actual wording, an implementing act cannot do so (despite Article 291 TFEU being silent on the manner, *i.e.* not containing an express prohibition to do so). Without this assessing of one in relation to the other, there would be no basis for claiming that an implementing act cannot be used to amend the wording of a legislative act. After all, Article 291 TFEU does not deal with that issue, and there is no express ban on a implementing act doing so in Article 290 TFEU either.

⁷⁹⁰ Page 49

⁷⁹¹ Page 47

⁷⁹² Page 43

⁷⁹³ The more detailed of the two criteria at issue in *EUROPOL*. See footnote 545.

the Commission's act be delegated or implementing? How could one distinguish between different steps of the waterfall structure at issue in *Visas* where the criteria seem to have been highly similar if not identical, yet the first act in the structure was held to be implementing and the next delegated?

Thus Ponzano's approach fails both to rationalise Articles 290 and 291 TFEU and to explain how to deal with their "competition".

3.4.8. Kieran St C Bradley⁷⁹⁴

Unlike the commentators considered above Bradley does not adhere to the thesis of mutual exclusivity of Articles 290 and 291 TFEU. He argues that it is at least possible

to imagine a secondary measure which is a delegated act as to its content, but an implementing act as to its *raison d'être*.⁷⁹⁵

Furthermore, according to Bradley using the discretion of the Commission as the criterion for deciding whether a power is delegated or implementing could prove unworkable in practice.

It is difficult to imagine any act, delegated or implementing, which would leave the Commission with *no* margin of discretion, so then the question is what margin of discretion would tip the balance in favour of a delegated act as opposed to an implementing act? Would a 'considerable amount of discretion' do the job? Is this the same as a 'significant amount', or would the Commission only be able to adopt implementing measures where its discretion was 'insignificant' in extent?⁷⁹⁶

Admittedly these are exactly the sort of difficulties which the commentators clamouring for discretion of the grantee of power as the criterion seem to completely disregard.

Unlike most commentators Bradley has also defended the ECJ's decision in *Biocides* to look only for manifest errors in the choice between Articles 290 and 291 TFEU.

Moreover, the Court's holding in this regard reflects the absence of Treaty rules constraining the legislature's choice. In effect, the Court held that the assessment of which type of act is appropriate for a particular secondary normative measure is a policy choice; in line with the established case law on judicial review of policy decisions, the Court will only interfere with such legislative assessments in very limited circumstances, such as a manifest error or abuse of power or procedure.⁷⁹⁷ The Court did not take up the Commission's invitation to focus on 'the nature and the purpose of the powers conferred on the Commission',⁷⁹⁸ preferring instead to exercise marginal review of whether the legislature had laid down a complete legal framework.

⁷⁹⁴ Kieran St C Bradley, *Delegation of Powers in the European Union: Political Problems, Legal Solutions?*, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016)

⁷⁹⁵ Page 77

⁷⁹⁶ Pages 79 and 80

⁷⁹⁷ Judgment of the ECJ in case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, paragraph 52

⁷⁹⁸ *Biocides*, paragraph 23

Having carried out a prima facie examination of the different elements on which the Commission relied to demonstrate its powers were delegated rather than implementing, the Court concluded that the legislature had not committed any manifest error of appreciation or other abuse, in considering the basic regulation complied with this standard.

/.../

The suggestion that in *Biocides* the Court concluded that ‘the more specific the “criteria and conditions” established by the EU legislature ... the more reasonable a delegation of implementing powers’ appears to be predicated on the notion that the legality of a choice of secondary act is in some way a matter of degree. To succeed under the ‘manifest error’ test, however, the party challenging the choice of secondary act must demonstrate that the error or abuse is obvious; here the Commission had not been able to establish that the legislative framework was manifestly incomplete.⁷⁹⁹

In the light of the case law discussed in section 3.2 above it is difficult to disagree with Bradley’s opinion or indeed improve on his very clear formulation of the point.

3.4.9. Jürgen Bast⁸⁰⁰

Like Bradley, Bast “falls out of line” compared to other academic commentators: he does not subscribe to the thesis of mutual exclusivity of Articles 290 and 291 TFEU nor does he adhere to the idea that discretion of the grantee of power could be used as a criterion to determine whether the power is delegated or implementing. If anything, Bast goes further than Bradley. What Bast seems to suggest is that there is no cardinal difference between Article 291 TFEU and the old Article 202 EC.

Bast starts by recalling that “implementation” within the meaning of Article 202 EC was a very wide concept indeed – covering anything and everything from individual decisions to (orthographical) amendments of texts of basic acts.⁸⁰¹ Comparing Article 202 EC with Article 291 TFEU he opines that

[t]he new functional definition [in Article 291 TFEU] is broad enough to cover the whole range of implementing acts adopted under the previous regime [Article 202 EC].⁸⁰²

Looking at the wording of the two provisions it is hard to disagree. It seems difficult to improve on the way Bast demonstrates the force of the point.

Establishing uniform conditions for applying Union law may in some cases require regulations of a rather technical nature, such as designing a form to be applied by the

⁷⁹⁹ Page 80

⁸⁰⁰ Is There a Hierarchy of Legislative, Delegated and Implementing Acts?, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016)

⁸⁰¹ Page 159

⁸⁰² Page 161

competent authorities, specifying data to be reported to the Commission, keeping a register of certified laboratories, and so forth. In other cases, ensuring uniformity may require making substantive determinations, either in the form of individual decisions addressed to a Member State or through acts of general application. In some cases, ensuring uniform implementation of a binding Union act may even require conferral on the Commission of the power to adopt individual measures addressed to private parties, thus replacing the Member States' implementing authorities (so-called direct implementation of EU law). However, there is nothing in Article 291 TFEU that limits the procedural or substantive regulations made by the Commission (or exceptionally, the Council) to matters of a mere technical character.⁸⁰³ Any regulations that complement the provisions of the basic act will, by definition, further constrain the scope of implementing action left to the Member States and therefore contribute to enhancing uniformity in the application of the basic act. As a result, the scope of application of Article 291 TFEU does not fall short of what Article 202 EC had termed 'implementation of rules'.⁸⁰⁴

Bast's conclusion is that the new language employed in the Lisbon Treaty does not make any real changes in respect of implementing acts.⁸⁰⁵ That would seem to direct one towards Article 290 TFEU as the "source" of changes in "implementing" within the meaning of Article 291 TFEU as compared to Article 202 EC. That brings Bast to the differences between Article 290 and 291 TFEU. After noting the two clear differences between them⁸⁰⁶ Bast moves onto the most "popular" criterion for distinction between the two: the extent of discretion of the grantee of power. He is unimpressed, and argues that "legislation, supplementation, and implementation should not constitute a scale (and, by implication, a hierarchy) of highly, medium, and less essential rules."⁸⁰⁷

[S]uch essentialist understanding seems rather naïve in view of the complexities of a modern legal system. Attempts at deriving a formal hierarchy of norms from the substantive contents of the law are as old as the doctrine of the separation of powers itself. For example, the German constitutional lawyer Paul Laband invented in the 1870s the distinction between executive laws in the substantive sense and mere implementation of laws in order to justify the Prussian King's power to make autonomous regulations. However, the theoretical basis and empirical validity of the distinction between substantial *Ergänzung* (supplementation of laws) and mere

⁸⁰³ Indeed the point has been taken by Jacqué that technical annexes frequently contain the substance of regulations and directives. The Evolution of the Approach to Executive Rulemaking in the EU, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 27. Annexes of legislative acts are precisely the object which the Commission is frequently given a mandate to change.

⁸⁰⁴ Page 161

⁸⁰⁵ Page 162. This agrees very nicely with the position which the ECJ: in *EURES*, decided under the Lisbon Treaty, it confirmed that its case law on Article 202 EC was still good law. See paragraphs 44 and 46 of *EURES* and section 3.2.2 above.

⁸⁰⁶ According to Article 290 TFEU the basic act must be a legislative act (Article 289 TFEU) while there is no such requirement in Article 291 TFEU. According to Article 290 TFEU a delegated act must be of general application, while there is no such requirement in Article 291 TFEU.

⁸⁰⁷ Page 166

Ausführung (implementation of laws) have repeatedly been demystified and deconstructed. Even a norm that intends only to provide further detail or give effect to existing norms adds to the present normative framework. The extent to which the latter is changed is a matter of degree rather than of categorical distinction. Hence, a loaded concept of supplementation does not provide a solid ground for distinguishing delegated and implementing acts, with the effect of preventing the EU legislature from making political judgements, on a case-by-case basis, as to which control regime it considers proper for the conferred power at hand.⁸⁰⁸

This accords rather well with the position taken by the ECJ in *Visas*: both with the express statement of irrelevance of discretion of the grantee of power as a criterion and with the fact that of two very similar acts of the Commission one could be implementing and the other – delegated. Bast’s point is that there is no reason to force upon the Parliament and the Council some pre-established (substantive) criterion which would classify grants of power into delegated and implementing; it should be their choice.⁸⁰⁹ He argues that

[e]liminating the overlap area between delegated and implementing acts would thus deprive the EU legislature (and thus, the European Parliament) of its command over its own resources.⁸¹⁰

This is consistent with paragraph 40 of *Biocides*: not only with the ECJ’s decision that the EU legislature should have discretion in deciding whether to resort to Article 290 or to Article 291 TFEU, but also with doubly loosened judicial review. It is likewise consistent with Bradley’s point on why the judicial review was loosened (policy choice⁸¹¹).

Thus, according to Bast virtually any act could be adopted both as an implementing and as a delegated one; the only limitations are the clear differences to which he refers.

3.4.10. Paul Craig⁸¹²

Craig’s views on the Article 290 and 291 TFEU issue have been set out above – in section 3.4.1 when detailing the position expressed in the textbook he co-authored. However, unlike many other academic commentators dealing with the “competition” of Articles 290 and 291 TFEU Craig has considered the issue from the perspective of the position in which drafters of EU acts are placed in their everyday practice. He has concluded that the standard practice for

⁸⁰⁸ Pages 166 and 167

⁸⁰⁹ Page 167

⁸¹⁰ Page 167. For instance, according to him, “the ‘unfiltered’ control mechanism of Article 290 TFEU can hardly be applied to a large numbers of cases effectively.”

⁸¹¹ See section 3.4.8 above.

⁸¹² Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains, in Carl Fredrik Bergström and Dominique Ritleng, Rulemaking by the European Commission: The New System for Delegation of Powers (OUP 2016)

primary legislation is to make provision for both delegated and implementing acts, and that implementing acts are the principle vehicle for secondary measures.⁸¹³

On the level of individual acts Craig finds that ordinarily the recitals of a basic act contain some explanation why delegated acts were chosen for some grants of power, while implementing acts were chosen for others, *i.e.* why it is thought that some changes to an article of a basic act amend or supplement it, while in other situations there is no amendment or supplement. He has found that both the volume of such explanations as well as their adequacy varies considerably.

The reality is that in most instances the preamble will simply state that a delegated act is needed or not as the case may be, without providing any indication as to why this should be so.⁸¹⁴

According to Craig this leads to the conclusion that

the way in which the divide between delegated and implementing acts is applied does not immediately strike one as principled. What it also means is that it is very difficult to test the soundness of that divide, given the fragility of the definitional distinction between the two species of act, and given also that it would take a lifetime to test that fragile divide in the many circumstances in which it has been applied.⁸¹⁵

3.5. Discussion

We have seen that all the commentators (bar, perhaps, Ponzano) share one point as common ground: an implementing act – at least to an extent – does change the act it is implementing (by modifying or adding to the normative content of that latter act). At the same time no commentator has been able to offer a workable distinction between implementing and delegated acts (or powers, if the commentator has approached the issue in such key).⁸¹⁶ The ECJ has with perhaps uncharacteristic clarity held that the discretion of the grantee of power – the criterion proposed as the instrument for the distinction by most, if not all, commentators who have sought to draw the distinction – is irrelevant for determining whether an act comes under Article 290 or 291 TFEU.⁸¹⁷ It has equally held irrelevant in this respect any other characteristic of grant of power.⁸¹⁸ This seems to give credence to the position of the Commission that attempts to formulate the distinction will probably remain fruitless,⁸¹⁹ and to the suggestion of Bast that adoption of any substantive criterion for drawing the distinction would be unworkable.⁸²⁰

⁸¹³ Page 182. He cites specific figures for support. Admittedly it is unclear from his formulation whether his figures include pre-Lisbon Treaty implementing acts (before the Lisbon Treaty “implementing acts” covered by both delegated acts and implementing acts within the meaning of Articles 290 and 291 of the Lisbon Treaty).

⁸¹⁴ Page 184

⁸¹⁵ Page 184. He seems to mean litigation when speaking of testing.

⁸¹⁶ To be fair, Bradley and Bast have not sought to do so: for them there is simply no need.

⁸¹⁷ *Visas*, paragraph 32

⁸¹⁸ *Visas*, paragraph 45

⁸¹⁹ 2011 Guidelines, paragraph 22

⁸²⁰ See section 3.4.9 above.

Indeed the one clear distinction which has been drawn is formalistic, not substantive. As suggested by Jacqu  the distinction between amending and supplementing is (by now) clear. Approving the Commission’s 2011 Guidelines the ECJ held in *Connecting Europe Facility* that that distinction is – like the notion of legislative act under Article 289 TFEU – formalistic. “Amending” means making orthographical changes to the text of the legislative act, whether those changes are substantive or not. Yet that is an intra-Article 290 TFEU⁸²¹ distinction. It simply seems to “sharpen” the point where the difficulty of dealing with “competition” of Articles 290 and 291 TFEU lies: the distinction between supplementing and implementing.

By the time of handing down the judgment in *Connecting Europe Facility* the ECJ had already held that the grantor of power (“the EU legislature”) has a discretion in choosing which article to resort to – Article 290 or 291 TFEU – and that the ECJ would review that choice only for manifest error in the reasonableness of the grantor’s opinion that the grantor could have resorted to the article to which it did resort.⁸²² Existence of discretion in respect of the choice between Articles 290 and 291 TFEU necessarily means that they are not mutually exclusive: that there are situations where either of them may be lawfully resorted to.⁸²³ If they were mutually exclusive in the sense that in any given situation only a particular one of them could lawfully be chosen, there could simply have been no discretion in deciding which to choose; the choice would have been conditioned by strict application of some rule of law. Combined with the ECJ’s – by now steadfast⁸²⁴ – refusal to postulate that that choice is based on objective criteria it gives considerable support to Bradley’s argument that the choice is one of policy, *i.e.* extra-legal.⁸²⁵ When dealing with the choice between Articles 290 and 291 TFEU it should be further added that it is clear from *ESMA* that Articles 290 and 291 TFEU do not constitute the complete framework for grant of (normative) power by the Parliament and the Council. According to the ECJ nothing precludes the grant of (normative) power to EU agencies in spite of them not being mentioned in either of those articles.

Speaking of objective criteria, it is clear that the doctrine of essential elements applies in respect of both Article 290 TFEU and Article 291 TFEU. While only the former contains a reference to it, in *Frontex* (both initiated and decided after the Lisbon Treaty came into force) the ECJ formulated the doctrine by reference to (as applying to) legislative acts, not by reference to acts which are adopted under legislative acts. Applying to all legislative acts, it equally limits what may remain undecided in a legislative act, whether that legislative act

⁸²¹ That article, incidentally, seems to be the successor of the old regulatory procedure with scrutiny of 1999 comitology decision as that stood after its 2006 amendment.

⁸²² *Biocides*, paragraph 40

⁸²³ Although it does not mean that there are situations where both of them may be resorted to at the same time in respect of the same object. This stronger version of the thesis of mutual exclusivity the existence of discretion leaves intact.

⁸²⁴ In every judgment dealing with the issue of which there are at least four: *Biocides*, *EURES*, *Visas* and *EUROPOL* (even if one leaves aside *Connecting Europe Facility* as relevant only for the intra-Article 290 TFEU distinction). Two of the four (*Biocides* and *Visas*) were decided by a Grand Chamber.

⁸²⁵ The Parliament would seem to completely agree with that. See section 3.3.3.

resorts to acts mentioned in Article 290 TFEU or Article 291 TFEU or indeed an *ESMA*-style grant of power.⁸²⁶

It should be further noted that none of the academic commentators has managed to present a tenable overall approach to Articles 290 and 291 TFEU. Several have attempted to do so – Schütze, Jacqué, Ponzano (usually by suggesting something along the lines of legislative Article 290 TFEU vs executive Article 291 TFEU) – but all such accounts ultimately fail. That is not to say that they would be untenable within the realm of political science,⁸²⁷ simply that the legal argumentation presented therein is incoherent. In this respect it should be mentioned that all the narratives purporting to show that Articles 290 and 291 TFEU made substantial changes to the pre-existing system of grant of power are either affected by that incoherence or ultimately come down to unsubstantiated postulations by their authors.⁸²⁸ No legally viable argument showing that Articles 290 and 291 TFEU substantially affected the pre-existing system has been made.

Now that there is case law on Articles 290 and 291 TFEU the fundamental issue seems to be capable of being put thus: what single legal explanation can be given for all the decisions of the ECJ in point? If a non-complete legal explanation is to be preferred,⁸²⁹ then (i) which decision(s) of the ECJ is (are) wrong, (ii) how are they wrong and (iii) what suggests that the ECJ will fix its error?⁸³⁰ More simply still, how does one decide whether recourse to Article 290 TFEU or Article 291 TFEU is lawful?

What is it that needs to be explained? In *Biocides* the ECJ stated 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,⁸³¹

while in case of conferral of implementing power the grantee

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.⁸³²

To that should be added that supplementing (within the meaning of Article 290 TFEU) means “fleshing out [legislative] act”, that is the

development in detail of non-essential elements of the legislation in question that the legislature has not specified,⁸³³

⁸²⁶ In fact the scope of application of the doctrine would seem even wider – see text to footnote 896 below.

⁸²⁷ Whether they are tenable or not within the realm of political science is simply not something dealt with in this thesis.

⁸²⁸ For an example of this latter see the postulations made by Ritleng (see the beginning of section 3.4.5 above). He presents no argument, let alone legal argument, as to why his postulations are correct.

⁸²⁹ That is one which explains some of those decisions only.

⁸³⁰ If it doesn't fix the error, then arguably such other explanations are useless: they amount to postulating an alternative legal order compared to the one which exists (it is the ECJ which ultimately decides what is correct as a matter of EU law).

⁸³¹ *Biocides*, paragraph 38

⁸³² *Biocides*, paragraph 39

and that in *EUROPOL* the measure was held implementing because there was a defined framework.⁸³⁴ One could be pardoned for seeing no difference between the latter two quotes, despite the fact that the former of these two is about Article 291 TFEU, while the latter – about Article 290 TFEU. Looking at what the ECJ actually decided in its judgments, in *Biocides* the ECJ held that

the mere fact that the basic regulation provided that the fees must be set at a level which ensures that the [European Chemicals] Agency’s costs are covered and takes account of the specific features of SMEs, and that SMEs may pay by instalments, /.../ comprise[d] a ‘complete legal framework’ [regarding the system of fees].⁸³⁵

It is important to note the text in the square brackets: the framework of fees was held to be complete, not just the framework for placing biocides on the market.⁸³⁶

In *EURES* recourse to Article 291 TFEU was held lawful as long as what was decided in the act adopted on the basis of a grant of power in a legislative act fell “within the scope of the essential general aim pursued by that” legislative act.⁸³⁷ Hence, for instance, (i) creation of a completely new body and (ii) requiring that body to be consulted by the Commission before the latter further exercises the power granted to it by the legislative act⁸³⁸ did not require an Article 290 TFEU act; an Article 291 TFEU act was perfectly sufficient.

In *EUROPOL* the following two provisions were held to constitute complete legal frameworks, the first setting out which countries the Council may add onto the list of countries with which EUROPOL was to conclude cooperation agreements, the second in respect of data protection requirements.⁸³⁹

In so far as it is necessary for the performance of its tasks, Europol may also establish and maintain cooperative relations with third states.⁸⁴⁰

Europol may, under the conditions laid down in Article 24(1), transmit to the entities referred to in paragraph 1 of this Article personal data, where Europol has concluded with the entity concerned an agreement as referred to in paragraph 2 of this Article which permits the transmission of such data on the basis of an assessment of the existence of an adequate level of data protection ensured by that entity.⁸⁴¹

⁸³³ *Connecting Europe Facility*, paragraph 41

⁸³⁴ *EUROPOL*, paragraphs 50, 54 and 56

⁸³⁵ Formulation by Kieran St C Bradley, *Delegation of Powers in the European Union: Political Problems, Legal Solutions?*, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 81. For a more detailed explanation of what was actually decided, see sections 3.2.1 and 3.4.5 above.

⁸³⁶ *Biocides*, paragraphs 40, 48 and 51

⁸³⁷ *EURES*, paragraph 53

⁸³⁸ Neither of these rules was in any way mentioned in the legislative act in which the power was granted to the Commission.

⁸³⁹ *EUROPOL*, paragraphs 50, 54 and 56

⁸⁴⁰ Article 23(1) of the *EUROPOL* decision

⁸⁴¹ Article 23(6)(b) of the *EUROPOL* decision. Article 5(4) of decision 2009/934, to which the ECJ also referred in paragraph 54 in respect of data protection adds nothing. It reads in relevant part: “Where the conclusion of an

With respect, the first of these sets no conditions at all. In effect in *EUROPOL* it seems to have been decided that a determination of a task amounts to a framework, and a complete one at that, within the meaning of paragraph 39 of *Biocides*.⁸⁴² And that when there is a complete framework, the act which is adopted on the basis of a legislative act may be implementing; it does not have to be delegated (despite the fact that in *Biocides* the ECJ referred to a framework when speaking of delegated acts⁸⁴³). As to the second, a lot could be said about its (in)completeness. As to the framework at issue in *Biocides* something has been said about its incompleteness.⁸⁴⁴

If determination of a task amounts to a framework, and one is needed and sufficient for both delegated and implementing acts, then not only the purported statements of law in paragraphs 39 of *Biocides* and 41 of *Connecting Europe Facility* seem indistinguishable. The statements made in paragraphs 38 and 39 of *Biocides* are likewise indistinguishable. This latter point is brought home by *Visas*. There it was held that an act essentially establishing a temporary visa requirement for all citizens of a third state could lawfully be adopted “as a delegated act” – in spite of the fact that an act essentially establishing a temporary visa requirement for some citizens only of that same third state was adopted “as an implementing act” and the lawfulness of that latter act was not put into question.⁸⁴⁵ It is submitted that there simply is no difference from this perspective between the two acts considered in *Visas*.⁸⁴⁶

In fact, in the light of *Visas*, one could question the reason for referring to a regulatory framework at all. What does postulating a regulatory framework do? It sets out some legal rules regulating an area without necessarily thrashing out all of them. Why is having a framework necessary? Because in a situation where somebody else is asked to thrash out all the rules required to actually apply the law, the framework sets some bridges which that

operational agreement with a third party is envisaged, Europol shall carry out an assessment of the existence of an adequate level of data protection ensured by that third party.”

⁸⁴² The extent of discretion available to the grantee of power under a framework is irrelevant – *Visas*, paragraph 32.

⁸⁴³ Admittedly the argument that a framework is needed for delegated acts, while it is not necessary for implementing ones is something no-one seems to have advanced. It would be tantamount to suggesting that implementing power is more extensive than delegated power.

⁸⁴⁴ See Kieran St C Bradley, *Delegation of Powers in the European Union: Political Problems, Legal Solutions?*, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 81.

⁸⁴⁵ *Visas*, paragraph 40

⁸⁴⁶ The suggestion that *Visas* was decided the way it was because “delegated act” made an orthographical change to the basic act does not stand up to scrutiny. The argument would assume that the difficulty of distinction concerns supplementing and implementing acts; since the delegated act at issue made an orthographical change to the basic act, it was, however, an amending act – and only Article 290 TFEU covers those. Hence the ECJ had no choice but to hold the act at issue to be a lawful delegated act. The problem with this argument is that while the ECJ referred to this aspect, the other half of the *ratio decedendi* of *Visas* was this: “For all those nationals, the [delegated] act adopted on the basis of Article 1(4)(f) of that regulation thus has the effect of amending, if only temporarily, the normative content of the legislative act in question. Apart from their temporary nature, the effects of the act adopted on the basis of that provision are identical in all respects with those of a formal transfer of the reference to the third country concerned from Annex II to Annex I of Regulation No 539/2001, as amended.” See paragraph 43. Furthermore, if the *ratio decedendi* of *Visas* were as simple as saying that the act at issue made an orthographical change to the basic act, and hence must have been delegated, then why discuss anything else (discretion, implementing acts etc.) at all in the reasoning of the judgment?

someone else cannot cross. Why does it do so? There would seem to be two possible answers. First, because the rules formulated in a framework must be formulated by whomever formulated the framework. Second, to limit what the somebody else might decide.

As a matter of EU law the first cannot be the answer to the question “Why does case law on Articles 290 and 291 TFEU refer to a regulatory framework?” The first basically corresponds to the doctrine of essential elements. That is a distinct doctrine which (according to *Frontex*⁸⁴⁷) has a much wider application than Articles 290 and 291 TFEU. It certainly applies to all legislative acts. Thus it would, for instance, apply in situations where the grant of power is in the style of *ESMA*, *i.e.* to an EU agency in which case Articles 290 and 291 TFEU simply do not apply.

The second explanation is likewise unavailable as a matter of EU law. The second explanation essentially says that the framework limits discretion of the grantee of power. Yet, in *Visas* the Grand Chamber of the ECJ very clearly stated that any such discretion is simply irrelevant for deciding whether recourse should be had to Article 290 TFEU or to Article 291 TFEU. It thus stands to reason that the “framework” does not go to the issue of how to distinguish fields of application of Articles 290 and 291 TFEU.⁸⁴⁸

Looking at *Biocides*, *EURES*, *Visas*, *EUROPOL* and *Connecting Europe Facility* – both at was said and at what was ultimately decided – there does not seem to be much between delegated and implementing acts at all.⁸⁴⁹ The tests for engagement of Articles 290 and 291 TFEU are stated in indistinguishable terms. Looking at ultimate rulings (rather than tests postulated in the main body of the judgments), of indistinguishable acts some were held delegated and some implementing.

It is true that (aside from in *Connecting Europe Facility*, which turned on a different issue – amending vs supplementing) the applicant failed in all cases. Thus it might be argued that the decisions came down not so much to substantive law as to the doubly-loosened standard of review which the ECJ opted for. With respect, that would be missing the point. It does not matter why a particular recourse to Article 290 TFEU or Article 291 TFEU is allowed to stand: because it is substantively correct or because it is not so wrong as to cause the ECJ to intervene. The distinction between substantive and procedural law is artificial here: in practice – as a result of application of totality of EU law – the consequence is that there is not much in it between implementing and delegated acts.

The distinction between the two has never been starkly put by the ECJ. The academic commentators were the ones who have engaged in making it. Yet by doing so they would seem to be trying to draw a distinction where there is none on their own argument. They all

⁸⁴⁷ See section 3.2.6 above and text to footnote 896 below.

⁸⁴⁸ As sparse a framework as humanly possible (article 23(1) of the *EUROPOL* decision) was not a cause for deciding that it was a case of adopting rules within a regulatory framework rather than providing further detail in relation to rules existing in a legislative act (paragraphs 38 and 39 of *Biocides*). It could well be argued that in *EUROPOL* there were no rules to develop under article 23(1) – only to adopt. That would mean that – according to paragraphs 38 and 39 in *Biocides* – the act should have been delegated. In *EURES* “implementing” was held as extensive as “delegated”. See the text to footnotes 402 and 403 above.

⁸⁴⁹ See in this respect text to footnote 390.

(bar, perhaps, Ponzano) accept that an implementing act – at least to an extent – changes the act it is implementing. In other words that Article 290 TFEU and Article 291 TFEU acts are indistinguishable (at least as far as supplementing and implementing go). If that is the premise, how could a distinction be drawn?

This would suggest that Bast is ultimately correct: virtually any act could be adopted both as an implementing and as a delegated one.⁸⁵⁰ So are Bradley and the Parliament: the choice between the two is political.⁸⁵¹ These opinions would seem to be supported by that expressed in all the textbooks to the effect that the distinction is unclear and further specifically by that of Chalmers, Davies and Monti to the effect that it is intentionally unclear.⁸⁵² More importantly the ECJ has held – in *EURES*⁸⁵³ – that its prior case law on implementing power, the old Article 202 EC implementing power, was still relevant and applicable in respect implementing power when Article 291 TFEU is the relevant provision. That would seem to confirm Bast’s contention that language of the TFEU does not support the suggestion that the TFEU departed in any significant sense from the EC Treaty in this respect. Indeed it would support the contention that not much changed in general.

This brings one back to Jacqué’s⁸⁵⁴ contention that the source of Articles 290 and 291 TFEU should be looked for in the article of Justus Lipsius. The latter did suggest that comitology be “treatified”, *i.e.* set forth in the treaties. Looking at Article 290 TFEU and at the regulatory procedure with scrutiny created by decision 2006/512 – they are basically the same thing (as admitted by the Commission and several commentators). Thus it would seem fair to say that that was what the Lisbon Treaty actually did. It “treatified” the comitology – to an extent. Regulatory procedure with scrutiny became Article 290 TFEU and reference to controls by member states was inserted in Article 291 TFEU.

“Controls” seems to be actually pretty much the only common thread running through all the sources considered above: the judgments of the ECJ, the other EU instruments and opinions of every single commentator. Why? It would seem fair to suggest that because that is what Articles 290 and 291 TFEU deal with. Let us take a step back and just consider the two provisions. Article 290 TFEU reads as follows.

1. 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.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

⁸⁵⁰ See section 3.4.9 above.

⁸⁵¹ See, respectively, section 3.4.8 and section 3.3.3 above.

⁸⁵² See section 3.4.1 above.

⁸⁵³ Paragraphs 44 and 46

⁸⁵⁴ See the beginning of section 3.4.2 above.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective "delegated" shall be inserted in the title of delegated acts.

Article 291 TFEU reads as follows.

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 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.

They deal with controls. Who controls the exercise of granted power and how he controls it. What is it that they do not deal with? What is conspicuous by its absence? – Rules on acts and on power. Neither article says anything about how delegated or implementing acts, as the case may be, are to be adopted.⁸⁵⁵ What the grantee of power, adopter of delegated and implementing acts, is to do. Nor does either article deal exhaustively with the question of who might the grantee of power be or when the grantor (the EU legislature) may grant power to a grantee: the ECJ is *ESMA* has said that entities not mentioned in either of the two articles may just as well be granted just as normative a power as the Commission which is mentioned in both articles.⁸⁵⁶ There is no other provision in the constitutive treaties which deals with these issues. This is in stark contrast with legislative acts: Articles 289 and 294 TFEU deal with who is to adopt legislative acts and how he is to adopt them. They do not deal with how that adopter is to be controlled.

⁸⁵⁵ The Commission has admitted as much: see page 6 of the 2009 Communication and paragraph 85 of the 2011 Guidelines.

⁸⁵⁶ Both articles mention some grantees, but it seems that according to *ESMA* those grantees could be granted the power mentioned therein even if they were not so mentioned. Thus reference to grantees functions simply as the trigger for engaging each article and as its hard limit. For the latter two see the discussion below in this section.

Looking back, the 1999 comitology decision and the decision which amended it in 2006 explain that they are about the conditions under which the Commission is to exercise the power granted to it. Not about grant of the power or what the Commission is to do with it or how the Commission is to draft and then adopt the act. Decision 2006/512 – which is the spiritual ancestor of Article 290 TFEU⁸⁵⁷ – contains, for instance, the following recital.

[1999 comitology decision] should be amended in order to introduce a new type of procedure for the exercise of implementing powers, the regulatory procedure with scrutiny, which allows the legislator to oppose the adoption of draft measures where it indicates that the draft exceeds the implementing powers provided for in the basic instrument, or that the draft is incompatible with the aim or the content of that instrument or fails to respect the principles of subsidiarity or proportionality.⁸⁵⁸

It also inserted the following recital into the 1999 comitology decision as recital 7a.

It is necessary to follow the regulatory procedure with scrutiny as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty, *inter alia* by deleting some of those elements or by supplementing the instrument by the addition of new nonessential elements. This procedure should enable the two arms of the legislative authority to scrutinise such measures before they are adopted. The essential elements of a legislative act may only be amended by the legislator on the basis of the Treaty.

These passages speak not of power of the grantee, but of controls over its exercise.

Thus Articles 290 and 291 TFEU are not actually about grant of power or about acts at all. They are mechanisms for control over the exercise of the power granted.⁸⁵⁹ “Delegated act” and “implementing act” are not types of acts, they are simply shorthands for different types of controls prescribed by the TFEU over the activities of the grantee of a power and the situations in which those controls are to apply. Consequently to speak of “delegated power” or “implementing power”, or “delegated act” or “implementing act” in any sense aside from a shorthand reference makes no sense. There are no two different types of power of the grantee or two different types of acts, simply because Articles 290 and 291 TFEU are not about types of power of the grantee or about types of acts. They do mention power which might be granted, but they do not specify it (its extent, for instance). Same is true in respect of acts. What they do specify is the controls.

Looking at whether that fits with the judgments of the ECJ, it would seem to. It explains the existence of discretion of the EU legislature and the lightness of the ECJ’s review of exercise

⁸⁵⁷ See to that effect also the statement annexed to regulation 182/2011 (the current comitology regulation).

⁸⁵⁸ Recital 2. In the 1999 comitology decision see recital 9.

⁸⁵⁹ Either specifically under some other provision of the constitutive treaties or otherwise. *ESMA* is authority for proposition that no specific provision is needed for grant of normative power. That Articles 290 and 291 TFEU (or rather their predecessors in the Constitutional Treaty) were about controls was, in fact, stated in the Final Report of Working Group IX of the Convention on the Future of Europe. See the Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 11.

of that discretion. Since neither Article 290 nor Article 291 TFEU formulates any (type of) power of the grantee (the Commission), the power is the constant: the choice is simply which controls this power should be subjected to. Just like it was the case under 1999 comitology decision as amended in 2006. Hence discretion of the legislature. That discretion – as pointed out by Bradley and the Parliament – is a political question, not a legal one. Hence the light review and no reference to objective criteria. That discretion – to choose between controls – also explains why in indistinguishable situations the ECJ deemed perfectly lawful recourse to Article 290 TFEU in some of them, and to Article 291 TFEU in others. That is because it was for the EU legislature to choose on the basis of political considerations which controls to opt for: Article 290 TFEU or Article 291 TFEU ones. As long as the triggers for an article (be it Article 290 or 291 TFEU) have been pulled, recourse to that article is lawful. That triggers of the other one have been pulled simultaneously and thus recourse to it is also lawful does not change that.

One could object that this approach contradicts *Connecting Europe Facility*. That there the ECJ clearly held that the power was a power to amend.⁸⁶⁰ Furthermore why did it hold that in amending the basic act while it could only supplement it, the Commission infringed

the rules of competence laid down in Article 290 TFEU[?]⁸⁶¹

Why would this matter at all if the same controls would apply in both “amending” and “supplementing” situations of Article 290 TFEU? In choosing to annul a delegated act because it amended rather than supplemented a legislative act, the ECJ might be argued to have shown that amending and supplementing are types of acts after all.

The problem is merely ostensible. The objective attained is the same regardless of whether a legislative act is amended or supplemented (within the meaning of *Connecting Europe Facility*). That is amply demonstrated by the fact that the Commission’s act there at issue was annulled pending adoption of the same act as a supplementing one. Thus the result does not change whether we are dealing with amending or supplementing: the normative content of the legislative act is amended in equal measure in both cases.⁸⁶² Nor do the actions of the Commission in adopting it change. What does change is the accessibility of the result (whether the amending act will need to be separately found on Eur-lex or whether the change will be consolidated into the legislative act). While that seems not to be about controls, it is in reality about the form which the exercise of power granted to the Commission should take. Specifically, not tinkering with the wording of the legislative act. Thus the amending vs supplementing distinction is simply a particular specification of the form of exercise of power. In other words it is the grantor (the EU legislature) controlling an aspect of exercise of the power. Thus it is, in reality, about controls. It does not go to (the substance of) the power itself.

⁸⁶⁰ See, for instance, paragraph 51.

⁸⁶¹ Paragraph 61

⁸⁶² To employ the language used by the ECJ in paragraph 43 of *Visas*.

What that distinction does bring us to is the question why any review at all was postulated in paragraph 40 of *Biocides* and why a review of manifest errors is actually good enough. It will be recalled that Christiansen and Dobbels bewailed the step back which they alleged the Lisbon Treaty to have made compared to the immediately preceding position of EU law in that the Lisbon Treaty was said to provide no criteria for deciding whether to have recourse to Article 290 TFEU or to Article 291 TFEU.⁸⁶³ Being both trigger-based,⁸⁶⁴ Articles 290 and 291 TFEU actually contain such criteria. Bast calls them hard limits.⁸⁶⁵ The controls set forth in Article 290 TFEU are obligatorily mandated if the Commission is given power to tinker with the wording of a legislative act. Article 291 TFEU controls must not be used in such a situation. Thus the discretion of the EU legislature is wide, but not absolute: there are situations where it is legally constrained to choose recourse to one article over the other. But – in part because of the distinction between amending and supplementing being formalistic⁸⁶⁶ – it is normally abundantly clear simply by looking at the situation if those constraints have been breached. Thus even the doubly-loosened review is perfectly sufficient to determine whether in a given situation the limits of that discretion were breached. On the other hand, as long as the legislature stays within those limits, the ECJ does not interfere, and the doubly-loosened review ensures that; when both articles are triggered, the question whether to opt for Article 290 TFEU or for Article 291 TFEU controls is – as Bradley and the Parliament put it – political. Thus the reason why in none of *Biocides*, *EURES* and *Visas* the acts at issue were annulled (and why in *Smoke Flavourings* the failure to adopt an act was not held disproportional) lies in the fact that in none of those cases were the limits breached, that both articles were triggered in all those cases; in other words they were cases of (uniform) supplementing vs implementing where the EU legislature has a political choice whether to opt for Article 290 TFEU or for Article 291 TFEU or for none at all (in case of *Smoke Flavourings*). *Smoke Flavourings* further demonstrates that even the decision whether to resort to any grant of power is political. Finally, this explains why Craig and de Búrca’s criticism of the discretion of the grantor is ill-conceived.⁸⁶⁷ Speaking of Craig, this approach also explains why

the way in which the divide between delegated and implementing acts is applied does not immediately strike one as principled.⁸⁶⁸

⁸⁶³ See section 3.4.4 above.

⁸⁶⁴ See section 3.3.2 above.

⁸⁶⁵ See section 3.4.9 above.

⁸⁶⁶ This is arguably not the only constraint or limit on the EU legislature’s choice which Articles 290 and 291 TFEU contain. It could be argued that the requirement of uniformity in Article 291 TFEU is another limit: if what the Commission was asked to do did not further uniformity (e.g. it was required to set out separate rules for each member state), the controls under Article 291 TFEU would not be available. Impossibility to grant the Council the power to tinker with the text of a legislative act is another example: assessing Articles 290 and 291 TFEU in relation to each other – as suggested by the ECJ in paragraph 35 of *Biocides* – leads to the conclusion that *ratione materiae* only Article 290 TFEU controls are available for tinkering, while *ratione personae* Article 290 TFEU controls are not available for grants of power to the Council. The exact constraints will likely be formulated in the future case law of the ECJ (cf. the point of Paul Craig made in the quote to footnote 815 above).

⁸⁶⁷ See the text to footnote 644 above.

⁸⁶⁸ See section 3.4.10 above.

It does not strike one as principled, because outside the (hard) limits it isn't nor does it need to be.

References to delegated or amending or supplementing or implementing power or acts in the ECJ's judgments should thus be read as shorthands: the ECJ employs the same language as the constitutive treaties do. Furthermore, it is not inconceivable that not all judges agree on these things (this actually seems likely) and that at least initially the ECJ toiled somewhat trying to make sense of Articles 290 and 291 TFEU resulting in some – initial – inconsistencies.⁸⁶⁹ As for references to “framework” which appeared in *Biocides* and have been repeated since, it could be argued that they constitute exactly such an inconsistency. Admittedly the better opinion would be – especially in the light of the similarity of ways in which references to “framework” have been put in relation to Articles 290 and 291 TFEU in *Biocides* and *EUROPOL* – that the existence of a framework is required for either of those articles to be engaged (the EU legislature has to decide something; it cannot leave the grantees of power even the formulation of the questions to be decided). As long as there is some framework (even as “thin” as the one contained in article 23(1) of the *EUROPOL* decision) Articles 290 and 291 TFEU are engaged (although resort to them is by no means obligatory). When they are not engaged, their controls do not apply. That would, in turn, mean that the grant of power would have its lawfulness judged under *Meroni* and, perhaps, *ESMA*.⁸⁷⁰

Returning to the questions posed at the beginning of this section 3, *viz.* “How do Articles 290 and 291 TFEU relate to legislative acts and legislative power? Are the powers referred to in both of them legislative? Or only in one of them? In that case which one? Or might neither article be about a power which is legislative? If the power to which set forth is legislative, are the acts adopted on their basis likewise legislative? If no, then why not?, it is possible to answer the first by saying “they do not”. Neither article is about acts or power of the grantee; both use “acts” as a shorthand and both assume existence of granted power and at least two level of acts: the granting one and the one adopted in exercise of granted power. They don't even necessarily regulate powers of control of the grantor: they are merely default catalogues of mechanisms of control which the grantor of power (ordinarily the Council and the Parliament acting jointly) may employ. After that answer to the first question, there is no need to answer the others.

Thus, the question whether Article 290 and 291 TFEU power or acts are legislative cannot arise. Posing it is a category error.

⁸⁶⁹ The treatment presented here is, after all, based on the ECJ's judgments.

⁸⁷⁰ If the power were discretionary, then the grant would need to specify some controls or be held unlawful. As long as either Article 290 TFEU or Article 291 TFEU is engaged there are no problems: if the legislature relies on either of them, controls apply. When neither Article 290 nor Article 291 TFEU is engaged (or when, despite being engaged, the legislature does not rely on either), such grant of power is subject to *Meroni* and *ESMA*.

4. Legislative acts and non-legislative acts

4.1. Introduction

Article 289(3) TFEU says that legal acts adopted by legislative procedure shall constitute legislative acts. Article 288 TFEU mentions the following legal acts: regulations, directives, decisions, recommendations and opinions. Article 289(1) TFEU mentions ordinary legislative procedure; Article 289(2) TFEU mentions special legislative procedure. They read as follows.

Article 289(1) TFEU: The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

Article 289(2) TFEU: In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

It thus stands to reason that legislative acts are regulations, directives and decisions adopted via ordinary or special legislative procedure. It has been shown in section 2 of this thesis that there is no requirement flowing from Article 289 TFEU (or Article 294 TFEU in case of ordinary legislative procedure) in respect of content of an act adopted via legislative procedure. The ECJ in its judgment in case C-77/11 seems furthermore to have held (as likewise discussed in section 2 of this thesis) that an act, which is neither a regulation nor a directive nor a decision, adopted via special legislative procedure does not constitute a legislative act for the purposes of Article 289 TFEU.⁸⁷¹

Based on the analysis contained in section 2 of this thesis it would thus seem that legislative act is quite a clear concept of EU law: a regulation, a directive or a decision adopted via ordinary or special legislative procedure. All other acts are not legislative.

4.2. Academic commentators

4.2.1. Consistent views

It is surprising, however, that far from all academic commentators subscribe to such a view. One of the few examples of an explicit acceptance of such a concept of legislative act comes from Nicola Lupo and Giovanni Piccirilli. They have simply stated as a fact that

⁸⁷¹ Although it must be stressed that that is not the only possible reading of that judgment. Different constructions of that judgment were discussed at some length in section 2.2.1 above.

in short, a ‘legislative act’ is no more than a binding legal act based on a Treaty provision that is explicitly providing a legislative competence,⁸⁷²

as well as that

the features of the legal [system] of the EU /.../ did not encourage the /.../ European [Court] to adopt a concept of legislation similar to the one prevailing in most of [its] member states, nor to verify whether the minimum procedural requirements needed in order to have a ‘law’ were respected.⁸⁷³

This is confirmed by their acceptance that

according to the Treaties, there is no difference whatsoever between a Regulation approved under the ordinary legislative procedure (in which the participation of the European Parliament is on an equal footing with the Council) and that approved under a special legislative procedure (in which the European Parliament plays a minor role).⁸⁷⁴

Another acceptance of such a concept of legislative act may be found in the textbook by Paul Craig and Gráinne De Búrca who state that

the definition of legislative act is purely formal. This follows from the wording of Article 289(3) TFEU: any legal act, whether in the form of regulation, a directive, or a decision, which is enacted in accordance with the ordinary or special legislative procedure is a legislative act for the purposes of the Treaty of Lisbon.⁸⁷⁵

They further state that the content of the act is irrelevant for determining whether it is legislative or not.⁸⁷⁶ They do however raise the issue of legislative nature of such acts which under the Lisbon Treaty would not be legislative.⁸⁷⁷ It would therefore seem that while they accept the position akin to the one formulated in section 4.1 as positive EU law, that acceptance does not amount to an endorsement: they do consider it problematic.

Michael Dougan seems to accept that the Lisbon Treaty “settles on” a concept of legislative act akin to the one formulated in section 4.1.⁸⁷⁸ What is less clear is whether he considers that

⁸⁷² Nicola Lupo and Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts’ Case Law: An Italian Perspective*, (2015) 11 *European Constitutional Law Review* 55, 63. Another commentator who seems not to have challenged such a concept is Edward Best. See his *Legislative procedures after Lisbon: fewer, simpler, clearer?*, (2008) 15 *Maastricht Journal of European and Comparative Law* 85. On page 95 he suggests that the “category [of non-legislative acts] may be considered to include the predictable provisions for special cases rather than a substantial challenge to the basic principles.”

⁸⁷³ Nicola Lupo and Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts’ Case Law: An Italian Perspective*, (2015) 11 *European Constitutional Law Review* 55, 63

⁸⁷⁴ Nicola Lupo and Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts’ Case Law: An Italian Perspective*, (2015) 11 *European Constitutional Law Review* 55, 62

⁸⁷⁵ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 114. See also chapter 5 of their textbook.

⁸⁷⁶ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 114

⁸⁷⁷ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 114

⁸⁷⁸ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 646

such a concept exhausts the meaning of “legislative act” in EU law, *viz.* whether some other acts are legislative in addition to those which constitute a regulation, a directive or a decision adopted via ordinary or special legislative procedure. In any case he offers a fierce criticism of the concept formulated in the introduction to this section.⁸⁷⁹

Finally Armin von Bogdandy and Jürgen Bast might be read as at least supporting this concept (although a different reading is possible). They accept that

it is hardly possible to normatively distinguish the legislative and executive functions at the abstract *Verbandskompetenz* level with sufficient precision.⁸⁸⁰

The concept formulated in section 4.1 (on the basis of the analysis of legislative procedures contained in section 2 of this thesis) would obviate the problem to which they allude. None of those discussed in section 4.2.2 (bar that of Konstadinides) would.

4.2.2. Inconsistent views

Section 2.3.1 contained a detailed discussion of the view promoted by Alexander Türk: acts adopted via ordinary legislative procedure and via such special legislative procedures where consent of both the Council and the Parliament is required for their adoption are legislative; no other acts are.⁸⁸¹ This coincides substantially with his view regarding the position under the EC Treaty.⁸⁸² Türk was writing about the Constitutional Treaty rather than the Treaty of Lisbon, but the procedural side of the issue is the same in the Constitutional Treaty and in the Lisbon Treaty.⁸⁸³ What his contention does not seemingly coincide with is the language of Article 289 TFEU and the language of paragraph 60 of the ECJ’s judgment in case C-77/11. For instance, according to the understanding formulated in section 4.1, measures adopted on the basis of Article 126(14)(2) TFEU⁸⁸⁴ would be legislative. According to Türk, they would not. The opposite is the case with the budget of the EU: according to the ECJ the act of the president of the Parliament adopted on the basis of Article 314(9) TFEU and endowing the budget of the EU with binding force is not legislative,⁸⁸⁵ while according to Türk it would

⁸⁷⁹ See section 4.2.2 below.

⁸⁸⁰ Armin von Bogdandy and Jürgen Bast, *The federal order of competences*, in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European constitutional law* (2nd ed., 2009 Hart), page 289

⁸⁸¹ *The Concept of the “Legislative” Act in the Constitutional Treaty* (2005) 6 *German Law Journal* 1563

⁸⁸² To the effect that only acts adopted via procedures necessitating the participation of all three of the Commission, the Council and the Parliament and further necessitating consent of both the Council and the Parliament for their adoption constitute legislation. See Alexander Türk, *The concept of legislation in European community law: a comparative perspective* (2006 Kluwer Law International), pages 227 *et seq.*

⁸⁸³ With the sole exception of the issue discussed in section 2.3.3, *i.e.* whether those acts which are adopted (i) via procedures which comply with the criteria set forth in Article 289(2) TFEU, but (ii) on the legal bases which do not explicitly say that the procedure mandated is a special legislative procedure, are nevertheless adopted via special legislative procedure. This issue needs not be of concern here: even excluding those “doubtful” legal bases there are acts which would be legislative within the meaning formulated in section 4.1, but would not be legislative according to Türk. See the text that follows in the paragraph in which this footnote appears.

⁸⁸⁴ Which was recently used for adopting two instruments belonging to the so-called six-pack of measures intended to deal with (the consequences of) the financial crisis. The instruments are Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure and Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

⁸⁸⁵ Judgment of the ECJ in case C-77/11, paragraphs 51 and 60

seem to be legislative because the consent of both the Parliament and the Council is needed before the president of the Parliament may lawfully adopt said act.⁸⁸⁶

A different view from Türk's but equally inconsistent with the law as formulated in section 4.1 has been advocated by Eva Nieto-Garrido and Isaac Martin Delgado.⁸⁸⁷

The elimination of the pillar structure and the introduction of the principle of hierarchy of norms has the result that in areas where fundamental rights are at stake, the relevant matter will be regulated by European law or framework law [*for the purposes of Lisbon Treaty: acts adopted via ordinary or special legislative procedure*]. According to this criterion, norms that may have an impact on fundamental rights will be established through the ordinary legislative procedure in which the Council and the Parliament will act as co-legislators.

The logic of the Union's normative system in this field enables us to draw the conclusion that the criterion to be used in deciding which normative instrument should be used in a particular policy will not only depend on whether the act contains basic policy choice, but also on whether the act may have an impact on fundamental rights.⁸⁸⁸

They go on to say that

[t]he principle of hierarchy of norms introduced into the Union's legal system by the Constitutional Treaty will divide normative instruments into legislative and non-legislative instruments,⁸⁸⁹

and that

[p]rimary law (European laws and framework laws) will be adopted via the ordinary legislative procedure.⁸⁹⁰

Leaving aside the incorrect contention that European laws and framework laws were to be adopted via ordinary legislative procedure (under Article I-34(2) of the Constitutional Treaty

⁸⁸⁶ It should be pointed out that Türk further contended that the Constitutional Treaty contained some rationale corresponding to legislation in substance: Article I-33 was said to mandate that legislative acts be of general application. It would, however, be incorrect to suggest that that contention should be applied to the Lisbon Treaty. The latter contains no language regarding (in general) the content of acts adopted via ordinary or special legislative procedures. See *The Concept of the "Legislative" Act in the Constitutional Treaty* (2005) 6 *German Law Journal* 1565.

⁸⁸⁷ They were again writing about the Constitutional Treaty, but for the same reason as that explained when considering the opinion of Türk there is no relevant difference between the Constitutional Treaty and the Lisbon Treaty; the contention of Nieto-Garrido and Delgado does not rely on the language, contained in the Constitutional Treaty, concerning generality of legislative acts.

⁸⁸⁸ *European Administrative Law in the Constitutional Treaty* (Hart 2007), page 21

⁸⁸⁹ *European Administrative Law in the Constitutional Treaty* (Hart 2007), page 21. It should be noted that a hierarchy of norms existed already under the EEC Treaty. See judgment of the ECJ in case 22/88 *Industrie- en Handelsonderneming Vreugdenhil BV and Gijs van der Kolk - Douane Expeditie BV v Minister van Landbouw en Visserij*. Both the hierarchy pre-existing the Constitutional Treaty and that mandated by it (and by the Lisbon Treaty) are partial. Regarding the position under the Lisbon Treaty see the text to footnote 874 above.

⁸⁹⁰ *European Administrative Law in the Constitutional Treaty* (Hart 2007), page 22

they could be adopted via special legislative procedure), Nieto-Garrido and Delgado seem to contend that instruments containing a basic policy choice as well as those impacting on fundamental rights must be legislative ones: according to sub-paragraphs 1 and 2 of paragraph 1 of Article I-33 of the Constitutional Treaty European laws and framework laws could only be legislative acts. The point about policy choices seems to be essentially equivalent to the requirement that

the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union/.../ The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated/.../ ⁸⁹¹

While no such rule is expressly contained in Article 289 TFEU, the proposition that any instrument containing a basic policy choice must necessarily be a legislative one would seem tempting, especially considering that *Frontex* was handed down after the entry into force of the Lisbon Treaty and that the issue in dispute was the validity of an instrument likewise adopted after the entry into force of the Lisbon Treaty. There can therefore be no doubt about *Frontex* being good law under the Lisbon Treaty. It should be stressed that the proposition advocated by Nieto-Garrido and Delgado does not seem to go so far as suggesting that legislative acts could not contain anything other than basic policy choices. A basic policy choice is seen as a sufficient condition for something being a legislative act, not a necessary one. ⁸⁹² Thus at first glance the position of Nieto-Garrido and Delgado would not, strictly speaking, seem to contradict the position formulated in section 4.1. It could be understood as saying that an instrument containing a basic policy choice would need to be a regulation, a directive or a decision adopted via ordinary or special legislative procedure. Article 289 TFEU would simply be supplemented by the rule on essential elements.

On a closer look, however, such reconciliation shows itself to be untenable. In *Frontex* the ECJ followed its aforementioned statement (see the text to footnote 891) with the following one.

⁸⁹¹ *Frontex*, paragraph 64. The relevant case law of the ECJ pre-dates the Constitutional Treaty. See the references in *Frontex*, paragraph 64.

⁸⁹² Admittedly it is possible to read Nieto-Garrido and Delgado as saying that the making of a basic policy choice is a necessary condition for an act to be legislative. They contend that

[t]he existence of delegated and implementing acts was justified by the need to focus primary law on the establishment of basic policy choices, leaving the details and technicalities to secondary law.

See European Administrative Law in the Constitutional Treaty (Hart 2007), page 22. It is clear that a view on which a basic policy choice is a necessary condition for an act to be legislative is not compatible with the concept on legislative act formulated in the introduction to this section. For instance, it is difficult to see why measures adopted on the basis of Article 195(2) TFEU to complement actions of member states in the field of tourism would need to contain any basic policy choice at all and what that choice would have to be. The corresponding provision in the Constitutional Treaty was Article III-281(2). Its wording was equivalent to that of Article 195(2) TFEU. Furthermore such approach would be incompatible with the extent of the power of the Council and the Parliament in deciding whether and if, then which power to grant the Commission: in section 3 of this thesis it was argued that that was essentially a political choice with which the ECJ would not interfere, *viz.* the Council and the Parliament need not grant any power to the Commission; they themselves may lawfully regulate to the maximum extent available to the EU any field in which they are competent to adopt acts. That point was essentially made by the ECJ in *Smoke Flavourings* (see section 3.2.6 above). For instance, there would seem no good reason for precluding the Council and the Parliament from fully regulating a field of action by means of two instruments: one instrument setting out the basic policy choice and the other – the details.

Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.⁸⁹³

This statement is not new. It echoes back to a statement of law which the ECJ had made in the early 1980s.

[T]he limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question, in this case Article 90, analysed in the light of its purpose and its place in the scheme of the Treaty.⁸⁹⁴

Thus the fact that most provisions of the constitutive treaties confer a particular power (in joined cases 188-190/80: the power to adopt general measures) on one institution (the Council) in no way indicates that in some particular instance a similar power could not have been conferred by those same constitutive treaties on another institution (the Commission).⁸⁹⁵ Returning to *Frontex*, the issue in dispute there was whether a particular provision could have been adopted by the Council alone acting in exercise of the power granted to it by a regulation of the Parliament and the Council or whether that provision could only be adopted by the Parliament and the Council acting together directly on the basis of the constitutive treaties – in other words whether the adoption of the provision was within or without the power granted to the Council. The ECJ held that since the provision amounted to a basic policy choice, it was without that power.

That was so, however, not by virtue of some general principle requiring all political choices of the EU to be made by “the legislature”,⁸⁹⁶ but because the provision amounted to a “political [choice] *within the responsibilities* of the European Union legislature”. By “the European Union legislature” the ECJ meant the Council and the Parliament acting jointly. The rule on essential elements does not postulate a general principle overruling explicit rules of constitutive treaties on conferral of powers. Each institution must still act within the limits of its powers as required by Article 13(2) TFEU. What the rule on essential elements does say is that (i) it is a privilege of each institution to adopt essential rules in respect of issues falling – according to the constitutive treaties – within that institution’s competence and (ii) that all other institutions are permanently disabled from adopting such essential rules (bar a change of the constitutive treaties).⁸⁹⁷ Put bluntly, the rule on essential elements cannot repartition the explicit allocation of powers contained in the constitutive treaties.

⁸⁹³ *Frontex*, paragraph 65

⁸⁹⁴ Judgement of the ECJ in joined cases 188-190/80 *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, paragraph 6

⁸⁹⁵ 188-190/88, paragraph 7

⁸⁹⁶ At least if “the legislature” is seen as something other than a shorthand referring to the entity empowered by the constitutive treaties to adopt a given rule.

⁸⁹⁷ This seems to have been decided and relied on as long ago as in *Rey Soda* (see the end of section 3.2.9 above), although the point was not then formulated by the ECJ in so explicit terms. Importantly, however, *Rey Soda* was decided after *Köster* which is one of the early cases in the *Frontex* line of case law.

Article 112 TFEU (which reproduces Article III-170(3) of the Constitutive Treaty verbatim) would seem an example of a provision of the constitutive treaties which provision allocates the power of making a (basic) political choice to the Council alone.⁸⁹⁸ It reads as follows.

In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.

Considering that the EU functions as a single market with free movement of goods it is difficult (if not impossible) to imagine a more basic policy choice for the EU than reintroduction of countervailing charges on imports from one member state to another. Yet the constitutive treaties have reserved that choice to the Council.⁸⁹⁹ The Parliament is not involved at all in making that choice. It is submitted that that provision alone makes it impossible to reconcile the position advocated by Nieto-Garrido and Delgado and the position as it stands under Article 289 TFEU. According to Nieto-Garrido and Delgado acts adopted on the basis of Article 112 TFEU would be legislative for they would contain a (basic) policy choice. It may be pointed out that Article 112 TFEU is not wholly exception in this respect; there are other provisions of the constitutive treaties, for instance Article 66 TFEU, in respect of which the same argument could be made.

According to the position formulated in section 4.1 acts adopted on the basis of Article 112 TFEU (or Article 66 TFEU) would not constitute legislative acts for they would not be adopted via ordinary or special legislative procedure. Acts containing policy choices, even basic ones, need not be legislative acts within the meaning explained in section 4.1. Nieto-Garrido and Delgado advocate some other concept of legislative act compared to the one formulated in section 4.1; reconciliation is impossible.

The same is true of their second contention: that instruments impacting on fundamental rights are legislative (they contend further that such instruments would need to be adopted via ordinary legislative procedure). In the broad sense any instrument of law which has any effect *vis-à-vis* a private party impacts on that party's fundamental rights. Assuming that what was meant was an impact of a certain magnitude and not just any impact, it is still easy to see that that concept of legislation is different from the one formulated in section 4.1. First, it would seem reasonable to assume that Nieto-Garrido and Delgado imply some criterion of generality into their statement: if they did not, it would be arguable that the single most impactful instrument on the fundamental rights of a private party which the EU has ever

⁸⁹⁸ To the extent that the Council cannot act without the Commission's proposal it could be argued that the power is held jointly by the Commission and the Council. The Parliament is, in any event, not involved at all.

⁸⁹⁹ To the extent that the Council cannot act without the Commission's proposal it could be argued that the power is held jointly by the Commission and the Council. The Parliament is, in any event, not involved at all.

adopted would be a fining decision of the Commission.⁹⁰⁰ Thus either such fining decisions are legislative for Nieto-Garrido and Delgado or one must imply some test of nature (presumably of generality) into their statement. Both these possibilities postulate some other concept of legislation compared to the one formulated in section 4.1: one possibility assumes that the Commission may adopt legislative acts, the other possibility prescribes certain nature for legislative acts. Neither is compatible with the concept formulated in section 4.1. Second, even dealing with “general” instruments it is submitted that the Commission’s regulations in the field of competition law or, for instance, the instruments which the regulation at issue in *Visas*⁹⁰¹ empowered the Commission to adopt could have a considerable impact on fundamental rights of the private persons concerned.⁹⁰² Moreover, in paragraph 52 of *EUROPOL* the ECJ expressly accepted the legality of Article 291 TFEU acts (“implementing acts”) which have serious consequences for fundamental rights of citizens. Thus in EU law there are in any case instruments which would be legislative according to Nieto-Garrido and Delgado but would not be legislative according to the understanding formulated section 4.1.

A similar position to that of Nieto-Garrido and Delgado in respect of policy choices has also been advocated by Paolo Stancanelli who, writing about the Constitutional Treaty, has opined that

les politiques prévues par la Constitution sont d’abord mises en œuvre par des actes législatifs puis, si nécessaire, sont mieux détaillées par des actes executifs.⁹⁰³

His position seems irreconcilable with the one formulated in section 4.1 for the same reasons as that of Nieto-Garrido and Delgado. Writing in the same volume as Stancanelli, Paolo Ponzano seems to have advocated what seems a yet further concept of legislation.

[L]e Conseil maintiendra un pouvoir legislative autonome dans des manières politiquement sensible (par exemple, la politique fiscal et sociale),

/.../

La Convention avait eu la tendance à octroyer un pouvoir législatif autonome au Conseil dans les matières politiquement sensible ou la règle de l’unanimité a était maintenu, mais ce critère n’a pas été appliqué systematiquement.⁹⁰⁴

⁹⁰⁰ At the time of writing possibly the one imposing a fine of some € 2.93 billion on certain manufacturers of lorries. The decision itself has not been published, but the information about it is available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824.

⁹⁰¹ See section 2.2.3 of this thesis.

⁹⁰² Such impact of competition law was expressly recognised by the ECJ in its judgment in case C-501/11P *Schindler Holding Ltd and Others v European Commission*.

⁹⁰³ Le système décisionnel de l’Union, in Giuliano Amato, Herve Bribosia and Bruno De Witte (eds.), *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir* (2007 Bruylant), pages 515 and 516. Paolo Stancanelli is a Principal Legal Adviser in the Legal Service of the Commission in the field of state aids and dumping.

⁹⁰⁴ Les institutions de l’Union in Giuliano Amato, Herve Bribosia and Bruno De Witte (eds.), *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir* (2007 Bruylant), page 481

It is clear that no act adopted by the Council alone could be legislative within the meaning of Article 289 TFEU as commonly understood. According to that statement of Ponzano, however, at least some of them⁹⁰⁵ would be legislative. Hence the concept suggested by Ponzano differs from the one formulated in the introduction to this section. It is worth noting, further, that the concept proposed by Ponzano shares some similarities with those of Nieto-Garrido and Delgado, and of Stancanelli. All three essentially rely (i) on legislation being concerned with political choices and (ii) hence there being substantive requirements in respect of content of legislative acts.

It is further important to note that Ponzano does not suggest that only the Council's acts could be legislative: on pages 481 and 482 he lists both the Council and the Parliament as having legislative power. That would, however, seem to create some difficulties for his own approach on its own terms. The problems could be gleaned when his approach is compared to the judgment of the ECJ in case C-133/06.⁹⁰⁶

In that judgment, which is best known for containing an explicit statement to the effect that creation of secondary legal bases is unlawful in EU law, the ECJ had to decide whether Articles 29(1), 29(2) and 36(3) of directive 2005/85⁹⁰⁷ were lawful. The directive regulated procedures for granting and withdrawing refugee status and was adopted under the then Article 63(1)(d) EC via what would now (probably) be a special legislative procedure (*i.e.* by the Council acting unanimously upon proposal of the Commission and after receiving the opinion of the European Parliament). By the provisions in dispute the Council purported to reserve to itself the power to decide by qualified majority which third countries would be considered "safe". The Parliament challenged that reservation of power contending that the EC Treaty required any such determination to be made according to the rules prescribed by the legal basis (Article 63 EC), *viz.* by the Council acting unanimously. Before the ECJ ruled that those three articles of the directive amounted a creation of secondary legal bases and were thus unlawful, it had to deal with the argument of the Council to the effect that what it had done was nothing more than to reserve to itself the Article 202 EC implementing power, *i.e.* that when establishing the list of safe countries the Council wouldn't be acting on the basis of the EC Treaty in exercise of the power granted to it by Article 63 EC (in which case the issue of secondary legal basis would arise since the procedure which the Council would follow under the challenged articles of the directive would differ from that prescribed by Article 63 EC), but on the basis of the directive in exercise of the power reserved to it under Article 202(3) EC. Thus no question of creating new legal bases could arise. The ECJ dismissed that argument.

46. Thus, on the assumption that the lists of safe countries are non-essential and relate to a specific case, the Council could have decided to reserve the right to exercise implementing powers, provided that it stated in detail the grounds for its decision /.../.

⁹⁰⁵ Article 66 TFEU could serve as an example here.

⁹⁰⁶ *European Parliament v Council of the European Union*

⁹⁰⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

47. The Council must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power /.../.

48. In the present case, the Council expressly referred, in recital 19 in the preamble to Directive 2005/85, to the political importance of the designation of safe countries of origin and, in recital 24, to the potential consequences for asylum applicants of the safe third country concept.

49. However, as the Advocate General stated at point 21 of his Opinion, the grounds set out in those recitals are conducive to justifying the consultation of the Parliament in respect of the establishment of the lists of safe countries and the amendments to be made to them, but not to justifying sufficiently a reservation of implementing powers which is specific to the Council.

50. In addition, in the present dispute – which concerns a directive the contested provisions of which reserve to the Council a power which is not limited in time – the Council has not advanced any argument as to why those provisions should be reclassified as provisions on the basis of which the Council has reserved the right to exercise directly specific implementing powers itself. On the contrary, the Council confirmed at the hearing that those provisions confer upon it a secondary legislative power.

51. In those circumstances, no possibility arises of a reclassification of the contested provisions to enable the view to be taken that the Council applied the third indent of Article 202 EC.

In paragraph 49 the Grand Chamber of the ECJ essentially states that political importance of an issue even combined with considerable impact which the rules regulating that issue might have on fundamental rights of individuals is not sufficient to preclude the Council (together with the Parliament) from granting the Commission the power to adopt those rules. For present purposes it has two-fold significance. First, the meaning of “essential elements” in the *Frontex* line of case law becomes somewhat unclear; it becomes arguable that essential elements need not be political at all and that political issues need not be essential elements.⁹⁰⁸ Second, however, it becomes difficult to understand why Ponzano’s approach excludes acts of the Commission from the catalogue of legislative acts. In case C-133/06, despite the fact that it was accepted that the issue was politically sensitive,⁹⁰⁹ the challenged provisions were not saved by reliance on Article 202(3) EC precisely because – according to the ECJ – (i) there were no reasons not to grant Article 202(3) EC power to deal with those issues to the

⁹⁰⁸ While the judgment in case C-133/06 predates *Frontex*, the ECJ did rely on it in *Frontex* in the very paragraph (paragraph 64) where it stated the rule on essential elements. It is thus submitted that *Frontex* did not implicitly overrule the judgment in C-133/06. Both cases were decided by a Grand Chamber. It must further be noted that the ECJ’s reasoning in case C-133/06 was expressly subject to an assumption that the political issues there in question (the list of “safe” third countries) did not constitute essential elements. See paragraph 49. Thus, it is submitted that too much significance cannot be given to this point without a detailed consideration which would, unfortunately, lie outside the scope of the present thesis.

⁹⁰⁹ See paragraph 59

Commission (paragraph 49), and (ii) that Article 202(3) EC power could be reserved for the Council only if there were such good reasons not to grant it to the Commission (paragraph 47).

Article 106(3) TFEU⁹¹⁰ could serve an example of a legal basis contained in the constitutive treaties which enables the Commission to adopt directives dealing with politically sensitive issues. If Council's acts dealing with politically sensitive issues and some (other) acts of the Parliament and of the Council are legislative, then why are acts of the Commission dealing with politically sensitive issues not?

It is submitted that the inconsistency in Ponzano's approach could be explained by the combined effect of three factors: (i) calling (in the Constitutional Treaty) only European laws and European framework laws legislative acts, (ii) empowering only the Council and the Parliament to adopt them with the result that the Commission could not adopt any legislative acts and (iii) disregarding the weight which the connotations (developed under national laws) of the term "legislative" would acquire (even on the minds of the representatives of the legal profession) the moment the term was employed in EU law. Thus Commission would not be listed in Ponzano's approach as having power to adopt legislative acts, because the Constitutional Treaty said that it did not have that power. While the Council on its own did not have the complete power to adopt legislative acts either,⁹¹¹ it was listed among the entities which could do so. In essence what one is dealing with here is a conflation of two distinct approaches into one: one based on certain formalities and the other on certain elements of the content of the acts (*viz.* EU law saying that legislative acts are those named in a particular way when adopted on a particular legal basis by particular entities and national-law experience adding that acts having certain content must be legislative).

A clear example of connotations of the term "legislative" leading to such conflation (and confusion) may be found in the opinion of advocate general Cruz Villalon in case C-280/11P.⁹¹² He opines (in footnote 5 of his opinion) that

it could be said that, by referring to concepts as significant as 'legislative procedure' (Article 289 TFEU), the Lisbon Treaty intends to encompass the entire range of meanings evoked by this type of term. Where the Council draws up or participates in drawing up legislation that is of general application, binding and directly applicable (Article 288 TFEU), it is creating in European Union law the equivalent of a national statute. As the Treaties provide that this type of measure is drawn up using a procedure that is referred to as 'legislative' (Article 289 TFEU), it must be concluded that this procedure must be based on the principles that are typical of this type of procedure in national legal orders.

He then asserts (in paragraphs 42 and 43 of his opinion) that

⁹¹⁰ The corresponding provision of the Constitutional Treaty was Article III-165(1).

⁹¹¹ Although it did have something close: power to adopt legislative acts without the consent of the Parliament (in situations where the Parliament was only to give an opinion).

⁹¹² *Council of the European Union v Access Info Europe*

it is not hard to conclude that, despite the differences that may exist between national legislation and EU ‘legislation’, or between Member State legislatures and the EU ‘legislature’, the ‘legislative procedure’ by which the Council is bound under Article 289 TFEU in relation to the adoption of regulations (and that followed by the Council when acting in its ‘legislative capacity’ pursuant to Article 207 EC) is conceptually very close to the national ‘legislative procedure’, speaking from the point of view of its underlying purpose and thus the principles on which it must be based.

Thus, the law-making procedure that lies at the heart of this appeal should be regarded as ‘legislative’ within the true and proper meaning of the term under the public law of individual States. In this regard, the important thing is that the result of the procedure is a measure that, owing to its characteristics (general application, binding nature, ability to override national laws – which are created by truly democratic authorities –), requires a certain level of democratic legitimacy and this can only be bestowed by a procedure based on the principles that have traditionally governed the workings of national legislatures that are representative in nature.

By equating legislative acts within the meaning of Article 289 TFEU with legislative acts within the meaning of national laws of member states and by explicitly stating that a legislative act within the meaning of Article 289 TFEU must be of general application, advocate general Cruz Villalon does not simply assert that some content-based concept of legislation is part of positive EU law, he asserts that Article 289 TFEU itself mandates a content-based concept of legislation. It has been demonstrated in section 2 of this thesis that the term “legislative” as employed in paragraphs 1 and 2 of Article 289 TFEU is a term of art, and that Article 289 TFEU sets no criteria in respect of the content of regulations, directives or decisions adopted via ordinary or special legislative procedure (*viz.* in respect of the content of legislative acts).⁹¹³ The assertion made by advocate general Cruz Villalon is simply wrong.

That is perhaps most clearly demonstrated by the evolution of the Council’s rules of procedure. Subparagraph 2 of paragraph 3 of Article 207 EC,⁹¹⁴ to which advocate general Cruz Villalon himself refers, tasked the Council with defining in its rules of procedure

the cases in which it is to be regarded as acting in its legislative capacity.

That “definition” contained in the various versions of the Council’s pre-Lisbon Treaty (but post-Amsterdam Treaty⁹¹⁵) rules of procedure was exactly the same.

The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives,

⁹¹³ The same point has been made by Craig and De Búrca. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 114.

⁹¹⁴ Both in its Amsterdam and Nice Treaty versions. There was no corresponding provision in the EC Treaty as it stood after the Maastricht Treaty.

⁹¹⁵ There was no provision akin to Article 207(3)(2) EC in the constitutive treaties prior to the entry into force of the Amsterdam Treaty.

framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).⁹¹⁶

The formulation of legislative capacity might be thought to cover all instruments (but do no more) which, had they been adopted by an abstract national parliament, would be deemed “a law”.⁹¹⁷ Advocate general Cruz Villalon goes further than positing that parallel, however: he suggests that legislative acts within the meaning of Article 289 TFEU are the same thing yet again. It is useful to compare the formulation of legislative capacity in the foregoing quote with Article 289 TFEU which reads in relevant part as follows.

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.
3. Legal acts adopted by legislative procedure shall constitute legislative acts.

Even a cursory reading of Article 289 TFEU would show that the formulation of legislative capacity in the Council’s rules of procedure adopted under Article 207(3) EC is much wider than formulation of legislative act in Article 289 TFEU.⁹¹⁸

What was the consequence of the Council acting in legislative capacity? First, there was enhanced public access to those documents of the Council which pertained to its actions in legislative capacity.⁹¹⁹ Second, debates of the Council when it was acting in legislative capacity were progressively “opened up”⁹²⁰ – to the point that under the Council’s 2006 rules of procedure (i) essentially all debates concerning acts to be adopted via Article 251 EC

⁹¹⁶ Article 6 of Council Decision 1999/385/EC, ECSC, Euratom of 31 May 1999 adopting the Council's Rules of Procedure; Article 7(1) of Council Decision 2000/396/EC, ECSC, Euratom of 5 June 2000 adopting the Council's Rules of Procedure; Article 7(1) of Council Decision 2002/682/EC, Euratom of 22 July 2002 adopting the Council's Rules of Procedure; Article 7(1) of Council Decision 2004/338/EC, Euratom of 22 March 2004 adopting the Council's Rules of Procedure; Article 7(1) of Council Decision 2006/683/EC, Euratom of 15 September 2006 adopting the Council's Rules of Procedure

⁹¹⁷ “Abstract” because when any given national parliament is looked at, some differences are bound to be found. However, advocate general Cruz Villalon contends himself with postulating only such abstract parallel. See the references to principles typical in national law at the end of footnote 5 of his opinion and to the differences obtaining between member states at the beginning of paragraph 42 of his opinion.

⁹¹⁸ For instance, the rules of procedure would cover acts which the Council adopts on the basis of Articles 31, 66 and 112 TFEU. None of these such acts would be legislative within the meaning of Article 289 TFEU.

⁹¹⁹ Article 255 EC and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

⁹²⁰ See Article 7 of the 1999 rules of procedure and Article 8 of the 2000, 2002, 2004 and 2006 rules of procedure.

procedure⁹²¹ and (ii) first deliberations of new legislative proposals adopted via any other procedure⁹²² were to be held in public.

Article 7 of the Council's current (*i.e.* post-Lisbon Treaty) rules of procedure⁹²³ is entitled "Legislative procedure and openness". Its first paragraph reads as follows.

The Council shall meet in public when it deliberates and votes on a draft legislative act. To that end, its agenda shall include a part entitled "Legislative deliberations".

That provision gives effect to Article 16(8) TEU and Article 15(2) TFEU which read as follows.

Article 16(8) TEU: The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.

Article 15(2) TFEU: The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

Regulation 1049/2001 still provides that there is to be enhanced access to documents of the Council pertaining to legislative procedures.⁹²⁴ The same is further provided in Article 7(2) of the Council's current rules of procedure.

Importantly the Council's current rules of procedure contain no definition of legislative capacity. The constitutive treaties no longer include a provision akin to Article 207(3) EC which required the Council to define when it was acting in legislative capacity. There is no need for that: the rules of procedure are based on the distinction between legislative and non-legislative acts contained in the constitutive treaties themselves. That is acknowledged in recital 1 of the decision adopting the current rules of procedure.

The Treaty of Lisbon brings several modifications /.../ to the different types of Union legal acts and to the process for adopting acts, notably by distinguishing between legislative and non-legislative acts.

Thus if advocate general Cruz Villalon's thesis that (i) legislation within its national-law meaning and (ii) legislative capacity defined in the Council's rules of procedure adopted under Article 207(3) EC and (iii) legislative acts within the meaning of Article 289 TFEU and therefore the Council's current rules of procedure had by and large the same meaning, Article 7 of the current rules of procedure would be *the* provision therein governing the making public of debates and information (unless there it was contended that with the Lisbon Treaty the Council became more secretive; no such contention seems to have been made).

⁹²¹ Article 8(1) of the 2006 rules of procedure

⁹²² Article 8(2) of the 2006 rules of procedure

⁹²³ Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU)

⁹²⁴ See Articles 2(4) and 12(2) of that regulation.

Article 7 of the current rule of procedure would cover all situations covered by the old formulation of legislative capacity, and there would be no need for an additional provision.

Interestingly there is such an additional provision: Article 8(1) of the current rules of procedure.

Where a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States, by means of regulations, directives or decisions, on the basis of the relevant provisions of the Treaties, with the exception of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions), the Council's first deliberation on important new proposals shall be open to the public. The Presidency shall identify which new proposals are important and the Council or Coreper may decide otherwise, whenever appropriate.

The content of this provision is strikingly similar to parts of the definition of legislative capacity in the pre-Lisbon Treaty rules of procedure, and – more importantly – to that of Article 8(2) of the Council's 2006 rules of procedure.

The Council's first deliberation on important new legislative proposals other than those to be adopted in accordance with the [Article 251 EC] procedure shall be open to the public. The Presidency shall identify which new legislative proposals are important and the Council or Coreper may decide otherwise, whenever appropriate. The Presidency may decide, on a case by case basis, that the subsequent Council deliberations on a particular legislative act shall be open to the public, unless the Council or Coreper decides otherwise.

If legislation within the meaning of Article 289 TFEU and within the meaning of the Council's rules of procedure adopted under Article 207(3) EC had been coextensive, there would have been no need for Article 8(1) in the current rules of procedure. The only other explanation of Article 8(1) of the Council's current rules of procedure would be to suggest that it makes public some debates which under the previous rules of procedure were not public. In view of the parallels between current Article 8(1) and the 2006 Article 8(2) that proposition is simply not tenable.⁹²⁵ Nor has it even been put forward.

Put bluntly, part of legislative capacity within the meaning of rules of procedure adopted under Article 207(3) EC was “off-loaded” into Article 8 of the current rules of procedure

⁹²⁵ As mentioned above, Article 8(1) of the 2006 rules of procedure covered rendering public debates and information pertaining to Article 251 EC procedures. With the Lisbon Treaty those became ordinary legislative procedures, and Article 8(1) of the 2006 rules of procedure was “treatified”: its content may (in a slightly widened form: it covers special legislative procedures as well) now be found in Article 16(8) TEU. If it had been felt that that covers all the scope of the 2006 rules of procedure (including their Article 8(2)), there would have been no need for Article 8(1) of the current rules of procedure. That article thus essentially ensures that the information and debates which pertain to what was legislative capacity within the meaning of the rules of procedure adopted under Article 207(3) EC but is not now covered by legislative procedures or acts within the meaning of Article 289 TFEU is still rendered public.

which article is entitled “Other cases of Council deliberations open to the public and public debates”.⁹²⁶ Since the current rules of procedure are based on formulations of “legislative act” and “legislative procedure” in Article 289 TFEU, it stands to reason that Article 289 TFEU and legislative capacity within the meaning of the Council’s rules of procedure adopted under Article 207(3) EC are not coextensive. Therefore in equating all three of national legislation, Article 207(3) EC legislative capacity and Article 289 TFEU legislative acts and/or procedures advocate general Cruz Villalon fell into error.

Why did he fall into error? It is submitted that the answer to that is easy to find in the aforequoted passages of his opinion. Of particular importance in this respect is the following statement in footnote 5 of his opinion:

by referring to concepts as significant as ‘legislative procedure’ (Article 289 TFEU), the Lisbon Treaty intends to encompass the entire range of meanings evoked by this type of term.

There is no explanation or argumentation showing that that was the intention. The veracity of the statement seems to be simply taken as given. When all three quoted passages of his opinion are read together⁹²⁷ it becomes evident that it essentially truly was taken as given – the conclusion (if the quoted statement could be called the conclusion) was reached by drawing a parallel between EU law and national law in a situation where they both employ the same term, taking the meaning of that term in national law and transplanting it to the same term in EU law. The meaning of that term under EU law was not analysed at all. If anything, that is further confirmed by advocate general Cruz Villalon’s desire to see legislation as satisfying the needs of democratic legitimacy.⁹²⁸ Again, that is what legislation ordinarily does in national legal systems, but there is no argumentation whatsoever as to why

⁹²⁶ Article 7 is called “Legislative procedure and openness”.

⁹²⁷ Footnote 5 and paragraphs 41 and 42. They read as follows.

Footnote 5: [I]t could be said that, by referring to concepts as significant as ‘legislative procedure’ (Article 289 TFEU), the Lisbon Treaty intends to encompass the entire range of meanings evoked by this type of term. Where the Council draws up or participates in drawing up legislation that is of general application, binding and directly applicable (Article 288 TFEU), it is creating in European Union law the equivalent of a national statute. As the Treaties provide that this type of measure is drawn up using a procedure that is referred to as ‘legislative’ (Article 289 TFEU), it must be concluded that this procedure must be based on the principles that are typical of this type of procedure in national legal orders.

Paragraph 41: [I]t is not hard to conclude that, despite the differences that may exist between national legislation and EU ‘legislation’, or between Member State legislatures and the EU ‘legislature’, the ‘legislative procedure’ by which the Council is bound under Article 289 TFEU in relation to the adoption of regulations (and that followed by the Council when acting in its ‘legislative capacity’ pursuant to Article 207 EC) is conceptually very close to the national ‘legislative procedure’, speaking from the point of view of its underlying purpose and thus the principles on which it must be based.

Paragraph 42: Thus, the law-making procedure that lies at the heart of this appeal should be regarded as ‘legislative’ within the true and proper meaning of the term under the public law of individual States. In this regard, the important thing is that the result of the procedure is a measure that, owing to its characteristics (general application, binding nature, ability to override national laws – which are created by truly democratic authorities –), requires a certain level of democratic legitimacy and this can only be bestowed by a procedure based on the principles that have traditionally governed the workings of national legislatures that are representative in nature.

⁹²⁸ Paragraph 42 of his opinion where he states that EU legislative acts do so.

that is the case in EU law⁹²⁹ – advocate general Cruz Villalon simply concludes from the parallel with legislation in national legal systems that that is the case in EU law.

Rather than consider what it is that the term “legislative” denotes in EU law, advocate general Cruz Villalon did the opposite: he implied a legal position and legal consequences into EU law from the use of a term. The error would seem especially flagrant in a situation, such as the one at hand, where the term is expressly given a particular formulation by the constitutive instrument of the EU (as “legislative act” and “legislative procedure” are in Article 289 TFEU).

A common thread of the four last approaches (those of Niedo-Garrido and Delgado, of Stancanelli and of Ponzano as well as that of Cruz Villalon) is that unlike the position formulated in section 4.1, they all postulate content-related requirements for legislative acts. Türk’s approach actually does likewise, however in view of where he sources the requirement in respect of content (in the reference to generality in Article I-33(1)(2) of the Constitutional Treaty) and what that requirement is (generality, not particular relation with policy or impact on fundamental rights) it might be unfair to Türk and, more importantly, incorrect in law to transpose that requirement to the Lisbon Treaty which contains no corresponding reference. The slight caveat (that it only might be incorrect in law and unfair to Türk) derives from the fact that he would seem to make his point (about the concept of legislation in the Constitutional Treaty being partially a concept of legislation in substance) in relation to both European laws and European framework laws.⁹³⁰ However, the Constitutional Treaty required only European laws to be of general application (see Article I-33(1)(2)); it contained no such requirement in respect of European framework laws (see Article I-33(1)(3)). Thus it is at least arguable that that part of Türk’s approach which may be transposed to the Lisbon Treaty likewise postulates (at least in part) some requirement of substance for legislation. This time the requirement would be generality.

Be that as it may, the issue of legislative nature of acts is tackled head on by Dougan. Dealing with the distinction between legislative and non-legislative acts he opines that the Treaty of Lisbon settles on

a purely formal criterion for distinguishing between legislative and non-legislative acts, *i.e.* based on the applicable decision-making procedures for their adoption, as they are identified in specific legal provisions and on an *ad hoc* basis under the Treaties. But could such a criterion ever hope to reflect any coherent underlying constitutional principle? It seems instead to emerge as a labelling exercise with an essentially pragmatic basis and some rather arbitrary consequences.⁹³¹

⁹²⁹ In view of “legislative” being a term of art in the constitutive treaties (see section 2 of this thesis) such argumentation would have been unavoidably necessary.

⁹³⁰ See Türk, The Concept of the “Legislative” Act in the Constitutional Treaty (2005) 6 German Law Journal 1565.

⁹³¹ Michael Dougan, The Treaty of Lisbon 2007: Winning Minds, Not Hearts (2008) Common Market Law Review 646

This view would not seem inconsistent with the position formulated in section 4.1. However, Dougan thinks that

as regards their substance, many measures identified as “non-legislative” in nature will seem indistinguishable from “legislative” ones in terms of their scope of application (in general terms across the entire Union territory) and subject matter (regulating the rights and obligations of natural and legal persons).⁹³²

Thus he applies to EU instruments some concept of legislation in substance, *i.e.* some concept of legislation which would not seem to be prescribed by Article 289 TFEU. While he admits that

the distinction between legislative and non-legislative acts drawn in the [Treaty of Lisbon] is clearly not based on the sort of institutional criterion familiar to national legal systems which are organized according to a traditional separation of powers: with an institutional structure as complex as that of the EU, patently lacking a clear and stable legislature such as the UK’s “Queen in Parliament”, it would have been difficult to state (for example) that *only* acts of the Council and the European Parliament, or *all* acts of the Council and / or the European Parliament, are to be considered legislative in nature,⁹³³

he prefers nevertheless to pointedly ask whether some acts, which according to an understanding akin to the one which is formulated in section 4.1 would be non-legislative, can really be

best categorized as “non-legislative” in character.⁹³⁴

He specifically mentions instruments regulating competition law in this respect. It is difficult to disagree with his point having considerable force. As to the consequences of eschewing legislation in substance he suggest that such eschewing might work, although not without anomalies or controversies concluding that

the lack of a coherent distinction between legislative and non-legislative acts will produce similarly arbitrary knock-on effects for other provisions premised on exactly the same distinction.⁹³⁵

⁹³² Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647. It should be mentioned that the examples which he gives to illustrate this point consist of instances (i) where an instrument is adopted by the Council upon proposal of the Commission and after receiving either opinion or consent (as applicable) of the Parliament, but (ii) where the legal basis fails to mention that that procedure constitutes a special legislative procedure. In section 2.3.3 it was suggested that such procedures are none the less special legislative procedures. Nevertheless, Article 31 TFEU or article 106(3) TFEU are examples of legal bases which would clearly not constitute special legislative procedure within the meaning of Article 289(2) TFEU, but in relation to which Dougan’s point would hold just as true.

⁹³³ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 646

⁹³⁴ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647

Thus on the one hand Dougan seems to accept that a concept of legislation in EU law after the Lisbon Treaty is similar to the one formulated in section 4.1. However, whether that is so, remains ultimately unclear for in the quote to footnote 934 above he seems to necessarily imply that some concept of legislation applicable in positive EU law says something about legislative character of acts. As has been stated elsewhere,⁹³⁶ the concept akin to the one formulated section 4.1 patently does not.

On the other hand, Dougan seems to argue for a substantive concept of legislation (based on generality of application and subject matter of an act), and more importantly he implicitly applies some such concept (which he does not explicate, however). Presumably Dougan thinks that such substantive concept is either valid as positive EU law (at least for some purposes) or if not, then useful in some other way. Otherwise there would be no need to apply it. Unfortunately he does not make explicit how or why such approach might be useful. Importantly for present purposes his discussion of legislation in substance explains where he sources his concept, *viz.* why it is that instruments of general application and of certain subject matter are legislative. As he states in the quote made to footnote 933 above, the source lies in national law and/or some doctrine of separation of powers. The bottom line would, however, seem to be that Dougan does not agree with the approach formulated in section 4.1 – at most he agrees that it is *an* approach mandated by EU law.

Aside from the issue of its applicability in positive EU law, there are two main problems with Dougan's substantive approach. First, its correctness would mean that acts adopted not directly on the basis of the constitutive treaties, but on the basis of other acts of EU law, could be legislative for they certainly could be general. The second problem lies in the difficulties which would or do arise upon adoption of such an approach. They have been concisely stated by Jürgen Bast.

Attempts at deriving a formal hierarchy of norms from the substantive contents of the law are as old as the doctrine of the separation of powers itself. For example, the German constitutional lawyer Paul Laband invented in the 1870s the distinction between executive laws in the substantive sense and mere implementation of laws in order to justify the Prussian King's power to make autonomous regulations. However, the theoretical basis and empirical validity of the distinction between substantial *Ergänzung* (supplementation of laws) and mere *Ausführung* (implementation of laws) have repeatedly been demystified and deconstructed. Even a norm that intends only to provide further detail or give effect to existing norms adds to the present normative framework.⁹³⁷

The same point has been made by Thomas Cottier.

⁹³⁵ Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647

⁹³⁶ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), page 114

⁹³⁷ Is There a Hierarchy of Legislative, Delegated and Implementing Acts?, in Carl Fredrik Bergström and Dominique Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016), page 166

The formulation of norms always includes delegation of powers to a greater or lesser degree to those implementing the rules. In reality there is no fundamental methodological distinction between rule-making and rule-applying.⁹³⁸

It simply would not clear which act would be legislative and which act would not be legislative under Dougan's approach – or indeed that of any other commentator (possibly aside from Türk) considered above in this section 4.2.2. Bar some other reasoning (which no commentator whose position has been considered in this section 4.2.2 has offered), no such approach could be useful. Considering that it is common ground that the main thrust behind the Constitutional Treaty, at least indirectly and certainly as far as the issues pertaining to legislative acts are concerned, was democratic legitimacy of the EU and well as transparency of its functioning and simplification of its instruments,⁹³⁹ Bast's and Cottier's would seem to be very mighty criticisms indeed.

Bast has based his own approach to legislative acts in EU law on three aspects: (i) both the Parliament and the Council deliberate in public when adopting legislative acts (Article 16(8) TEU and Article 15(2) TFEU), (ii) the Commission must consult "widely" before proposing a draft legislative acts (Article 2 of Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality) and (iii) draft legislative acts are forwarded to national parliaments with the latter being able to object to their adoption (Protocol (No 1) on the Role of National Parliaments in the European Union and Articles 6 and 7 Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality).⁹⁴⁰ Thus Bast suggest that

[t]aking this set of rules as the defining characteristic, a legislative act under the Lisbon Treaty is an act which is subject to enhanced public scrutiny.⁹⁴¹

This approach would not seem to impose any criteria in respect of substance of legislative acts. Is Bast's approach compatible with the approach formulated in section 4.1? If one looks at his reasoning, the answer would seem to be in the affirmative. All the provisions of the constitutive treaties to which he refers in his argumentation on this point speak of legislative acts which could be argued to have the meaning given to them by Article 289 TFEU, and none further. Therefore Bast's approach would not only be compatible with that formulated in section 4.1, it would be its equivalent. However, that would seem to drain his definition of legislative act of any significance, and hence does beg the question why he proposes his

⁹³⁸ International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law, (2009) 5 European Constitutional Law Review 324

⁹³⁹ See, for instance, Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001), pages 22 and 23 (the so-called "Laeken Declaration"), SN 300/1/01 REV 1, or Paolo Stancanelli, *Le système décisionnel de l'Union*, in Giuliano Amato, Herve Bribosia and Bruno De Witte (eds.), *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (2007 Bruylant), page 515. The point has been made by Dougan himself in the very article referred to above: Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 637.

⁹⁴⁰ Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, (2012) 49 *Common Market Law Review* 893 and 894

⁹⁴¹ Jürgen Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, (2012) 49 *Common Market Law Review* 894

definition of legislative act at all. If the reader is to assign any meaning to the definition, the position becomes less clear.

Bast defines legislative act as an act subject to enhanced scrutiny. It is thus reasonable to ask compared to what is the scrutiny of legislative acts enhanced. There are two dimensions in which the issue could be analysed: a historic one (*i.e.* compared to the pre-Lisbon Treaty position) and an instrumental one (*i.e.* compared to other instruments adopted on the basis of the Lisbon Treaty). Starting with the historic one it is clear that the Lisbon Treaty resulted in widening of the use of ordinary and special legislative procedures.⁹⁴² But that has been done by every new set of constitutive treaties since the SEA. Postulating such a change as the enhancement is just as unclear as any substantive criterion which Bast himself so ably criticises: when are ordinary or special legislative procedures sufficiently widely used for the public scrutiny to be sufficiently enhanced? Bast offers no argument why specifically the widening of employment of such procedures which occurred as a result of the Lisbon Treaty was sufficient. Besides, that begs the question why should the “legislativeness” of an act depend on how diffuse the criterion on which that “legislativeness” hinges is in the polity. No consideration is given to that issue in Bast’s article.

Moving on to the ordinary and special legislative procedures themselves, in section 2 of this thesis it has been shown that as far as those procedures go, nothing of relevance changed with the Lisbon Treaty. The Parliament did deliberate in public under the Nice Treaty. Indeed there would seem no provision in any version of the constitutive treaties for the plenary of the Parliament (which is the relevant formation for adoption of an act via procedures currently called ordinary and special legislative procedure) to deliberate *in camera*. As for Council, the only change would seem to consist of “treatifying” the Council’s duty to deliberate in public when dealing with legislative acts. Before the Lisbon Treaty the Council was already under a duty to do so with the duty flowing from its own rules of procedure.⁹⁴³ Of Bast’s three aspects that leaves the Commission’s duty of wide consultation and the role to be played by national parliaments. With respect, considering

- that the Commission’s duty of wide consultation would seem to do no more than “treatify” paragraph 26 of the pre-Lisbon Treaty Interinstitutional agreement on better law-making,⁹⁴⁴
- that national parliaments – even if all of them consider that a draft legislative act is flagrantly contrary to both the principle of proportionality and subsidiarity – cannot halt the adoption of that draft legislative act and
- that already before the Lisbon Treaty the draft legislative acts were to be forwarded to national parliaments,⁹⁴⁵

⁹⁴² See section 2 of this thesis.

⁹⁴³ Article 8(1)(b) of the Council Decision of 22 July 2002 adopting the Council's Rules of Procedure (2002/682/EC, Euratom) and Article 8(1)(b) of the Council Decision of 22 March 2004 adopting the Council's Rules of Procedure (2004/338/EC, Euratom)

⁹⁴⁴ 2003/C 321/01. See also paragraphs 27-30.

⁹⁴⁵ Protocol (No 9) on the role of national parliaments in the European Union (1997) annexed already to the Treaty of Amsterdam

it is difficult to argue that Protocol (No 1) on the Role of National Parliaments in the European Union or Articles 2, 6 and 7 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality actually changed anything. There would seem to be only three changes of any note. First, under the 1997 protocol the period after the forwarding of a draft act to national parliaments during which period EU institutions could not adopt the act was six weeks; the Lisbon Treaty raised it to eight weeks. Second, the Lisbon Treaty protocols require that all draft legislative acts be forwarded to national parliaments while the 1997 protocol required the forwarding only of Commission's own proposals. Third, if "legislative act" in the Lisbon Treaty Protocols Nos 1 and 2 has the same meaning as explained in section 4.1, then if anything the Lisbon Treaty has in some respects narrowed down the group of acts which must be forwarded to national parliaments.⁹⁴⁶

It is difficult to see any relevant differences (let alone enhancements of public scrutiny of acts adopted via what are now ordinary or special legislative procedure) between the EC Treaty as it stood after the Nice Treaty (or indeed the Amsterdam Treaty) and the Lisbon Treaty. Similar opinions have been expressed by both Bruno De Witte⁹⁴⁷ and Dougan⁹⁴⁸ as well as Lupo and Piccirilli.⁹⁴⁹ Thus if what was intended was an enhancement by comparison to *status quo ante*, then Bast's suggestion is simply wrong.

To analyse the issue from an instrumental dimension it is apposite to ask which instruments currently available to the EU are subject to more public scrutiny than others? To clarify the question let us take the acts adopted via ordinary or via special legislative procedure as benchmarks. Are any other instruments adopted by the EU subject to comparable public scrutiny? It is submitted that any act containing

rules which are legally binding in or for the Member States, by means of regulations, directives or decisions, on the basis of the relevant provisions of the Treaties, with the exception of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions),⁹⁵⁰

would constitute such an instrument. Pursuant to the Council's current rules of procedure the Council's first deliberation of such acts must, and subsequent deliberations may, take place in

⁹⁴⁶ Article I(2) of the 1997 protocol required Commission's proposals for legislative acts within the meaning of the Council's rules of procedure to be forwarded to national parliaments. Thus acts which the Council could adopt under, for instance, Article 31 or 66 or 112 TFEU (adopted on the basis of the Commission's proposal, but without any participation of the Parliament) would seem to have been covered by the formulation in Article I(2) of the 1997 protocol, but probably not by the current protocols.

⁹⁴⁷ Legal Instruments and Law-Making in the Lisbon Treaty, in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008 SpringerWienNewYork), page 97

⁹⁴⁸ *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) *Common Market Law Review* 647. Dougan has called the "changes" introduced by the Lisbon Treaty a labelling exercise. In fact it would seem that his dissatisfaction with the lack of progress in that field has prompted (i) his disagreement with what he sees as the approach adopted in the Lisbon Treaty and (ii) indeed his alternative (substance based) approach.

⁹⁴⁹ Nicola Lupo and Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts' Case Law: An Italian Perspective*, (2015) *11 European Constitutional Law Review* 55, 63

⁹⁵⁰ Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU), Article 8(1)(1)

public.⁹⁵¹ For example, instruments adopted on the basis of Articles 31 (common customs tariff) or 66 (restriction of capital flows to or from third countries) or 112 (intra-EU export subsidies and import countervailing duties) would likely fall into that category. A specific example could be recommendation 2015/1184⁹⁵² which, although not adopted via ordinary or special legislative procedure, was in fact adopted at the 3403rd meeting of the (Economic and Financial Affairs) Council of the European Union held in Brussels on 14 July 2015 in public.⁹⁵³

It is true that the Council must hold all debates on “legislative acts” in public,⁹⁵⁴ while only the first one on the other acts mentioned in the foregoing quote must necessarily be held in public. However it must likewise not be forgotten that in practice very little actual debate takes place in the Council at all.

[A] majority of legal acts are de facto adopted by bureaucrats in the various working groups and committees of the Council without any direct involvement of ministers.⁹⁵⁵

Thus any considerable difference in scrutiny would have to lie in the fact that neither Parliament’s opinion nor its consent is required for adopting such acts. The aforementioned recommendation 2015/1184 was adopted on the basis of Article 121(2) TFEU. That article⁹⁵⁶ requires the Council to inform the Parliament of the acts the Council adopts on the basis of that article. According to the GC such a procedure does not constitute a special legislative procedure.⁹⁵⁷ However that would not seem to preclude the Parliament from considering such acts.⁹⁵⁸ Essentially the only difference of the Parliament being informed from the Parliament’s opinion being required lies in the fact that in the former case the Parliament cannot delay the adoption of the act, while in the latter it can. Information about the act is transmitted to the Parliament in both cases (admittedly those transmissions could take place at different times in the procedures leading to adoption of acts), and in neither case would the Parliament be in a position to halt the adoption of the act altogether. Indeed that inability in cases where the Parliament must only be consulted lead Türk to conclude that the acts resulting from procedures where the Parliament is only consulted are not legislative precisely because the influence of the Parliament over such acts is not sufficient.⁹⁵⁹

⁹⁵¹ Article 8(1)(2) of the Council’s rules of procedure of 2009

⁹⁵² Council Recommendation (EU) 2015/1184 of 14 July 2015 on broad guidelines for the economic policies of the Member States and of the European Union

⁹⁵³ Monthly summary of Council acts – July and August 2015 (15081/15), page 8

⁹⁵⁴ Article 7(1) of the of the Council’s rules of procedure of 2009

⁹⁵⁵ Frank M Häge, Committee decision-making in the Council of the European Union, (2007) 8 European Union Politics 299, 300. See also Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 87. They stated that between 2004 and 2007 the Council in fact discussed only 15-30% of items on its agenda.

⁹⁵⁶ Along with Articles 126(11), 134(3), 155(2), 215(1), 218(3), 218(4), 218(5), 218(6)(1), 218(7), 218(9), 219(1)(2) and 329(2) TFEU

⁹⁵⁷ See the judgment in case T-160/13 discussed in more detail in section 1.3.3 of this thesis.

⁹⁵⁸ In its judgment in case 230/81, *Grand Duchy of Luxembourg v European Parliament*, at paragraph 39 the ECJ stated that the Parliament had an inherent privilege to discuss any question concerning the EU and to adopt resolutions on such questions.

⁹⁵⁹ See section 2.3.1 above for Türk’s argumentation.

It thus stands to reason that there are legal bases in the constitutive treaties which mandate a procedure for adoption of acts which is neither ordinary nor special legislative procedure, but which nevertheless enables public scrutiny which is comparable (although not equivalent) to that obtaining in case of ordinary or special legislative procedure. Furthermore, by virtue of Article 8(1) of the 2009 Council's rules of procedure, even in case of acts adopted by the Council under Article 31 TFEU or Article 66 TFEU or Article 112 TFEU (in which cases there is even no duty to inform the Parliament) the public scrutiny would nevertheless seem to be enhanced compared to, for instance, instruments adopted by the Commission. Furthermore, when something is determined by reference to being "enhanced" it is inherently an issue of degree, and thus suffers from the same criticism which Bast formulates in respect of substance-based concepts of legislation.⁹⁶⁰ Bast does not even purport to formulate from what point onwards the enhancement of public scrutiny over an act is sufficient for it to be deemed legislative.

Finally, the concept of public scrutiny itself is somewhat ambiguous. Above it has been considered in the strictest (and probably somewhat incorrect) sense: that of consideration of an issue by some majoritarian institution. That sense is probably incorrect because the act is nevertheless not scrutinised by the public, but by an institution of the EU which institution will have its particular biases and agendas.⁹⁶¹

Thus, seen from an instrumental perspective Bast's definition of legislative acts differs from the approach set forth in section 4.1: there are acts, other than regulations, directives and decisions adopted via ordinary or special legislative procedure, which are during their adoption subject to public scrutiny at least comparable to that obtaining in respect of regulations, directives and decisions adopted via ordinary or special legislative procedure; on Bast's approach these other acts would be legislative. To sum up, either Bast's definition of legislative acts is irrelevant (if he does no more than restate Article 289 TFEU) or, if it is to be of some relevance, it would seem to proffer an approach to legislative acts which differs from the one formulated in section 4.1.

A more simplistic and easy to apply concept of legislation has been proffered by Theodore Konstadinides who writing in 2008 (thus after the Constitutional Treaty and even after the signing of the Lisbon Treaty⁹⁶²) suggested that in *Köster* the ECJ

established a distinction between measures directly based on the Treaty itself (considered as legislative acts) and derived law intended to ensure their implementation (executive acts).⁹⁶³

⁹⁶⁰ See the quote to footnote 937 above.

⁹⁶¹ From the perspective of scrutiny by the public (*e.g.* via the press) most acts adopted by the EU and certainly those adopted otherwise than by the Commission alone would seem – broadly – in a similar position. That is, however, an issue lying in the field of political science and hence outside the scope of this thesis.

⁹⁶² Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (2009 Wolters Kluwer). In the preface and acknowledgements Konstadinides expressly states that both the failure to ratify the Constitutional Treaty and the signing of the Lisbon Treaty have been taken into account in the book.

⁹⁶³ Footnote 42 on page 64

While Konstadinides does not refer to any particular passage of *Köster* where that is alleged to have been established, the closest the ECJ seems to have come to his suggestion in *Köster* was to opine in paragraph 6 that

[b]oth the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation.⁹⁶⁴

It is submitted that that falls short of establishing a distinction between legislative and executive acts, although it does establish a distinction between acts adopted directly on the basis of the constitutive treaties and acts adopted otherwise than directly on the basis of the constitutive treaties. Be that as it may, it is clear that the concept of legislation proffered by Konstadinides is something quite alien to Article 289 TFEU. For instance, on Konstadinides's concept Commission's regulations adopted on the basis of Article 106(3) TFEU or the Common Customs Tariff fixed by the Council (without any participation of the Parliament) on the basis of Article 31 TFEU or a decision setting out restrictive measure adopted by the Council under Article 215(1) TFEU (with the Parliament merely being informed) would be legislative acts. None of these would be legislative acts in accordance with the understanding formulated in section 4.1. More importantly in its judgment in case T-160/13 the GC expressly held (in paragraph 50) that acts adopted under Article 215(1) TFEU are not legislative.⁹⁶⁵

Finally let us consider the position of Koen Lenaerts which is thought to have influenced the drafters of the Constitutional Treaty.⁹⁶⁶ In a paper submitted to Working Group IX of the Convention on the Future of Europe Lenaerts advocated the making of a cardinal distinction between legislative and executive acts.

This distinction, based not on the identity of the author of the act, but on the type of procedure followed for its adoption, is not so much inspired by the principle of separation of powers in a Union based on the rule of law, as it is concerned with the necessity to identify, in a transparent way, the procedure which is best suited – in terms of legitimacy and efficiency – for the exercise of the legislative and executive functions of the institutions of the Union.⁹⁶⁷

He thus seems to have argued strongly for a procedural concept of legislative act: whether an act is legislative depends on procedure used for its adoption, not on the identity of the adopter. However, Lenaerts then postulated that acts adopted via co-decision which acts

⁹⁶⁴ While *Köster* pre-dated the Lisbon Treaty, it is submitted that it still represents good law. For instance, it was relied upon by the Grand Chamber of the ECJ in its post-Lisbon Treaty judgment in *Frontex*.

⁹⁶⁵ Admittedly the appeal against the judgment is pending at the time of writing.

⁹⁶⁶ Robert Schütze, 'Delegated' Legislation in the (new) European Union: A Constitutional Analysis (2011) 74 *Modern Law Review* 661, footnote 135

⁹⁶⁷ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 2(1)

contain a basic policy choice should be regarded as legislative acts.⁹⁶⁸ Why specifically those acts were to be considered legislative was not explained. For present purposes, however, it is important to note that the concept is no longer procedural: it is based on a combination of a procedural and a content-based approach.

While Lenaerts thought that all acts entailing a basic policy choice should be subject to co-decision and hence constitute legislative acts, he was mindful of the fact that a number of acts adopted otherwise than via co-decision were based directly on the constitutive treaties and contained a basic policy choice.⁹⁶⁹ He opined that

[a]s a result it seems to be necessary to identify, on the one hand, the autonomous regulations which imply basic policy choices. These acts, which need to enjoy representative democratic legitimacy, should be adopted by the legislative power in its entirety (European Parliament and Council) and belong, as such, to the first category. On the other hand, the autonomous regulations of a more technical nature do not justify a direct intervention of the legislator (otherwise the co-decision procedure would become completely “congested”). These acts, which should also be identified, would correctly fall within the second category, and take the form either of “delegated legislation”, or of executive acts *sensu stricto*.⁹⁷⁰

It is submitted that the quoted passage is somewhat unclear. According to a procedural concept of legislative acts a particular procedure is a condition for the act being legislative: if the relevant procedure is employed, the act is legislative. Lenaerts, it will be remembered, started with suggesting a procedural concept. However, in the last quoted passage the procedure (co-decision) is no longer a condition. It has become a consequence: it is to be applied if the act contains a basic policy choice. Thus in the last quoted passage Lenaerts essentially abandons a procedural concept in favour of a substantive one.

At the same time the quoted passage further seems to suggest that there are two types of autonomous regulations: those which imply a basic policy choice and those which are of a more technical nature.⁹⁷¹ Lenaerts then argues that only the former ones should be adopted by the Parliament and the Council. Yet, if that is so, there was no problem to begin with: all acts implying a basic policy choice are adopted via co-decision. Thus the group of acts of which Lenaerts was mindful simply does not exist. If that group does exist, then the quoted passage simply fails to deal with the issue, *viz.* what about acts which do entail a basic policy choice and are adopted directly on the basis of the constitutive treaties, but not via co-decision? The passage does not say whether they are to be legislative or not; it ignores them.

⁹⁶⁸ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 2(2)

⁹⁶⁹ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 9

⁹⁷⁰ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 10

⁹⁷¹ That this distinction is itself untenable is a separate issue. See section 3 (and especially sections 3.2.6 and 3.3.2) of this thesis where it was considered in more detail.

Admittedly one could suggest that the passages which came in his paper before the last quoted passage concerned *lex lata*. Since the paper was prepared for submission to the drafters of the Constitutional Treaty, it could be argued that the last quoted passage was *de lege ferenda*. Hence the contradiction. The passage is a suggestion how to deal with the problem: divide all acts into those entailing a basic policy choice and those not entailing it; make co-decision applicable to all acts in the first group; the first group would be legislative acts. If so, then it is clear that that suggestion was not followed: the Constitutional Treaty provided for adoption of legislative acts otherwise than via what was, according to the EC Treaty, the co-decision procedure. No basic-policy-choice approach to identifying legislative acts ultimately found its way into the Constitutional Treaty.⁹⁷² Furthermore, that reconciliation does not sit well with the structure of the paper. With its paragraphs 9 and 10 reading as follows:

9. These acts form the core of the problem. Indeed, it cannot be denied that various acts adopted by the Council alone or after consulting the European Parliament, or by the Commission alone, include basic policy choices. Normally, such acts should be subject to the co-decision procedure and belong to the first category.

10. As a result, it seems to be necessary to identify, on the one hand, the autonomous regulations which imply basic policy choices. These acts, which need to enjoy representative democratic legitimacy, should be adopted by the legislative power in its entirety (European Parliament and Council) and belong, as such, to the first category. On the other hand, the autonomous regulations of a more technical nature do not justify a direct intervention of the legislator (otherwise the co-decision procedure would become completely “congested”). These acts, which should also be identified, would correctly fall within the second category, and take the form either of “delegated legislation”, or of executive acts *sensu stricto*,

it is submitted that the natural reading would be that both paragraphs speak of the legal position as it stands at the same time, *i.e.* not that paragraph 9 speaks of *lex lata* while paragraph 10 of *de lege ferenda*.

Finally that passage (paragraph 10) would seem to contradict Lenaerts’s own premise to the effect that the concept of legislative act should not be based on the identity of EU’s legislator. In fact the other rapporteur to Working Group IX, Jean Claude-Piris,

noted first that it would be very difficult to transpose to the Union the **customary clear distinction between legislative and executive authority**, *i.e.* between some institutions empowered only to pass laws and others merely implementing legislation or issuing regulations. It is certainly open to the Treaty's authors, should they see fit, to undertake such a project, but the powers conferred on the institutions by the Treaties are so convoluted that such a distinction between legislative and executive

⁹⁷² See section 4.5 below.

authority could not be made without upsetting the existing balance. The present institutional system of the Union is not modelled on that of a State.⁹⁷³

Nevertheless in paragraph 10 Lenaerts implies the identity of the legislator.

These acts, which need to enjoy representative democratic legitimacy, should be adopted by *the legislative power* in its entirety (European Parliament and Council)/.../

It is submitted that Lenaerts's approach is ultimately based on a hidden assumption – that the Parliament and the Council are the legislator. There is no explanation why that is so. However, if one does not assume that they are, it becomes exceedingly unclear why matters of basic policy choice should be decided by them acting together. Considering that there were and are acts which contain a basic policy choice, but are not adopted by the Parliament and the Council,⁹⁷⁴ and that these acts were not held to be legislative despite containing a basic policy choice,⁹⁷⁵ it would seem that ultimately Lenaerts postulates some combination of content-based and identity-based approach to legislation.⁹⁷⁶

That his approach is based on such dual grounds would seem to be demonstrated by footnote 8 of his paper. There he opines that what would now be an Article 103 TFEU act enabling the Commission to exercise its Article 105(3) TFEU power

could either be considered as "legislative" and be adopted in compliance with the co-decision procedure, or be regarded still as "autonomous" since it "only" puts into effect the "legislative" options expressed in the Treaty itself.

It is clear that one's consideration of the content of an act does not change that content, *viz.* whether it does or does not contain a basic policy choice is a fact (however difficult establishing it might be). That being understood, Lenaerts would seem to be suggesting that the same act, *ex hypothesi* containing a basic policy choice, could be seen as legislative or non-legislative. If one agrees to admit a basic policy choice, then the legislator must adopt it and the act is legislative. If one decides not to see the basic policy choice, no intervention of the legislator is needed and the act is not legislative. It is submitted that three conclusions follow.

First, paragraph 10 of his submission should be understood as a construction technique which avoids the hard question: what is an act which has not been adopted by the Council and the Parliament jointly, but has been adopted directly on the basis of the constitutive treaties and which contains a basic policy choice. Is it legislative? The question is construed away by assigning the act – like in the aforementioned footnote 8 – to the suitable category.

⁹⁷³ Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002), Working document 06 of the Working Group IX (6th November 2002), page 20

⁹⁷⁴ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 9

⁹⁷⁵ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 10

⁹⁷⁶ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 10.

Second, that category is ultimately based on the identity of the adopter. If it is the Parliament and the Council, then the act is legislative. If it is someone else (or only one of the Parliament and the Council), the act is not legislative. That conclusion is reached either via a reconsideration of the earlier conclusion about the existence of a basic policy choice or via taking the identity of the adopter into account in the initial consideration of the existence of a basic policy choice. Thus the concept is ultimately always based at least in part on the identity of the adopter.

Third, there is no legal certainty. Reasonable people could disagree as to whether a given instrument is legislative or not.

Lenaerts further suggested that national sensitivities be taken into account in determining whether a particular act is legislative: in some member states a field of action may fall within the competence of the national legislator, while in some others the same field would be within the competence of the executive.⁹⁷⁷ There is no elaboration of the point, but it could be understood as some further criterion. What remained unclear was how that criterion would be applied.⁹⁷⁸

To conclude, Lenaerts's contribution seems somewhat unclear and capable of different constructions. It starts with postulating a procedural concept of legislation and expressly dismissing an identity-based one, but gradually moves away from it: first towards some content-based concept and ultimately to a combination of a content-based and an identity-based concept with the latter seemingly being the dominant one in the combination.

To sum up, regardless of the fact that based on an analysis of legislative procedures (akin to the one conducted in section 2 of this thesis) it is possible to formulate quite a clear concept of legislative act in EU law (a regulation, a directive or a decision adopted via ordinary or special legislative procedure), many commentators have either resisted accepting that such a concept is part of EU law or have expressed their disagreement with it. In all such cases they have developed some alternative concept of legislative act. Leaving aside their political merits, all such concepts ultimately contradict the clear one mentioned in the first sentence of this paragraph by either deeming to be legislative those acts which according to the clear concept are not legislative or by excluding from the group of legislative acts some which according to the clear concept are legislative or by doing both simultaneously.

All the concepts of legislation considered above have been developed in the context of EU law and by reference to the constitutive treaties. It is perhaps useful briefly to consider here an understanding of legislation obtaining in jurisprudence. By comparing the approaches described and analysed above with a jurisprudential analysis of legislation it might be possible to glean if not the correctness of a particular approach (for that would be ultimately determined by positive EU law), then at least its suitability for purpose and viability as well

⁹⁷⁷ How to Simplify the Instruments of the Union? (17th October 2002), Working document 07 of Working Group IX (6th November 2002), paragraph 11

⁹⁷⁸ For instance, ratification of international treaties is a royal prerogative in the UK (hence falling within the purview of the executive), but in most cases requires an act of parliament in Estonia (hence falling within the purview of the legislator).

as the reasons for postulating it. Considering that the language of legislation was introduced into the constitutive treaties essentially due to a desire to increase democratic legitimacy of the EU, while having an eye on ensuring the rule of law,⁹⁷⁹ it is useful to consider the jurisprudential position developed by Jeremy Waldron who has dealt specifically with the relationship between legislation and the rule of law.

Jeremy Waldron thinks that while legislation is not the only source of law and legal change (the courts have law-making role as well), the legislature does occupy a pre-eminent role in this respect for it is an institution set up explicitly to make and change law.⁹⁸⁰ Explaining why Locke (the forefather of “legislatures”) had given the legislature such importance, predominance even, Waldron has contended that

[w]ith the establishment and operation of a legislature, the law begins to exist in a new sense. It exists now as “ours”, as something almost tangible, something each of us can count on as a common point of reference. Adapting words that Hannah Arendt used to describe the virtue of a written constitution, law exists now as “an enduring objective thing, which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change or amend with circumstances, but which nevertheless was never [merely] a subjective state of mind.” It has become part of the in-between of our world, something we can make common reference to, each understanding what the other is getting at. Whatever its provenance, natural law never existed in this sense in the state of nature.⁹⁸¹

Relying on Dicey Waldron suggests that legislation operates in the context of separation of powers.

[Legislation] establishes a framework of legality for executive action and it is enforced by judges who – if things are working well – are insulated not just from executive interference, but from legislative interference as well. The legislature in England may be subject to a large degree of executive control, but once a bill is enacted and leaves the legislature, it passes out of the control of either of those agencies and into the hands of the courts. So even if the initiation of legislation is a governmental measure, it is a measure which subsequently becomes subject to the institutional controls of an articulated system, with important points of decision clearly separated from the initiation of a bill.⁹⁸²

More immediately relevant for the purposes of the various approaches to legislation in EU law advocated by commentators is Waldron’s contention that legislation must be of general application.

⁹⁷⁹ See footnote 939 above and the presidency conclusions (including the Laeken Declaration) referred to therein more generally.

⁹⁸⁰ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 99

⁹⁸¹ Jeremy Waldron, *The dignity of legislation* (1999 CUP), page 76

⁹⁸² Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 105

[T]he rule of law accords great significance to the generality of legislation and to the distinction between a statute and a bill of attainder; this is important because if legislation is general in character then legislators and their dependents will [be] subject to the rules they enact along with everyone else; and there is thus less potential for oppression.⁹⁸³

Of itself, however, Waldron holds that insufficient. General form of law decreases potential for oppression

only if there is a prophylactic against cahoots between legislators and prosecutors or between legislators and judges; the separation of powers that Dicey emphasizes provides that prophylactic.⁹⁸⁴

According to Waldron that is the reason for the importance of procedural and institutional features pertaining to legislation.⁹⁸⁵ What are those features? In addition to those already mentioned above (separation of powers, set-up of the legislature, generality of acts) Waldron stresses that legislating must be laborious; passing legislation must not be simple or quick. That is what distinguishes a polity which is ruled by legislation from a polity which is ruled by decree.

Legislating is not the same as passing a resolution or issuing of a decree; it is a formally defined act consisting of a laborious process; in a well-structured legislature that process involves successive stages of deliberation and voting in each of [several] institutions, in two of which the legislative proposal is subject to scrutiny at the hands of myriad representatives of various social interests.

/.../

Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation, and the sheer time for consideration – formal and informal, internal and external to the legislature – that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment's eventual status as law (for the purposes of our thinking about the rule of law).⁹⁸⁶

Thus in the last quote Waldron would essentially seem to be postulating substantively procedural concept of legislation: procedural because the matters which of he writes there pertain to the way legislation is adopted; substantively because he sets substantive criteria for those ways of adopting legislation. Considering its extensive criticism by academic commentators, how does the concept of legislative act formulated in section 4.1 and based on

⁹⁸³ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 106

⁹⁸⁴ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 106

⁹⁸⁵ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 106

⁹⁸⁶ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 107

the analysis of legislative procedure contained in section 2 of this thesis fare by Waldron's standards?

We have seen that general applicability of acts simply does not come into it as far as the concept of legislative act formulated in section 4.1 is concerned. Nothing in Article 289 or 294 TFEU precludes the adoption via ordinary or special legislative procedure of an act which is in no way general. Adoption of the WTO Agreements could serve as an actual example here.⁹⁸⁷ They were adopted on the basis of, *inter alia*, what is now Article 207 TFEU. That provision mandates the use of an ordinary legislative procedure.⁹⁸⁸ Yet the WTO Agreements have ordinarily no direct effect in EU law,⁹⁸⁹ *i.e.* they do not apply generally to individuals within the EU. Furthermore, if it is accepted that an express use of the words "special legislative procedure" in a legal basis is not needed for the procedure mandated by that legal basis to constitute a special legislative procedure,⁹⁹⁰ current Article 7(1) TEU could be an even starker example of such a legal basis: it would be difficult to argue that a determination that a member state was risking a breach of values set forth in Article 2 TEU did not concern a truly singular situation.⁹⁹¹

Moving on to the question of how laborious the adoption of acts via ordinary and special legislative procedure is, it is submitted that Article 294 TFEU prescribes quite an arduous procedure. All the more so considering that in addition to that procedure it must go through the various technical committees and COREPER.⁹⁹² The special legislative procedures mandating the consent of the "other institution" are less laborious, however, and the special legislative procedures merely mandating that the Parliament be consulted before the Council adopts the resulting act may be thought to be even less laborious (considering that the Council could, and sometimes does, simply disregard the Parliament's opinion to the point of having essentially agreed on the resulting act before asking for the Parliament's opinion with the consultation of the Parliament amounting to no more than going through the motions⁹⁹³). This seems to correspond nicely with the position of Türk in holding acts adopted via ordinary legislative procedure to be legislative, those adopted via special legislative procedure mandating consent of the other institution to be likewise legislative (albeit doing so after some further argumentation) and those adopted via special legislative procedure mandating mere consultation of the Parliament not to be legislative at all.

⁹⁸⁷ Council Decision 94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)

⁹⁸⁸ At the time they were adopted by the Council on the basis of, *inter alia*, Article 113 EC as it stood after the Treaty of Maastricht. By virtue of Article 228(3)(2) of that treaty the assent of the Parliament was required.

⁹⁸⁹ See the judgment of the ECJ in case C-149/96 *Portuguese Republic v Council of the European Union* where in paragraph 46 the ECJ held that "having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions."

⁹⁹⁰ See section 2.3.3 above.

⁹⁹¹ It does however demonstrate that generality is a matter of degree: it might be argued that for residents of that member state such determination would be general.

⁹⁹² See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), pages 148 and 149.

⁹⁹³ The Concept of the "Legislative" Act in the Constitutional Treaty (2005) 6 *German Law Journal* 1564

A cynic would, however, suggest that Türk's portrayal of the situation⁹⁹⁴ is unrealistic. The reason why that is so stems from the fact that

in practice, or *de facto*, Coreper has evolved into a veritable decision-making factory.⁹⁹⁵

All items which reach the Council for adoption be it via ordinary or via special legislative procedure will have been prepared by COREPER. As a result 70-80% of all such items reaching the Council will require no discussion in the Council itself⁹⁹⁶ having been decided by COREPER.⁹⁹⁷ Furthermore, COREPER together with its "underworld" of committees⁹⁹⁸ is the "first port of call"⁹⁹⁹ of any draft instrument reaching the Council: be it a proposal submitted by the Commission or a proposal already amended by the Parliament. In spite of that

[m]eetings of the COREPER are not public. Its minutes are not published and it is not accountable to any parliamentary assembly.¹⁰⁰⁰

While the ECJ has stated that COREPER cannot take acts binding third parties (only the Council can),¹⁰⁰¹ in view of the foregoing it is difficult to argue that most of the time the Council is doing something other than rubber-stamping decisions of COREPER. Finally, it is the members of COREPER who participate in the so-called trilogues.¹⁰⁰² A trilogue is an informal meeting or negotiation of the representatives of the Council, the Parliament and the Commission with a view of adopting instruments via ordinary or special legislative procedures. It is not provided for in the constitutive treaties. It may take place at any stage of procedure for adoption of an act.¹⁰⁰³ The objective is to reach agreement on the text of the draft act so that the draft sails through the Council and the Parliament without difficulty or

⁹⁹⁴ See section 2.3.2 above.

⁹⁹⁵ Jeffrey Lewis, National interests: the committee of permanent representatives, in John Peterson and Michael Shackleton (eds.), *The institutions of the European Union* (3rd ed., 2012 OUP), page 325

⁹⁹⁶ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th ed., 2015 OUP), pages 44 and 45. Damian Chalmers, Gareth Davies and Giorgio Monti agree: see their *European Union Law* (3rd ed., 2014 CUP), page 87, as does Thomas Christiansen, see *The Council of Ministers: facilitating interaction and actorness in the EU*, in Jeremy John Richardson (ed.), *European Union: power and policy-making* (3rd ed., 2006 Routledge), page 162

⁹⁹⁷ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 87

⁹⁹⁸ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 58. Those committees are staffed by civil servants of member states, *i.e.* in the member states they are representatives of the executive or, if one adopted Vile's quadripartite division of power into legislative, executive, judicial and administrative, the administration (see M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd ed., 1998 Liberty Fund), chapter 13).

⁹⁹⁹ Thomas Christiansen, *The Council of Ministers: facilitating interaction and developing actorness in the EU*, in Jeremy John Richardson (ed.), *European Union: power and policy-making* (3rd ed., 2006 Routledge), page 161

¹⁰⁰⁰ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 88

¹⁰⁰¹ Judgment of the ECJ in case C-25/94 *Commission of the European Communities v Council of the European Union*, paragraphs 24-28

¹⁰⁰² Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), pages 120 and 121

¹⁰⁰³ Activity report on codecision and conciliation: 14 July 2009 – 30 June 2014 (7th parliamentary term), page 19, available at: http://www.europarl.europa.eu/code/information/activity_reports/activity_report_2009_2014_en.pdf.

delay. According to the Parliament's statistics during the 7th parliamentary term some 90% of all legislative procedures were ordinary legislative procedures,¹⁰⁰⁴ and some 85% of all ordinary legislative procedures (and hence some 77% of all legislative procedures) ended in adoption of the proposed act at first reading.¹⁰⁰⁵ It has been opined that some 76% of the instruments adopted via ordinary legislative procedure are actually agreed via trilogues.¹⁰⁰⁶ That has prompted Chalmers, Davies and Monti as far as suggesting that

[i]n instances where the trilogue is successful, Parliament and COREPER are acting as genuine co-legislators.¹⁰⁰⁷

For the purposes of Waldron's analysis this means three things. First, the process of adopting any act via ordinary or special legislative procedure is most of the time not as laborious as might seem from the constitutive treaties (or at least differently laborious). Most of the instruments adopted via ordinary or special legislative procedure are negotiated behind the scenes by the institutions concerned. Any public debate (in any of the three institutions) is unlikely to be what Waldron means by public legislative debates: substantive discussion of the content of the proposed act will take place at trilogues or otherwise away from public scrutiny. The distinctions which Türk purports to make simply do not represent real life.¹⁰⁰⁸

Second, if adoption of acts via ordinary or special legislative procedures is deemed suitably laborious, it is difficult to see how adoption of acts by the Commission under a power granted to it by the Council and/or the Parliament is any less or indeed much differently laborious. If Article 291 TFEU applies, then according to the comitology regulation¹⁰⁰⁹ the Commission's draft acts will be scrutinised prior to their adoption by committees staffed by the same people staffing the technical committees existing under COREPER. Furthermore all information pertaining to such draft acts will be provided – at the same time as to those committees – to the Council and the Parliament.¹⁰¹⁰ If Article 290 TFEU applies, the information will again be provided to the Council and the Parliament prior to adoption of a proposed act by the Commission; the Commission shall furthermore consult experts of member states¹⁰¹¹ – essentially again the same people as those staffing the technical committees existing under

¹⁰⁰⁴ Activity report on codecision and conciliation: 14 July 2009 – 30 June 2014 (7th parliamentary term), page 19

¹⁰⁰⁵ Activity report on codecision and conciliation: 14 July 2009 – 30 June 2014 (7th parliamentary term), page 8

¹⁰⁰⁶ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 121

¹⁰⁰⁷ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd ed., 2014 CUP), page 122

¹⁰⁰⁸ To the extent that it might be argued that public legislative debates within Waldron's meaning do take place in the Parliament, it might be asked whether publicity in a body which cannot force the resulting act to have the content which results from such public legislative debate is sufficient? The Parliament can never force such content for it cannot adopt any act of consequence without the consent of the Council (which will not have such public debates).

¹⁰⁰⁹ 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

¹⁰¹⁰ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, section V

¹⁰¹¹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, Appendix

COREPER.¹⁰¹² Finally, the Council or the Parliament might essentially have a veto over the Commission's acts to which Article 290 TFEU applies.

Third, it is difficult to see much scrutiny "at the hands of myriad representatives of various social interests"¹⁰¹³ in any ordinary or special legislative procedure: for the most part those procedures take place behind closed doors. To the extent that there is scrutiny of some acts adopted via such procedures, it is submitted that the existence or lack of such scrutiny depends in practice on the subject matter of the act and its perceived importance rather than on the procedure taken for its adoption.

On that view while a regulation, a directive or a decision adopted via ordinary or special legislative procedure could be a legislative act according to Waldron's understanding of legislation, it certainly need not be: the regulations, the directives and the decisions need not be of general application and most of the time the procedure for their adoption either might be thought to be not sufficiently or suitably laborious or, to the extent that it is, it is not a well structured process involving different steps (*e.g.* as evidenced by trilogues which have no basis in the constitutive treaties) or it does not involve public legislative debates (neither trilogues nor meetings of COREPER or of technical committees take place in public or are given any *ex post facto* publicity, *e.g.* publication of minutes etc.) or there is no scrutiny by representatives of different social interests. The most that can be said is that ordinary legislative procedure is usually lengthy¹⁰¹⁴ and involves negotiations. Ultimately, in deciding whether such procedures are laborious or not much would seem to depend on

- whether one looks at what the law says or at how it is applied and
- whether one thinks laboriousness within the administration as opposed to laboriousness by the actual people who are appointed to the public-facing positions of the institutions concerned (*viz.* by the commissioners, the ministers meeting in the Council and the MEPs themselves) is enough to satisfy Waldron's formulation.

Waldron has this to say about such a position of the cynic.

Cynics will respond that much of what we call legislation is not in fact enacted scrupulously according to these forms and procedures; much legislation is enacted in a way that makes a mockery of the procedural principles I have been emphasizing. This is certainly true of some legislation, and it is deplorably true as a matter of the general practice of some legislatures.

/.../

¹⁰¹² See, in general, section 3.3.4 of this thesis.

¹⁰¹³ Understanding "social interests" here as representatives of civil society, not representatives of different political parties in a parliament.

¹⁰¹⁴ Activity report on codecision and conciliation: 14 July 2009 – 30 June 2014 (7th parliamentary term), page 10. According to the statistics during the 7th parliamentary term the average length of ordinary legislative procedure was 19 months; for those ordinary legislative procedures where "agreement" between institutions was reached early and an act adopted at first reading it was 17 months.

This is legislation in opposition to the rule of law; it flouts the notion of legislative due process; it sits unsatisfactorily with the separation of powers (though mercifully the judiciary remains active and independent in New Zealand); and it really does elide the idea of the rule of law and rule by the state.¹⁰¹⁵

It is submitted that, in view of the arguments presented above, of legislation within the meaning of the concept formulated in section 4.1 (on the basis of analysis contained in section 2 of this thesis) the position of the cynic as presented by Waldron and Waldron's assessment of that position are true. Admittedly it need not necessarily be true of every legislative act within the meaning of the concept formulated in section 4.1, but the concept is conducive to such criticism as Waldron sketches out, and very frequently the criticism hits the mark. That concept of legislative act should not, jurisprudentially speaking, be deemed a concept of legislation at all (in spite of it being able to cover some legislative acts).

It is submitted that that is the probable reason why so many academic commentators have found themselves unable to subscribe to the clear view of legislative acts formulated in section 4.1. All the commentators whose positions have been considered above and who have somehow disagreed with the concept of legislative act formulated in section 4.1 implicitly view legislation as something either needed for legitimacy of a polity or, even if not needed, nevertheless furthering that legitimacy.¹⁰¹⁶ The concept formulated in section 4.1 offers no additional legitimacy, however. It cannot do so because the terms of Article 289 TFEU on which it is based are terms of art:¹⁰¹⁷ they mean nothing more and nothing less than what that provision says. Unlike similar terms in national law, they would not – as a matter of positive EU law – seem to bear any connotations (let alone denotations) pertaining to separation of powers or rule of law. As has been noted elsewhere,

[e]ven after the overall revision of the categories of legislative, delegated and implementing acts, the Treaties do not embrace a procedural concept of legislation based on parliamentary participation.¹⁰¹⁸

Thus, put bluntly, while the positions of academic commentators considered above would seem not to be good law, the reasons for developing such positions are at least understandable.

4.3. Constitutive treaties

The concept formulated in section 4.1 would, however, seem to face a challenge not only from academic commentators, but from within the constitutive treaties themselves. Article 2 TFEU has been considered at some length in section 2.2.2.1 above. It is useful to set it out in full.

¹⁰¹⁵ Jeremy Waldron, *Legislation and the rule of law*, (2007) 1 *Legisprudence* 108

¹⁰¹⁶ Advocate general Cruz Villalon actually makes that explicit in paragraph 42 of this opinion in case C-280/11P.

¹⁰¹⁷ See section 2.4 of this thesis.

¹⁰¹⁸ Nicola Lupo and Giovanni Piccirilli, *The Relocation of the Legality Principle by the European Courts' Case Law: An Italian Perspective*, (2015) 11 *European Constitutional Law Review* 55, 63

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 2 TFEU makes a distinction between legislating and adopting legally binding acts. It mentions legislating as a possibility in the areas falling within either exclusive competence of the EU or one of the shared competences of the EU. By contrast, legislating is not mentioned as a possibility in areas where the EU (i) is only competent to support, coordinate and supplement the actions of member states or (ii) has only what was termed in section 2.2.2.1 above “political” coordinating competence’. It is likewise not mentioned as a possibility in the field of CFSP. It would thus stand to reason that in the first two areas of competence the EU may adopt legislative acts, while in the latter three it may not.

However, as has been demonstrated in section 2.2.2.1 above, in fact, even on a narrow construction of special legislative procedure¹⁰¹⁹ the EU may adopt what are legislative acts within the clear meaning formulated in the introduction to this section in all areas of

¹⁰¹⁹ *I.e.* if procedures complying with all the requirements set forth in Article 289(2) TFEU bar a statement in the legal basis to the effect that the procedure is a special legislative procedure are excluded from among special legislative procedures.

competence bar CFSP. On a wide construction of special legislative procedure¹⁰²⁰ the EU would have been able to adopt legislative acts even in the field of CFSP had it not been for the specific carve-out in Articles 24(1)(2) and 31(1) TEU. Thus the concept of legislation employed in Article 2 TFEU and the concept of legislation developed on the basis of Article 289 TFEU would seem to be different.

At this stage one would seem to be left with two options. First, disregard the reference to “legislating” in Article 2 TFEU, and stick to the concept formulated in section 4.1. That could perhaps find some support in paragraph 6 of Article 2 TFEU to the extent that that provision suggests that the way the EU’s competences are to be exercised is determined by particular legal bases.¹⁰²¹ Paragraph 6 of Article 2 TFEU could thus mean that a general rule set out in Article 2 TFEU could not preclude adoption of a legislative act if a particular legal basis mandates such adoption (regardless of the field of competence in which that legal basis lies). That would, however, empty references to “legislating” in Article 2 TFEU of much (if not all) of their meaning. As has been demonstrated in section 2.3.3 above such a consequence is sometimes inevitable, but it nevertheless demonstrates internal inconsistency. In any case, it is submitted that such emptying of words of their meaning is hardly desirable.¹⁰²²

The second option would be to accept the internal inconsistency of the constitutive treaties: that they truly do rely on several different meanings of legislation without making any single one of them explicit (it must not be forgotten that the concept formulated in section 4.1 is, after all, a construction). That does not help one much further. It begs the question what other concepts of legislation in addition to the one formulated in section 4.1 the constitutive treaties rely on, and which concept is relevant in which situation. Furthermore, if there are other concepts of legislation in EU law, why was it necessary to expressly provide that regulations, directives and decisions adopted via ordinary or special legislative procedure are legislative acts? There would seem to be no good answer.¹⁰²³

Whichever option one chooses, it would seem evident that there is more to legislation in EU law than the concept of legislation formulated in section 4.1. Additionally, one should note the wording the first sentence of Article 2(2) TFEU.

When the Treaties confer on the Union a competence shared with the Member States in a specific area, *the Union and the Member States may legislate* and adopt legally binding acts in that area.

¹⁰²⁰ *I.e.* if procedures complying with all the requirements set forth in Article 289(2) TFEU bar a statement in the legal basis to the effect that the procedure is a special legislative procedure are not excluded from among special legislative procedures.

¹⁰²¹ That echoes the statement made by the ECJ in its judgment in joined cases 188-190/80 at paragraphs 6 and 7. See the text to footnotes 894 and 895 above.

¹⁰²² It could be thought of as contrary to *effet utile* of constitutive treaties, especially when such consequence (loss of meaning) is not an inevitable corollary of every possible approach.

¹⁰²³ The best answer one could come up with would seem to run along the lines of the constitutive treaties being instruments of public international law, negotiated by politicians, and hence expecting consistency being simply too much. That would, however, mean that any attempt of trying to find some internal consistency (in respect of legislative acts, for instance) is bound to be futile.

The words in bold italics alone would seem to preclude the correctness of the concept formulated in section 4.1 altogether: the words would seem to indicate that the concept of legislating must be capable of being applied both to the EU and to the member states. The concept formulated in section 4.1 on the basis of Article 289 TFEU is clearly incapable of applying to member states. Thus one is presented with the third option: to accept that the concept formulated in section 4.1 is neither the whole, nor a part of the story; that it, in fact, forms no part of the story at all. Furthermore, considering the differences in institutional make-ups of the EU and of member states (let alone those between different member states), it is submitted that it might be nigh on impossible to formulate a procedural approach to legislative acts which would be applicable to both the EU and the member states.

A more subtle inconsistency with the concept formulated in section 4.1 could be found in the third sentence of Article 24(1)(2) TEU. That provision expressly excludes adoption of legislative acts in the field of CFSP. It will be recalled that in section 2.3.3 it was suggested that if the wide construction of special legislative procedure¹⁰²⁴ were adopted, that provision could be read as excluding the consequences, which ordinarily follow in EU law if something is a legislative act, from applying to any act adopted within the field of CFSP. The main such consequence would arguably be the scrutiny of draft CFSP acts by national parliaments – which, were CFSP acts considered legislative acts, would be mandated by Protocol (No 1) on the Role of National Parliaments in the European Union and Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality.

It is, however, worthy of remembering that the existing authorities (judgments of the GC) are inconsistent on the issue of whether the wide construction of special legislative procedure is ultimately the correct one. If it is not, then should clear concept of legislation formulated in section 4.1 be *the* correct one in EU law, it would be difficult to find any meaning for the third sentence of Article 24(1)(2) TFEU.¹⁰²⁵ Furthermore, even if the wide concept is correct, one cannot but notice that stating that

¹⁰²⁴ *I.e.* if procedures complying with all the requirements set forth in Article 289(2) TFEU bar a statement in the legal basis to the effect that the procedure is a special legislative procedure are not excluded from among special legislative procedures.

¹⁰²⁵ Admittedly, if the narrow construction of special legislative procedure is correct, some meaning could seemingly be ascribed to Article 24(1)(2) TEU by reference to the judgment of the ECJ in case C-91/05 *Commission of the European Communities v Council of the European Union (ECOWAS)*. The ECJ there held that the EU could adopt an instrument simultaneously on multiple legal bases provided that the procedural requirements for adoption of instruments mandated by the relevant legal bases are compatible. The procedural requirements set forth in Articles 27(3) and 41(3)(1) TEU are certainly compatible with any TFEU legal basis mandating a special legislative procedure where the Parliament is merely consulted. Thus Article 24(1)(2) TEU could be read as banning the use of dual legal bases where (i) one of the legal bases is a CFSP one and (ii) the other one mandates the use of special legislative procedure thus resulting in a legislative act within the meaning of Article 289(3) TFEU. The difficulty with such an approach is that squaring it with Article 40 TEU might be complicated (although based on the wording of that article and paragraphs 76 and 77 of *ECOWAS* it might very well be possible). What would be even more difficult is squaring such a possibility with Article 275 TFEU which, should such hybrid CFSP/non-CFSP acts be possible (and this approach assumes their possibility), would grant the CJEU jurisdiction over non-CFSP parts, but deny it in respect of CFSP parts of such hybrid acts. The difficulty here is that according to paragraph 75 of *ECOWAS* multiple legal bases are only possible if a measure pursues equally objectives set forth in all legal bases on the basis of which it has been adopted. Thus it would seem highly doubtful that such a measure could be reviewed only as far as the non-CFSP legal basis goes

[t]he adoption of legislative acts shall be excluded,

is a strange way of positing that the consequences which ordinarily follow in EU law from something being a legislative act do not apply. Surely, if the concept formulated in section 4.1 were correct, whether the resulting act is or is not legislative would depend on whether it is a regulation, a directive or a decision adopted via ordinary or special legislative procedure (should the clear concept be correct). What consequences are drawn from that in a particular situation is a separate issue entirely.

A more direct inconsistency manifests itself if one considers Article 31(1)(1) TEU.

Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

While the second sentence could be read as referring to decisions of the Council alone (specifically those mandated by Article 27(3) or 41(3)(1) TEU¹⁰²⁶) and hence amounting to nothing more than a repetition of Article 24(1)(2) TFEU, it is hardly the natural reading of the provision. First of all, as stated above, that would hardly be the expected way of saying that consequences attaching to something being a legislative act do not attach to decisions adopted on two particular legal bases. If those exclusions apply only to two legal bases, it would have been much easier to simply say so in those bases themselves (especially seeing as that “exclusion” is repeated in the TEU twice in any event). In any case it is submitted that there is no ground in Article 31 TEU – or anywhere else in the TEU for that matter – for saying that the second sentence of Article 31(1)(1) TEU does not refer to decisions of the European Council or to all CFSP decisions of the Council. If it does refer to the acts of the European Council and to all CFSP acts of the Council, it must be based on some other understanding of legislation, not the one formulated on the basis of Article 289 TFEU in section 4.1. The European Council can simply never adopt legislative acts within the meaning of the latter concept.

It must be noted that the first three sentences of Article 24(1)(2) TEU read as follows.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded.

Thus both Article 24 TEU and Article 31 TEU refer to acts of both the European Council and the Council immediately before proscribing adoption of legislative acts. It is submitted that the use of such a formulation is consistent enough not to be dismissed out of hand. Especially considering that according to Article 24 TEU, CFSP is subject to its own specific rules and

without any effect on the CFSP legal basis. Those interrelationships lie, however, outside the scope of this thesis.

¹⁰²⁶ The decisions adopted on the basis of either of those provisions require consultation of the Parliament and would thus amount to a legislative procedure under the wide concept of special legislative procedure with the resulting act being legislative according to the concept formulated in section 4.1.

procedures. Together that might be thought sufficient to raise a question whether “legislative act” might have some meaning peculiar to the field of CFSP; a meaning which includes at least some acts adopted by the European Council.¹⁰²⁷

Furthermore, the TEU as it stood prior to the Lisbon Treaty did not contain provisions akin to the third sentence of Article 24(1)(2) TEU and the second sentence of Article 31(1) TEU. It could thus be credibly suggested that those provisions were inserted either for political fears (of expanding EU’s competences) or for other political reasons (*e.g.* to enable the member states to at least claim to “national audiences” that the EU would not be legislating in the field of CFSP). If so, however, it is submitted that the interrelation of references to “legislative acts” in those two provisions with the TFEU was simply not thought through.¹⁰²⁸ In addition, should such political motivation prove correct, the references to “legislative acts” in those two provisions were in all likelihood understood within their national law meaning (and different meanings at that – representative of each member state is likely to have considered his or her own national law meaning). As we have seen, however, the concept formulated in section 4.1 is purely formal, being based on the terms of art defined by the constitutive treaties. The concept formulated in section 4.1 in no way corresponds with ordinary national law meaning of legislation (for instance, no member state has a Commission, a Council and a Parliament in its institutional make-up; the concept, however, relies on their existence).

It is worth noting one further provision of the constitutive treaties here: paragraph 15(1) of Article 294 TFEU, which deals with ordinary legislative procedure and reads as follows.

Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

It might be thought strange that it refers to cases “where a legislative act is submitted to the ordinary legislative procedure” if using ordinary legislative procedure for the adoption of an instrument is what makes the act legislative (and automatically so). It is submitted that according to a natural reading Article 294(15)(1) TFEU would apply if what was submitted to the ordinary legislative procedure were a legislative act. That would imply that something other than a legislative act might be submitted to ordinary legislative procedure.¹⁰²⁹ As

¹⁰²⁷ There would seem to be no case law in point.

¹⁰²⁸ That those references truly were not thought through would seem to gain support from interrelationship of the third sentence of Article 24(1)(2) TEU and the second sentence of Article 31(1) TEU. They form part of the same chapter of the TEU entitled “Specific Provisions on the Common Foreign and Security Policy”. The former essentially says that no legislative acts are possible at all within the field of CFSP. Yet the latter then says, when speaking of decisions of the Council and of the European Council in the field of CFSP, that adoption of legislative acts shall be excluded. Why have the latter provision at all? There is no field of application for it which field would not already be covered by the former provision.

¹⁰²⁹ Admittedly this provision is the easiest of all so far considered in this section 4.3 to explain by means of bad drafting: surely no instrument submitted to ordinary legislative procedure could be any sort of act. At the time of submission the instrument would simply not yet have been adopted.

suggested by the ECJ in case C-77/11¹⁰³⁰ such a situation might admittedly occur if the resulting act is an atypical one. There is however no legal basis in the constitutive treaties which mandates adoption of an atypical act via ordinary legislative procedure initiated by a group of member states, the ECB or the ECJ, which are the only situations when Article 294(15)(1) TFEU applies.¹⁰³¹

Finally the interaction between legislative acts within the meaning of the concept formulated in section 4.1 and regulatory acts needs to be briefly considered. Regulatory acts are a Lisbon Treaty addition to the constitutive treaties. They are mentioned only once in the constitutive treaties – in Article 263(4) TFEU.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Before the entry into force of the Lisbon Treaty there were only two tests for determination of standing of private parties to challenge acts of the EU before the CJEU. There was standing only if the act was addressed to the private party seeking to mount a challenge or if the act was of direct and individual concern to that party. The Lisbon Treaty introduced the third (alternative) test: a private party has standing to challenge an act if that act (i) is a regulatory one, (ii) does not entail implementing measures and (iii) directly concerns that private party. The relevant issue for present purposes is determining which acts are regulatory.

The first authority in point was the judgment of the GC in *Inuit*.¹⁰³² The GC held in paragraph 56 that

the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.

To avoid doubts as to the meaning of “legislative act” in that quote, it is useful to repeat GC’s own words on this matter (paragraphs 60 and 61 of the judgment).

In that regard, it is apparent from Article 289(1) and (3) TFEU that legal acts adopted according to the procedure defined in Article 294 TFEU, referred to as ‘the ordinary legislative procedure’, constitute legislative acts.

¹⁰³⁰ Discussed at length in section 2.2.1 above.

¹⁰³¹ It might be argued that adoption of atypical acts is possible in every situation where the legal basis does not expressly specify that the resulting act be a regulation, a directive or decision, but grants the privilege of initiative to either a group of member states, the ECB or the ECJ (Article 129(3) TFEU could be an example of such a legal basis). Then the resulting act need not to be a regulation or a directive or a decision. That would however seem to empty Article 289(1) TFEU of much of its meaning.

¹⁰³² GC’s order of 6th September 2011 in case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*

As the procedure defined in Article 294 TFEU reproduces, in essence, that defined in Article 251 EC, it must be concluded that, within the categories of legal acts provided for by the FEU Treaty, the contested regulation must be categorised as a legislative act.

Thus the GC adopted the concept formulated in section 4.1 (the reference to ordinary legislative procedure only is explained by the fact that the act at issue was adopted via that procedure). On appeal the ECJ, at first glance, seems to have confirmed the construction placed upon “regulatory act” by the GC.

The General Court was therefore correct to conclude that the concept of ‘regulatory act’ provided for in the fourth paragraph of Article 263 TFEU does not encompass legislative acts.¹⁰³³

This position seems to have been confirmed, for instance, by the order of the GC in case T-596/11¹⁰³⁴ where it was held that a Council’s implementing regulation,¹⁰³⁵ *i.e.* an instrument adopted on the basis of another instrument itself adopted on the basis of the constitutive treaties, rather than on the basis of the constitutive treaties directly, was a regulatory act. Thus Article 263(4) TFEU would seem to be in perfect accord with the concept formulated in section 4.1.

Indeed, whatever the correct concept of legislation is, Article 263(4) TFEU relies on it. In this respect it is worthy of note that according to the ECJ a regulatory act must be of general application; an act which is not of general application cannot be regulatory.¹⁰³⁶ That means, however, that Article 263(4) TFEU is incompatible with any concept of legislation based (solely) on generality of application. Should the issue whether an act is legislative or not be determined (only) by reference to generality of application of that act, it would simply be impossible to distinguish between regulatory and legislative acts. Yet that distinction would need to be made in order to decide which test for determination of standing to apply.

Two more points may be taken in respect of Article 263(4) TFEU. First, in view of the way the ECJ in paragraph 61 of its judgment in *Inuit* approved the ruling of the GC, it remains unclear whether such non-legislative acts within the meaning of the concept formulated in section 4.1 which acts are adopted directly on the basis of the constitutive treaties are regulatory or not. The ECJ simply stated that legislative acts within the meaning of Article 289(3) TFEU are not regulatory. It said nothing about other acts adopted directly on the basis of constitutive treaties. The issue has not yet been clarified in case law.

¹⁰³³ Judgment of the ECJ in case C-583/11P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, paragraph 61. In paragraph 45 the ECJ made clear that it was relying on the same concept of legislative act as that relied upon by the GC.

¹⁰³⁴ GC’s order of 21st January 2014 in case T-596/11 *Bricmate AB v Council of the European Union*, paragraph 65. The order was handed down three and a half months after the ECJ’s judgment in *Inuit*.

¹⁰³⁵ Council Implementing Regulation (EU) No 917/2011 of 12 September 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People’s Republic of China

¹⁰³⁶ See the judgment of the ECJ in case C-33/14P *Mory SA and Others v European Commission*, paragraph 92.

Second, the position as formulated by the CJEU would seem to lead to the consequence that an instrument of, for instance, the Commission, by which it exercises the power granted to it to amend an element (admittedly a non-essential one) of a legislative act,¹⁰³⁷ is regulatory.¹⁰³⁸ It is submitted that this consequence likewise shows that any concept of legislation based on general application of acts is untenable in EU law. More interestingly, it was demonstrated in section 3 of this thesis that a grant of power to adopt rules (subject to Article 290 TFEU controls over the exercise of such granted power) is lawful as long as the grantor has determined which questions the grantee must decide (that was essentially the totality of the framework which was prescribed for the grantee in *EUROPOL*¹⁰³⁹). Thus the grantee may be tasked with adopting any rules, possibly aside from essential rules in respect of issues falling – according to the constitutive treaties – within the competence of another institution (as stated in *Frontex*).

It thus stands to reason that any content-based concept of legislation possibly aside from such which squarely relies on essential elements as formulated in *Frontex* is likewise incompatible with Article 263(4) TFEU. Such content-based approaches would suggest that the act is legislative, while within the meaning of Article 263(4) TFEU it could (depending on the case) be regulatory, because it was adopted by the Commission on the basis of a power granted to it (subject to, for instance, Article 290 TFEU controls). According to the *Inuit* line of case law, being so adopted precludes such an act from being legislative. The fact that it could be regulatory suffices to show the contradiction between Article 263(4) TFEU and such content-based concepts: if content is the criterion, all such acts would have to be legislative; Article 263(4) TFEU would however seem to mean that some of them must be classified as regulatory and hence not legislative.

In view of these last two points – on which it must be remembered the ECJ has not yet explicitly ruled – it is perhaps better to modify the earlier suggestion, and say that the concept formulated in section 4.1 accords well with a part of the regulatory-rule contained in Article 263(4) TFEU; in part the issue has not yet come up for decision by the CJEU.

To sum up, not all provisions of the constitutive treaties would seem reconcilable with the concept of legislative acts formulated in section 4.1 and based on the analysis of legislative procedures. Nevertheless, some provisions – for instance Article 263(4) TFEU – are reconcilable with that concept. However, Article 263(4) TFEU is reconcilable with neither concepts of legislation which suggest that legislative are those acts which are of general application nor with most content-based concepts of legislation. Article 2(2) TFEU would, on the other hand, seem to exclude all procedural concepts of legislation. Might this conundrum have already been solved in the case law of the CJEU?

¹⁰³⁷ The possibility of the Commission having such a power is expressly mentioned in Article 290 TFEU. See section 3 of this thesis.

¹⁰³⁸ No explicit statement regarding this issue has been made in the decisions of the ECJ or the GC.

¹⁰³⁹ That grant of power was held lawful. See sections 3.2.4 and 3.5 above.

4.4. Case law

4.4.1. Legislative acts

In its judgment in *Gibraltar v Council*¹⁰⁴⁰ the ECJ tackled head-on the issue of which acts are legislative and which are not.

15. It should be noted, first, that the Court has held /.../ that the term 'decision' used in the second paragraph of Article 173 of the Treaty has the technical meaning employed in Article 189, and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general 'application' or otherwise of the measure in question.

16. It should also be noted that even though a directive is in principle binding only on the parties to whom it is addressed, namely the Member States, it is normally a form of indirect regulatory or legislative measure. Moreover, the Court has already had occasion to classify a directive as a measure of general application /.../.

17. Furthermore, the Court has consistently held that the general application, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies at any given time, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose /.../.

The act at issue in *Gibraltar v Council* was a directive¹⁰⁴¹ which was adopted by the Council (after consulting the Parliament) on the basis of Article 84(2) EEC as it stood after the SEA. While the corresponding legal basis in the TFEU – Article 100(2) – provides for an ordinary legislative procedure, the procedure actually employed for adoption of the directive was analogous to either a special legislative procedure or a non-legislative procedure altogether.¹⁰⁴² However as is clear from the quoted paragraphs of the judgment the ECJ did not link the “legislativeness” of an act with the procedure employed for its adoption. Instead “legislativeness” followed from the generality of an act:¹⁰⁴³ if an act was of general application, then it was of legislative nature.

¹⁰⁴⁰ Judgment of the ECJ in case C-298/89 *Government of Gibraltar v Council of the European Communities*

¹⁰⁴¹ Council Directive 89/463/EEC of 18 July 1989 amending Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States

¹⁰⁴² Unless one subscribes to the view formulated in section 2.3.3 above to the effect that any procedure leading to adoption of an act by the Council which procedure entails participation of the Parliament constitutes a special legislative procedure (even if the legal basis does not call the procedure “a special legislative procedure”), it is ultimately impossible to say whether the procedure would under the TFEU be a special legislative procedure or not: some legal bases of the TFEU call such a procedure “a special legislative procedure”, while others do not.

¹⁰⁴³ It should perhaps be noted that generality does not mean an abstract class of addressees. All addressees might be identifiable without the act losing its generality. See paragraph 17 of the quote. A detailed consideration of generality in CJEU’s case law lies, however, outside the scope of this thesis. As will be seen below in this section 4.4 it is not necessary for conclusions regarding legislative acts; it rather pertains to issues of standing of private parties to bring direct actions before the CJEU.

Clearly this does not fit well at all with the position formulated in section 4.1: that regulations, directives and decisions adopted via a legislative procedure constitute legislative acts. Article 289 TFEU does not require such regulations, directives or decisions to be of general application. Furthermore, some instruments other than regulations, directives and decision adopted pursuant to ordinary or special legislative procedure could very well be of general application. Nor does it fit well at all with Article 263(4) TFEU and the case law developed on the basis of it in respect of the regulatory-alternative; in fact, it is all but impossible to reconcile with Article 263(4) TFEU as currently construed by the CJEU. The concept of legislative acts which equates “legislativeness” with generality of application would, however, seem to fit well with content-based concepts of legislation: especially the one the absence of which was lamented by Dougan.¹⁰⁴⁴

There are potentially three ways to reconcile this seeming inconsistency with the concept formulated in section 4.1. First, *Gibraltar v Council* was handed down more than fifteen years before the TFEU entered into force. Hence it could be argued that the judgment, while good law at the time, has been overtaken by events; that the concept of legislation was simply changed, perhaps precisely by the Lisbon Treaty. That would, however, fail to explain the following statement of law made by the ECJ in *Puma*¹⁰⁴⁵ well after the entry into force of the TFEU.

[I]t should be noted that regulations such as the regulations in dispute are of a legislative character inasmuch as they apply generally to the traders concerned.

The instruments in dispute were two anti-dumping regulations of the Council: one an implementing regulation¹⁰⁴⁶ adopted after the entry into force of the TFEU and the other a pre-TFEU anti-dumping regulation¹⁰⁴⁷ which would have been an implementing regulation had it been adopted under the TFEU. Since the Parliament was not involved in their adoption, the procedure employed for their adoption was not a legislative procedure referred to in paragraphs 1 or 2 of Article 289 TFEU. Both cases stemmed from applications for repayment of anti-dumping duties which the applicant importers had paid. In both cases at least some of the duties were paid after the entry into force of the TFEU.¹⁰⁴⁸ Thus *Puma* seems to expressly confirm *Gibraltar v Council* as good law under the TFEU, *i.e.* post-Lisbon Treaty.¹⁰⁴⁹

¹⁰⁴⁴ See section 4.2.2 above. However, it would still not explain Article 2 TFEU and Articles 24(1)(2) and 31(1) TEU: there are EU acts of general application in the fields where they seem to exclude legislation.

¹⁰⁴⁵ Judgment of the ECJ in joined cases C-659/13&34/14 *C & J Clark International Ltd v The Commissioners for Her Majesty's Revenue & Customs and Puma SE v Hauptzollamt Nürnberg*, paragraph 58

¹⁰⁴⁶ Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96

¹⁰⁴⁷ Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam

¹⁰⁴⁸ Paragraphs 41 and 47 of the judgment

¹⁰⁴⁹ Furthermore, *Puma* seems to demonstrate an inconsistency between paragraphs 16 and 17 of *Gibraltar v Council*. In the former the ECJ opined that directives are of general application and either regulatory or

The second way would take as its basis the different language versions of the two judgments. Where the English version of *Gibraltar v Council* speaks of “legislative” in paragraphs 15 and 17, the French and the Italian versions refer to “normative”. The German version of *Gibraltar v Council* refers to “normative” in paragraph 17 and to “Rechtsetzung” in paragraph 15.¹⁰⁵⁰ In *Puma* the French, the Italian, the German and the Estonian versions all refer “normative” rather than legislative.

Based on these differences it could be argued that in both *Gibraltar v Council* and in *Puma* the ECJ actually linked generality of application of an act with its “normativity”, not with its “legislativeness”. This could seemingly find some supports in the opinions of advocates general. To the extent that he engaged with the issue, advocate general Lenz in the original German of his opinion in *Gibraltar v Council* (in paragraph 91 and in footnote 62) wrote of “normative”. Advocate general Bot in the original French in his opinion (in paragraph 38) likewise wrote of “normative”.

Further support could be found in academic opinion. It has been suggested that

[t]he drafters of the original Treaty deliberately failed to accord [the Council and the Commission¹⁰⁵¹] a “legislative power”,¹⁰⁵²

according them decision-making power instead.¹⁰⁵³

This solution faces several problems. First, *Gibraltar v Council* was argued in English, and *Puma* was argued in English and in German. That should mean that none of the arguments made by the parties and by reference to which the ECJ had to rule were presented in either French or Italian (or German in case of *Gibraltar v Council*). Assuming (not unreasonably) that a judgment must engage with the points made by the parties, it seems more likely that the English (and in case of *Puma*, German) versions should better reflect the actual argumentation.

legislative. In the latter the ECJ stated that a directive was legislative because it was of general application. Hence one could enquire how a directive could be regulatory if that is an alternative to it being legislative, a directive is of general application and “legislativeness” follows from that general application. No clarification seems to have been provided by the case law other than dropping the reference to “regulatory” in *Puma*. It could perhaps be argued that in view of introduction of the concept of regulatory act in Article 263(4) TFEU the position changed, but that would seem too strong an argument. The change would mean that the instruments at issue in *Puma* were precisely regulatory within the meaning given to that term in the *Inuit* line of case law (*Inuit* judgments referred to in section 4.3 above pre-date *Puma*). The ECJ, nevertheless opined that they were legislative. There would seem to be no way to resolve the inconsistency.

¹⁰⁵⁰ Rechtsetzung means “law creating” thus potentially perhaps differing from both legislative and normative. At least in Estonian law normative would likely cover a general order (*üldkorraldus*) which is a type of administrative act set forth in section 51(1) of the Act on Administrative Procedure, while law creating would probably not.

¹⁰⁵¹ There was no Parliament as we know it at the time.

¹⁰⁵² Jürgen Bast, *New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, (2012) 49 *Common Market Law Review* 891

¹⁰⁵³ Jürgen Bast, *New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, (2012) 49 *Common Market Law Review* 891. He further opines that the language was the same as recently as in the EC Treaty.

Second, at least some commentators seem to have accepted the English version as the correct one.¹⁰⁵⁴

Third, both relevant passages in advocate general Lenz's opinion in *Gibraltar v Council* actually referred to an order the ECJ had made in another case where in German the language of "normative" was employed.¹⁰⁵⁵ It is thus at best questionable whether any independent value should be attributed to his use of "normative".

Fourth, that order of the ECJ in case 160/88R displays exactly the same characteristics. Paragraph 27 of its English version reads as follows.

[The ECJ] has also consistently stated that the criterion for distinguishing between a measure of a legislative nature and a decision is whether or not the measure at issue is of general application.

Its French, Italian and German version again use "normative" in place of "legislative". Thus such use is consistent: it spans at least three different cases, decided by different benches under differently worded constitutive treaties and dealing with different instruments. Furthermore, they span nearly 30 years meaning that there has been ample opportunity to rectify this discrepancy. It is submitted that in such a situation such a linguistic inconsistency is more likely to disclose either confusion within the ECJ about the normative vs legislative issue or alternatively a settled understanding that as far as EU law is concerned they are one and the same.

These two alternatives are, fifth, given further credence by the fact that the German version of *Gibraltar v Council* uses in one place, but in one place only, yet another term (*Rechtsetzung*). Considering that in all of English, French and Italian versions the use of terminology within a given language version is consistent as between paragraphs 15 and 17, the German "discrepancy" would suggest either confusion as to meaning of terms or an understanding that they have one and the same meaning (*i.e.* that they don't matter). That would seem to be further supported by the fact that "*Rechtsetzung*" appeared in the judgment in spite of not having been employed by (the German speaking) advocate general Lenz in his opinion in German. If neither proposition (confusion or settled understanding of equivalence) is correct and the English version (as the version in the language in which the case was argued) is not given precedence, one would need to further explain why in paragraph 15 the ECJ referred to *Rechtsetzung* rather than normativity as it did in paragraph 17. It is submitted

¹⁰⁵⁴ See Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 6, and Jean-Claude Piris, *Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002)*, Working document 06 of the Working Group IX (6th November 2002), page 21. Piris was speaking about the judgment in case C-202/88, discussed below in section 4.4.2. However it will be seen there that the different language versions of that judgment display the same differences as those of *Gibraltar v Council*. It is worth noting that Piris contends that the judgment speaks of legislative power (as it does in English) and not of normative power (as it does in French) in spite of being a French native speaker.

¹⁰⁵⁵ Order of the ECJ in case 160/88R *Fédération européenne de la santé animale and others v Council of the European Communities*, paragraph 27. It is assumed for present purposes that advocate general Lenz was referring to that order in "his" language version, *i.e.* in German.

that it is both difficult to find an explanation, and that any potential explanation would be out of place in the EU's multilingual environment – it would rely on distinctions which might be thought to be too fine to be made.

The thesis that the ECJ was referring to normativity alone (and that hence the English versions of the judgments are simply wrong) might be sought to be saved by reliance on paragraph 16 of *Gibraltar v Council*. There the French and Italian versions employ the term “legislative” just like the English does.

It should also be noted that even though a directive is in principle binding only on the parties to whom it is addressed, namely the Member States, it is normally a form of indirect regulatory or legislative measure. Moreover, the Court has already had occasion to classify a directive as a measure of general application /.../.

Il y a lieu de rappeler également que même si elle ne lie en principe que ses destinataires, qui sont les États membres, la directive constitue normalement un mode de législation ou de réglementation indirecte. La Cour a d'ailleurs déjà eu l'occasion de qualifier une directive d'acte ayant une portée générale /.../.

Va del pari ricordato che, benché in linea di principio essa vincoli unicamente i propri destinatari, i quali sono gli Stati membri, la direttiva costituisce normalmente un modo di legislazione o di regolamentazione indiretta. La Corte ha del resto già avuto occasione di qualificare una direttiva come un atto che ha portata generale /.../.

One could therefore present the following argument in support of normative and not legislative acts having been held to be connected with general application. In paragraphs 15 and 17 the ECJ speaks of normativity which is connected with general application (being at the very least its corollary). In paragraph 15 the ECJ says that a directive is an act of general application. It hence follows that a directive is a normative act. Fortunately in that very same paragraph 15 the ECJ further states that a directive is normally either legislative or regulatory. Hence it stands to reason that “normative” is a generic term which covers legislative, regulatory and possibly something else (in paragraph 15 the ECJ suggested that a directive, which constitutes an act of general application, is only ordinarily legislative or regulatory; there is room for something else). This “saving” explanation runs into several difficulties.

First, it is contradicted not only by the English version, but also by the German version (*i.e.* both the language versions of the arguments and of the advocate general).

Es ist auch darauf hinzuweisen, daß Richtlinien zwar grundsätzlich nur ihre Adressaten, d. h. die Mitgliedstaaten, binden, daß sie aber normalerweise ein Mittel der indirekten Rechtsetzung sind. Im übrigen hat der Gerichtshof Richtlinien bereits als Maßnahmen mit allgemeiner Geltung qualifiziert.

Thus the German version speaks only of “Rechtsetzung” – law-making. This would not seem to lend itself to any argument about classification akin to the one made in respect of the French and Italian versions, because paragraph 15, which in the French and Italian versions

refers to the generic term of normativity covering both terms used in paragraph 16, in the German version uses exactly the same term as in paragraph 16. Furthermore, this “saving” approach hinges on two terms being used in paragraph 16 (which could then be types of the generic term employed in paragraphs 15 and 17). Only one term is used in the German version of paragraph 16. It is submitted that the best reading of the German version of paragraph 16 of *Gibraltar v Council* is to the effect that directives are ordinarily employed to regulate (someone’s) activities. Thus, on the “saving” approach there would seem to be contradictions between English, and French and Italian versions on the one hand, and German, and French and Italian versions on the other – and the contradictions would be different.

Second, if the “saving” explanation is to be correct, it is clear that there must be a third type of normative acts (in addition to legislative and regulatory ones) into which directives are capable of falling – and that type must comprise acts of general application (for the ECJ held in paragraph 15 directives to be of general application). It is submitted that there simply is no such category.

Third, the “saving” explanation does not ultimately answer why the French and Italian versions are to be preferred to the English one. The force of the “saving” explanation was based on it being the only one which is internally consistent. The foregoing paragraphs have shown that it is not.

It is therefore submitted that there is either confusion within the ECJ about the normative vs legislative issue or alternatively a settled understanding that as far as EU law is concerned they are one and the same (*i.e.* that the terms don’t matter). In any event the foregoing discussion of linguistic discrepancies manifested in the *Gibraltar v Council* line of case law shows two things. First, that the legislative vs normative distinction is ample ground for difficulties and inconsistencies. Second, that the language-based attempts at explaining *Gibraltar v Council* in no way help one further as far as concept of legislation in EU law is concerned.

Even assuming the correctness of the French and Italian versions, that leaves one with two concepts (legislative act and normative act) which need to be somehow related. Furthermore, it has been accepted that “language of legislation” was introduced into the constitutive treaties to augment legitimacy of the EU and to enhance the rule of law.¹⁰⁵⁶ If the French and Italian versions of *Gibraltar v Council* are to be given precedence, then arguably the wrong language was introduced into the constitutive treaties. It has been noted above¹⁰⁵⁷ that use of terms of art cannot enhance legitimacy or rule of law; only actual substantive changes could do so. It thus stands to reason that language of normativity rather than of legislation should have been introduced into the constitutive treaties. Thus either all legislation-related changes in the constitutive treaties were doomed to be futile from before they were conjured up by the Convention on the Future of Europe, or the French and Italian version of *Gibraltar v Council*

¹⁰⁵⁶ See the text to footnote 939 above.

¹⁰⁵⁷ See the text to footnote 1017.

cannot be the correct ones on their own terms.¹⁰⁵⁸ Finally, academic commentators who disagree with the concept formulated in section 4.1 and whose views were discussed in section 4.2.2 above would actually be wrong for another reason: on the French and Italian versions of *Gibraltar v Council* what they were writing about under the guise of legislative acts were actually normative acts. It is submitted that, put bluntly, the entire legislative vs normative debate is more trouble than it is worth.

The third way of overcoming the inconsistency between the (English language) authorities and the TFEU is by construing the TFEU. Article 289(3) TFEU says that legal acts adopted by legislative procedure shall constitute legislative acts. From the perspective of formal logic that provision in no way means that no other acts could be legislative; all it does is say that the acts adopted via legislative procedure are. Admittedly this would result in a certain duality of “legislative acts”: some would be determined by reference to the criteria set forth in Article 289 TFEU, while some by reference to something else. However, it is worth mentioning that the Grand Chamber of the ECJ might be thought to have already introduced a similar duality into EU law by contending in paragraph 60 of its judgment in case C-77/11 that

[e]ven though the act based on Article 314(9) TFEU is the outcome of a special legislative procedure, it does not, **due to the nature of the budget**, take the form of a legislative act in the strict sense of the term for the purpose of Articles 288 TFEU and 289(2) TFEU.

Article 289(2) TFEU reads as follows.

In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

Article 314 TFEU is undoubtedly such a specific case – it explicitly mentions special legislative procedure. Thus what the ECJ seems to have done in its judgment in case C-77/11 is said that since Article 314(9) TFEU mentions neither a regulation, nor a directive nor a decision, then the resulting instrument is not a legislative act. From the perspective of formal logic the step which the ECJ made in paragraph 60 of its judgment in case C-77/11 and the step on which the third way of overcoming the inconsistency being explained here hinges are exactly the same. Both paragraphs 2 and 3 of Article 289 TFEU could be formalised as “All S are P”. Both solutions are based on the obvious corollary that it does not follow from “All S are P” that “All P are S”, *i.e.* that if “All S are P” is true, it is also true that “Some P might not be S”.

¹⁰⁵⁸ This is not to say anything about the whole normativity vs legislativeness debate. That falls outside the scope of this section. The important issue for present purposes is that whatever their relationship with each other and with general application, if it is exactly as postulated in *Gibraltar v Council* and confirmed post-Lisbon Treaty in *Puma* the Convention on the Future of Europe could never have achieved, by means of using language of legislation, the objectives set in the Laeken declaration.

However, on this third option an instrument not being a regulation, a directive or a decision adopted via legislative procedure would not be sufficient for concluding that the instrument is not a legislative act. This third option is based on something else being legislative acts as well. This is where the words quoted above in bold italics come into play. What the ECJ seems to say there is that it is because of the nature of the budget that Article 314 TFEU did not require the instrument by which it was adopted to take the form of one of the instruments listed in Article 289(2) TFEU. Hence ultimately the nature of the act could be a reason for a particular instrument constituting or not constituting a legislative act. Following that implication it could be suggested that the dual concept of legislative act in EU law is this: legislative are (i) regulations, directives or decisions adopted via ordinary or special legislative procedure and (ii) other acts of some particular nature. The most one could take away from the judgment in case C-77/11 in respect of the nature of the budget there at issue is that it was

an accounting document setting out estimates for the European Union of all income and expenditure over a certain period.¹⁰⁵⁹

One could hypothesise that the nature thus referred to the fact that the budget dealt with a singular situation, but, on the one hand it would be no more than a hypothesis, and on the other it would lead one straight back into the matter of generality of application (and the legislativeness vs normativity debate) without offering any additional criteria. That would, however, run into immediate difficulties with Article 263(4) TFEU discussed at the end of section 4.3.

This third option, however, does no more than bring one back to the initial issue. Which other acts are legislative, and how does one determine that? Lest we forget almost all substance-based concepts of legislation are incompatible with EU law.¹⁰⁶⁰ Furthermore, why was it in that case necessary to postulate in Article 289 TFEU that a regulation, a directive or a decision adopted via ordinary or special legislative procedure is a legislative act? Surely, for instance the subsidiarity and proportionality controls by national parliaments (to the extent they could be taken seriously) would be more needed where EU acts are adopted via procedures where fewer EU institutions are involved than in those where more of them are involved? Ordinary and special legislative procedures involve the largest number of EU institutions of any act-adoption-procedures which the constitutive treaties provide for. Protocol (No 1) on the Role of National Parliaments in the European Union and Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality mandate those controls for legislative acts. On this explanation they would necessarily apply to the acts the adoption of which always involves both the Council and the Parliament (and mostly involve the Commission), but their application to acts where fewer (or more minoritarian) institutions have decisive role would hinge on those acts being legislative by some unclear criterion. A manner of overcoming inconsistencies which has such consequences would hardly seem acceptable.

¹⁰⁵⁹ Paragraph 59 of C-77/11

¹⁰⁶⁰ Aside possibly from those relying squarely on the doctrine of essential elements. See section 4.3 above.

To sum up, there is case law of the ECJ directly in point (*i.e.* dealing specifically with legislative acts) which displays inconsistencies with the concept of legislative act formulated in section 4.1. While there are several ways of attempting to overcome those inconsistencies, such solutions ultimately fail (in case of the first one and to an extent the second one considered) or their consequences are, if anything, more problematic than the inconsistencies themselves (in case of the second and the third one). Furthermore there would seem to exist a contradiction between the line of case law discussed in this section 4.4.1 (legislative acts as acts of general application) with certain implications flowing from Article 263(4) TFEU discussed at the end of section 4.3 (legislative acts as acts of general application being virtually impossible to square with some implications of the case law on Article 263(4) TFEU). The only thing which could potentially be taken away from the case law discussed in this section 4.4.1 is that a directive must be of general application.¹⁰⁶¹ Leaving aside the issue of the vagueness of that suggestion, it would not seem to help one much further: even if a directive must be of general application, Article 289 TFEU explicitly calls legislative an act (a decision) in respect of which there is no – and cannot be any – such requirement: a decision which specifies those to whom it is addressed shall be binding only on them (Article 288(4) TFEU). Furthermore it is difficult to see how adding such a requirement of generality would help to square the concept formulated in section 4.1 with the provisions of constitutive treaties discussed in section 4.3 above.

4.4.2. Legislative power

The second line of case law of the ECJ pertinent to the issue under consideration deals with the institutions which have legislative power. Admittedly, all the authorities in this line predate the Lisbon Treaty. The ECJ has in no less than four judgments explicitly spoken about the legislative power or competence of the Commission when adopting acts¹⁰⁶² (as opposed to the Commission's power or competence to initiate a procedure for adoption of acts by some other institution). In the judgments in cases C-202/88 and C-314/93 the power of the Commission deriving from what is now Article 106(3) TFEU was said to be legislative. In the judgment in case C-234/89 the Commission's power to adopt block exemption regulations was considered legislative by the ECJ.¹⁰⁶³ Currently this power is conferred on the Commission by the constitutive treaties, specifically Article 105(3) TFEU. The EEC Treaty as it stood at the time of adoption of the block exemption regulation at issue contained no such provision. The power to adopt the block exemption regulation was granted to the Commission by the Council. The power so granted was considered legislative by the ECJ. The same was true of the power at issue in joined cases C-246-249/94. The regulation

¹⁰⁶¹ Paragraph 16 of *Gibraltar v Council*. This follows from all language versions of the judgment.

¹⁰⁶² Judgment of the ECJ in case C-202/88 *French Republic v Commission of the European Communities*, paragraph 15; judgment of the ECJ in case C-234/89 *Stergios Delimitis v Henninger Bräu AG*, paragraphs 43-46; judgment of the ECJ in case C-314/93 *Criminal proceedings against François Rouffeteau and Robert Badia*, paragraph 7; judgment of the ECJ in joined cases C-246-249/94 *Cooperativa Agricola Zootechnica S. Antonio and Others v Amministrazione delle finanze dello Stato*, paragraph 31

¹⁰⁶³ The regulation at issue was Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements.

there at issue¹⁰⁶⁴ had been adopted by the Commission in exercise of the Article 155 EEC power granted to it by the Council. In this respect it is interesting to note that the ECJ called that power of the Commission “a delegated legislative power”.¹⁰⁶⁵

Like with the case law on legislative acts the different language versions of these four judgments again differ. The situation is relatively straightforward with English, French and Italian versions of the judgments in cases C-202/88 and C-314/93, *i.e.* those dealing with the Commission’s power under Article 106(3) TFEU. Like with the case law on legislative acts the English version refers to legislative power, while the French and Italian ones refer to normative power. The situation is, however, complicated by the German versions of those judgments. In the case C-202/83 the judgement refers to “Regelungsbefugnis” the closest analogue of which would seem to be “regulatory authority”. That is, however, a term never employed either in *Gibraltar v Council* or in *Puma*. Furthermore, the German version of the judgment in case C-314/93 eschews all characterisations of the Commission’s power there at issue.

Die Richtlinie 88/301 wurde von der Kommission in Ausübung ihrer Befugnis nach Artikel 90 Absatz 3 EWG-Vertrag erlassen /.../¹⁰⁶⁶

Thus the judgment simply speaks of Article 90(3) EEC power of the Commission.

In case C-234/89 (dealing with the powers of the Commission granted to it by the Council and hence – constitutive treaty-wise – founded on Article 155 EEC) both the French and the Italian judgments call the Commission’s power legislative, while the German one refers to Rechtsetzungsbefugnis. Finally, the French version of the judgment in joined cases C-246-249/94 (dealing likewise with the powers of the Commission granted to it by the Council and hence – constitutive treaty-wise – founded on Article 155 EEC) refers to the regulation at issue there having been adopted

sur le fondement d'une délégation législative,¹⁰⁶⁷

while the German version of that judgement refers to the regulation having been adopted on the basis of an empowering provision (“aufgrund einer Ermächtigungsnorm”).¹⁰⁶⁸ There is no Italian version of that judgment.

There is thus no pattern in these statements of law made by the ECJ. If one gives preference to the French and the Italian versions, one ends up in a somewhat unexpected situation: the power granted to the Commission directly by the constitutive treaties is not legislative, while the power granted to the Commission by the Council is. Surely in any analysis of normative power, it is the former which is more likely to be legislative? Moreover, German “Regelungsbefugnis” is employed to describe the power which in French and in Italian is

¹⁰⁶⁴ Commission Regulation (EEC) No 612/77 of 24 March 1977 laying down rules for the application of the special import arrangements in respect of certain young male bovine animals for fattening

¹⁰⁶⁵ Paragraph 31 of C-246-249/94

¹⁰⁶⁶ Paragraph 7 of C-314/93

¹⁰⁶⁷ Paragraph 31 of C-246-249/94

¹⁰⁶⁸ Paragraph 31 of C-246-249/94

called normative (in *Gibraltar v Council* in paragraph 17 all three spoke of normative, while in paragraph 15 the German spoke of *Rechtsetzung* and the French and Italian of normative), and “*Rechtsetzungsbefugnis*” – legislative. It is submitted that this case law is sufficient to finally and conclusively put to rest any doubts concerning the viability of the “saving” explanation formulated in section 4.4.1 above when considering and trying to determine the meaning of the statements of law made in *Gibraltar v Council* and in *Puma*. In view of these further four judgment it may be said with considerable certainty that the best explanation of the authorities is that there is either confusion within the ECJ about the normative vs legislative issue or alternatively a settled understanding that as far as EU law is concerned they (and all other similar terms) mean one and the same thing (*i.e.* that the terms don’t matter).

The same inconsistencies present themselves in two judgments where someone other than the Commission, the Council or the Parliament were held to have legislative power. In its judgment in case C-301/02P¹⁰⁶⁹ the ECJ held that Articles 12.3 and 36.1 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the EC Treaty granted the Governing Council of the ECB

legislative power to adopt, on the one hand, rules of procedure to determine the internal organisation of the ECB and its decision-making bodies and, on the other, the conditions of employment of the staff of the ECB.¹⁰⁷⁰

The French and Italian versions of the judgment again refer to normative power, while the German one – to *Rechtsetzungsbefugnis* (which in the judgment in case C-234/89 was employed as a counterpart of the French and Italian “legislative”). Curiously, the later translated Estonian version of the judgment avoids any characterisation of the power which the Governing Council has under Articles 12.1 and 36.1 simply stating that it is sufficient to adopt the rules at issue. In this respect it would seem similar to the German version of the judgment in joined cases C-246-249/94.

Finally, in its judgment in case T-28/89¹⁰⁷¹ the GC in paragraph 46 essentially held that when a general meeting of staff of an EU institution was adopting rules it did so in exercise of legislative power. Interestingly enough both the French and Italian versions of the judgment refer to that power as “legislative or regulatory” (without specifying which one), while the German employs *Rechtsetzungsbefugnis*, which, while more neutral, might still be thought a surprising way of referring to the power of a general meeting of staff.

It is submitted that not much could be taken away regarding which acts are legislative and which are not from the case law considered in this section 4.4.2. No useful generalisation of the judgments would seem possible: the one thing which they have in common is that they all

¹⁰⁶⁹ *Carmine Salvatore Tralli v European Central Bank*

¹⁰⁷⁰ Paragraph 38. The provisions read as follows.

Article 12.3: The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

Article 36.1: The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

¹⁰⁷¹ *Claude Maindix and others v Economic and Social Committee*

concerned rules which applied to an undetermined group of persons (*i.e.* the persons to whom they applied would not meet the *Plaumann* test for standing¹⁰⁷²). The only other commonality would seem to be characterisation of the power as “legislative” in the English versions of the judgments.

4.4.3. Access to information

There have been several cases about access to information which have ultimately turned on “legislativeness” of an instrument. There are two strands to the case law.

4.4.3.1. First strand of case law

The cases of the first strand have been decided on the basis of regulation 1049/2001¹⁰⁷³ which in Article 12(2) contains the following formulation of legislative documents:

documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States.

It should further be noted that according to that regulation legislative power includes both power deriving from the constitutive treaties as well as power granted by an institution acting on the basis of the constitutive treaties (*i.e.* the so-called “delegated power” is legislative – see recital 6). That seems to be so equally for all fields of EU law, including the CFSP (recital 7). More interesting is the way one determines under the regulation whether some procedure is legislative.¹⁰⁷⁴ One would need to start with Article 2(4).

Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

The regulation does not contain a separate definition-like formulation of legislative procedure, however Article 12 reads as follows.

Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

¹⁰⁷² See the judgment of the ECJ in case 25/62 *Plaumann & Co. v Commission of the European Economic Community*

¹⁰⁷³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

¹⁰⁷⁴ It should be recalled that at the time when the regulation was adopted the constitutive treaties contained no language on legislative procedures.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.
4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

It thus stands to reason that by virtue of Articles 2(4) and 12 – and especially of paragraph 2 of Article 12 – any procedure resulting in adoption by the EU of acts which are binding within or for member states is a legislative procedure. In its judgment in joined cases C-39&52/05P¹⁰⁷⁵ the ECJ came close to saying as much.

Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible.¹⁰⁷⁶

That is a very wide formulation of legislative process. It would seem to essentially cover adoption of any binding act whatsoever.¹⁰⁷⁷ Thus it should not be surprising that the ECJ opined that the process leading to the adoption of what became Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers was legislative.¹⁰⁷⁸ Reading the judgment it seems, however, somewhat unclear why the ECJ held that directive to be legislative. The aforementioned Article 12(2) of regulation 1049/2001 could have been one reason. Another view is that that was so because the Council's (who was the respondent in that case) rules of procedures classified that directive as a legislative act.

It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases.¹⁰⁷⁹

Article 207(3) EC read as follows.

The Council shall adopt its Rules of Procedure.

For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its

¹⁰⁷⁵ *Kingdom of Sweden and Maurizio Turco v Council of the European Union*

¹⁰⁷⁶ Paragraph 47

¹⁰⁷⁷ In fact the Council may well be understood as having made precisely that submission to the ECJ in its arguments – see paragraph 13(2) of the judgment in joined cases C-39&52/05.

¹⁰⁷⁸ Paragraph 32. To the same effect see also paragraph 77 and 78 of the judgment of the GC in the same case: T-84/03 *Maurizio Turco v Council of the European Union*. The directive was adopted on the basis of Article 63(1)(b) EC by the Council after consulting the Parliament; at the time there were no procedures which the constitutive treaties expressly called legislative.

¹⁰⁷⁹ Paragraph 47 of the judgment

decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.

Article 255 EC further had this to say.

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

Thus – pursuant to an explicit requirement of the EC Treaty – the Council’s rules of procedure specifically set forth the situations when it was acting in legislative capacity, and Article 255 EC (which was the legal basis of regulation 1049/2001) provided that when the Council was acting in legislative capacity its documents were to be available to the public. That availability was, in turn, governed by regulation 1049/2001.

What did the Council’s rules of procedure say in this respect? According to the rules in force at the relevant time

[t]he Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).¹⁰⁸⁰

Thus the judgment of the ECJ could be seen as doing no more than applying the Council’s rules of procedure rather than relying on regulation 1049/2001. Determination whether the instrument at issue was legislative or not would, on this view, have been made by the Council when adopting its rules of procedure and not by the ECJ when solving a dispute. In that connection the width of the formulation contained in Article 7 of the Council’s rules of procedure must be noted: like in case of Article 12(2) of regulation 1049/2001, the extent of

¹⁰⁸⁰ Article 7(1) of Council Decision 2002/682/EC, Euratom of 22 July 2002 adopting the Council's Rules of Procedure

the formulation contained in the Council's rules of procedure is such that it would seem to leave very little room for any other rulemaking capacity.

Subsequent case law has not offered much further consideration of the issue. In its judgment in case C-280/11P¹⁰⁸¹ the ECJ opined that Article 251 EC procedure was legislative,¹⁰⁸² however that would not seem to add anything to our understanding of legislation in EU law. In any case, the judgment was handed down after the entry into force of the Lisbon Treaty. It might therefore be argued that the source of such statement lies more in the fact that Article 251 EC procedure became ordinary legislative procedure under the Lisbon Treaty than in anything else. While the judgment did not represent any considerable development, it is important for in it the ECJ relied very heavily on the objective of regulation 1049/2001.¹⁰⁸³ That objective was to provide wider access to information and that was achieved via making legislative documents ordinarily available. It is submitted that regulation 1049/2001 and the case law relying on it should therefore, as far as the concept of legislation goes, be considered sector specific. It is at best doubtful whether they provide any general guidance about legislative acts in EU law.

The only *prima facie* exception from this could be the judgment of the GC in case T-529/09.¹⁰⁸⁴ In that case the GC had to decide whether the Council was acting in legislative capacity when initiating and conducting negotiations concerning a treaty. According to the aforementioned article 7(1) of the Council's rules of procedure such activities are not undertaken by the Council in its legislative capacity. The GC decided likewise.

86. The Council contends that it was not acting in its legislative capacity. In that regard, it invokes Article 7 of its Decision 2006/83/EC, Euratom, of 15 September 2006 adopting the Council's Rules of Procedure (OJ 2006 L 285, p. 47). That article lists the cases where the Council acts in its legislative capacity pursuant to the second subparagraph of Article 207(3) EC; discussions leading to the adoption of acts concerning international relations are not contained in that list.

87. It should be noted that the provisions invoked, which seek, in essence, to define the cases or documents which must, in principle, be directly accessible to the public, merely serve as a guide in determining whether or not the Council has acted in its legislative capacity for the purposes of applying the exceptions in Article 4 of Regulation No 1049/2001.

88. It should be observed that initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive. Moreover, public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations. ***Therefore, during that procedure, it must be held that the Council is not acting in its legislative capacity.***

¹⁰⁸¹ *Council of the European Union v Access Info Europe*

¹⁰⁸² Paragraphs 60, 63 and 74

¹⁰⁸³ See, for instance, paragraph 33. See also recital 6 of regulation 1049/2001.

¹⁰⁸⁴ *Sophie in 't Veld v Council of the European Union*

The GC's conclusion on the point was accepted on appeal by the ECJ.¹⁰⁸⁵ The reason why the conclusion quoted in bold italics might have a more general bearing is that it would not seem to be based on the Council's rules of procedure. Council's rules of procedure were deemed no more than a guide for the CJEU in deciding whether the Council was acting in legislative capacity. The decision that the Council was acting in legislative capacity seems ultimately to be based on two premises: (i) initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive and (ii) there is a legitimate interest in not revealing details of negotiations.

As far as premise (i) goes, there would unfortunately seem to be no argumentation in the judgment explaining why the GC held that to be the case. On the one hand, the content of the immediately preceding paragraphs could suggest that premise (i) was based on the guidance contained in the Council's rules of procedure. On the other hand, dismissal of those rules of procedure as mere guidance in paragraph 87 taken together with the tenor of the first sentence of paragraph 88 could indicate that the GC relied on some doctrine of separation of powers (akin to that obtaining in national laws of all member states) in deciding that treaties are a matter for the executive. No clear conclusion would seem possible.

Relevance of premise (ii), however, seems to have been squarely based on "reverse-argumentation" from regulation 1049/2001. According to that regulation information pertaining to legislative processes was to be made available to the public. Thus the GC seems to have concluded from the fact of there being an interest, which it held legitimate, not to disclose the information that the information cannot have pertained to a legislative process. Otherwise it would have been subject to publication.¹⁰⁸⁶

For present purposes it means that the judgment in case T-529/09 is, like other judgments in this strand of case law, based to a considerable extent on regulation 1049/2001 (and/or the Council's rules of procedure). To the extent that it may be taken as a more general statement of law all it would be saying is that treaty-making powers are not legislative – and it would be offering no reasoning for such a statement.

4.4.3.2. Second strand of case law

The cases belonging to this strand have been decided on the basis of directive 2003/4¹⁰⁸⁷ by which effect was given in EU law to the Aarhus Convention.¹⁰⁸⁸ While regulation 1049/2001

¹⁰⁸⁵ Judgment of the ECJ in case C-350/12P *Council of the European Union v Sophie in 't Veld*, paragraphs 76 and 105. The ECJ's judgment did not add anything of substance to the judgment of the GC on the issue of legislative capacity.

¹⁰⁸⁶ Admittedly such a conclusion has a further premise – that regulation 1049/2001 would not require publication of information not pertaining to legislative procedure when there are good grounds to avoid publication of that information. It is submitted that by making the jump from premise (ii) to the conclusion the GC might have confused the notion of legislative procedure and documents (Articles 2(4) and 12(2) of regulation 1049/2001), on the one hand, with the exceptions to the publication of information (Article 4 of regulation 1049/2001) on the other.

¹⁰⁸⁷ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

¹⁰⁸⁸ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed on 25th June 1998

is drafted in such a way that when information pertains to a legislative procedure, access to it must (ordinarily) be ensured, directive 2003/4 provides essentially the opposite: when a public authority acts in legislative capacity it need not make information available.¹⁰⁸⁹ Thus while in disputes on the basis of regulation 1049/2001 private party applicants ordinarily claim that some information pertains to a legislative procedure and the EU institutions contend that it does not, in disputes on the basis of directive 2003/4 it is private party applicants who ordinarily claim that public authorities were not acting in legislative capacity while public authorities claim that they were.

In its judgment in case C-204/09¹⁰⁹⁰ the ECJ held that a ministry of a member state was acting in legislative capacity when participating “in the legislative process *stricto sensu*”, i.e. not when adopting acts itself but when tabling draft laws, introducing them into the national parliament or giving opinions about such draft laws.¹⁰⁹¹ By contrast, when adopting rules of law itself, a ministry of a member state was held not to be acting in legislative capacity.¹⁰⁹² “Legislative capacity” in Article 2(2) of directive 2003/4 did not

refer to all procedures for the preparation of general abstract norms, including those of a lower rank than a law.¹⁰⁹³

It referred to

only those procedures that could result in the adoption of a law or a norm of an equivalent rank.¹⁰⁹⁴

Aarhus Convention to which directive 2003/4 was intended to give effect distinguished between legislative and regulatory acts.¹⁰⁹⁵ The ECJ essentially seems to have decided that when adopting rules itself a ministry of a member state was acting in regulatory and not legislative capacity. The distinction from the situation at issue in case C-204/09 lied in the fact that in parliamentary legislative process environmental information was ordinarily available to the citizens in an adequate manner; that was said not to be the case when a ministry itself was adopting binding rules.¹⁰⁹⁶ Thus in determining whether a body was or was not acting in legislative capacity the cases in this strand of case law likewise ultimately turn on the objectives of the instruments the interpretation of which is in dispute, viz. directive 2003/4 and Aarhus Convention. That objective is public access to information.

For these reasons it is submitted that no general indications about what constitutes a legislative act in EU law may be taken away from the case law on access to documents. It is too tightly connected with acts regulating that field which acts contain formulations of

¹⁰⁸⁹ Articles 2(2) and 3(1) of directive 2003/4

¹⁰⁹⁰ *Flachglas Torgau GmbH v Bundesrepublik Deutschland*

¹⁰⁹¹ Paragraphs 33, 34 and 49 as well as paragraph 1 of the *dispositif*

¹⁰⁹² Judgment of the ECJ in case C-515/11 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*

¹⁰⁹³ Paragraph 26

¹⁰⁹⁴ Paragraph 28. Reading the judgment it would seem fair to assume that by “law” the ECJ meant an act of parliament.

¹⁰⁹⁵ Paragraph 33

¹⁰⁹⁶ Paragraphs 23 and 29

legislative acts or procedures or capacity which are in turn construed by the ECJ in the light of nigh overriding objective – access to information.

4.5. Convention on the Future of Europe

The foregoing parts of this section 4 have shown that the concept of legislative act formulated in section 4.1 (a regulation, a directive or a decision adopted via ordinary or special legislative procedure) may not be seen as *the* concept of legislative act obtaining in EU law. It has been severely criticised by commentators, it has led to confusion among both commentators and officers of the ECJ, parts of the constitutive treaties have proven difficult if not impossible to square with it and the case law of the ECJ offers no solution; if anything, it too is occasionally difficult to square with that concept without offering anything in its stead.

Article 289 TFEU on which that concept is based stems from the Constitutional Treaty. That was the first EU treaty where the “language of legislation” was widely employed. It is submitted that an analysis of its preparatory materials might offer an understanding of legislative acts in the current constitutive treaties. It is useful to start that analysis by considering the *status quo ante*, i.e. the EU law as it stood at the time when the Convention on the Future of Europe was convened.

The *status quo ante* has been helpfully described by Liisberg. He has opined that when the work on the Constitutional Treaty commenced there was no clear definition of legislation in EC law.¹⁰⁹⁷ The ECJ was said to use

the term “legislative act” in a broad, unspecified sense of the word, probably comprising all derived sources of law, at least those of general application.¹⁰⁹⁸

That would certainly seem to be borne out by the case law analysed above (in section 4.4). Thus, Liisberg considers that the term “legislation” was

sometimes used as synonymous with “law” in its most abstract and broad meaning, including the Treaties (perhaps excluding non-formalized sources of law), sometimes as synonymous with “regulatory measures”, encompassing all sources of *derived* law (perhaps excluding individual decisions).¹⁰⁹⁹

While it was therefore

¹⁰⁹⁷ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 7

¹⁰⁹⁸ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), pages 41 and 6

¹⁰⁹⁹ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 7. He illustrates his point by the term “legislation” in Eur-lex. See footnote 7 of his paper.

not possible to establish an exhaustive, consistent definition of legislation based on *who* adopts legislation, on *how* legislation is adopted, or on *what* separates the content of true legislation from other kinds of regulation,¹¹⁰⁰

Liisberg does state that four characteristics were generally accepted as minimum elements of an instrument which constituted a piece of EC legislation. Such an instrument would have had to be

1. a formalised, derived source of law (other than the constitutive treaties themselves);
2. binding;
3. of general application, *i.e.* normative;
4. adopted directly on the basis of the constitutive treaties.¹¹⁰¹

He, nevertheless, shows that ultimately no definition of legislative act was possible under EC law.¹¹⁰²

1. Typological definition was not possible because the EC Treaty did not categorise any particular type of acts (*e.g.* directives or regulations) as legislative or non-legislative.
2. Authorship definition was not possible because there was no one legislature in the EC: in different cases different institutions acting independently or in (various) combinations authored various acts.
3. Procedural definition was not possible because there was no one single procedure for adopting acts.
4. Content-based definition was not possible because the constitutive treaties set not criterion for determining which content (expression of original political will? basic and fundamental policy choices? something else?) should be decisive in determining whether an act was legislative.

That was the position as a matter of EC law when the Convention on the Future of Europe commenced its work. How did the Constitutional Treaty purport to change that *status quo ante*?

The Final Report of Working Group IX (on simplification of legislative procedures and instruments) of the Convention on the Future of Europe started by noting that

[c]itizens must be able to understand the system so that they can identify its problems, criticise it, and ultimately control it.¹¹⁰³

¹¹⁰⁰ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 8

¹¹⁰¹ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 7. Cf. the case law discussed in section 4.4 where the ECJ seems occasionally to have eschewed this criterion.

¹¹⁰² Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 8

¹¹⁰³ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 1

The Working Group then went on to suggest three levels of EU acts doing so in spite of the fact that in view

of the special features of the Union's institutional system, it is difficult to make a crystal-clear distinction, as is done in national systems, between matters falling to the legislative arm and those falling to the executive.¹¹⁰⁴

Those levels were¹¹⁰⁵

- legislative acts being the acts adopted on the basis of the constitutive treaty and containing essential elements in a given field;
- “delegated” acts being acts which would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by “the legislator” and determined by it on a case by case basis as well as enabling it to maintain control over such “delegation”;
- implementing acts being acts implementing legislative acts, “delegated” acts or acts provided for in the constitutive treaty itself.

This formulation alone discloses a problem. In spite of dividing acts into three, there seems to be a fourth category: “acts provided for in the constitutive treaty itself”. Nothing was said about whether such acts would or would not be legislative. Leaving this problem aside, postulating these three levels required some way of differentiating between them. Legislative acts in particular were determined by reference to three criteria: definition, adoption procedure and type of act. The definition-criterion was formulated as follows:

legislative acts are adopted directly on the basis of the Treaty and contain the essential elements and the fundamental policy choices in a certain field. The scope of such a concept is to be determined on a case-by-case basis by the legislator. It is consequently for the legislator to determine the degree of detail of a legislative act in a given field and whether and to what extent certain elements of the act should be delegated by way of “delegated” acts.¹¹⁰⁶

As a general rule legislative acts were to be adopted via co-decision, but the Working Group did foresee some legal bases providing for exceptions in this respect.¹¹⁰⁷ The types of legislative act were to be laws and framework laws.¹¹⁰⁸

One could already see a potential problem here. The foregoing quote suggests that legislative acts contain both the essential elements and fundamental policy choices, while earlier on in the final report¹¹⁰⁹ legislative acts were only said to contain essential elements. Although at

¹¹⁰⁴ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 8

¹¹⁰⁵ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, pages 8 and 9.

¹¹⁰⁶ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 10

¹¹⁰⁷ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 10. In view of the codecision becoming the principle legislative procedure, the Working Group (on page 15 of its Final Report) recommended that it be designated “legislative procedure”.

¹¹⁰⁸ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 10

¹¹⁰⁹ See the beginning of the list to footnote 1105 above.

first glance it might be difficult to perceive a problem here, a moment's consideration will show that there is one. What could "the fundamental policy choice" mean? While there is no express statement of its meaning in the Final Report, it would seem that there are two possibilities: it could mean the determination of a basic aspect of approach to be taken by the EU in a certain field or it could mean a sensitive political choice. The problem is that the first option seems already amply covered by "essential elements" (with the result that the added words carry no added meaning), while the latter has never been reserved to the institutions which adopt acts via co-decision (*i.e.* to the Council and the Parliament acting together). The power to make sensitive political choices could always be granted by those institutions to the Commission.¹¹¹⁰ It is conceivable that that was what Working Group IX desired to change, but considering (i) that this switch occurred in the text of the Final Report without any attention being drawn to it and (ii) that both formulations (one referring to essential elements only, and the other to essential elements and essential policy choices) are offered following an introductory sentence saying that Working Group IX proposes them,¹¹¹¹ the better view seems to be that the consequences of this switch simply eluded Working Group IX.

Furthermore, unfortunately, Working Group IX discussed all three levels of acts – legislative, "delegated" and implementing – under the heading of "Hierarchy of Union Legislation".¹¹¹² It is submitted that at best it raises the question of relationship between legislation and legislative acts – a question which is not answered in either any document of the Convention or in the Constitutional Treaty itself, and is, if anything, made more of an issue by the fact that Working Group IX itself seems to have referred to a fourth category of acts ("acts provided for in the constitutive treaty itself"). At worst, it indicates the sort of confusion which seems to obtain in the Lisbon Treaty, in the case law and in the writings of some commentators.

The Praesidium of the Convention on the Future of Europe did not clarify the matter further. Some concerns were expressed about there being exceptions to adoption of legislative acts by means of co-decision.¹¹¹³ The Praesidium did, however, state that

[t]he system described in draft Article I-33 implies that legislative acts are always adopted by the legislator.¹¹¹⁴

The first two paragraphs of Article I-34 (entitled "Legislative Acts") of the Constitutional Treaty (which substantially, and certainly in all relevant parts, corresponded to the draft Article I-33 commented by the Praesidium) read as follows.

¹¹¹⁰ See the discussion of the judgment of the ECJ in case C-133/06 in section 4.2.2 above.

¹¹¹¹ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 9

¹¹¹² Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 8

¹¹¹³ See Draft Constitution, Volume I – Revised Text of Part One (28th May 2003), CONV 724/1/03 REV 1, page 88 (comment to draft Article I-33). The text of the comment speaks of exceptions to "legislative procedure". It is submitted that the better view is that the Praesidium meant co-decision with the exceptions meaning what is now special legislative procedure.

¹¹¹⁴ See Draft Constitution, Volume I – Revised Text of Part One (28th May 2003), CONV 724/1/03 REV 1, page 88 (comment to draft Article I-33).

1. European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure as set out in Article III-396. If the two institutions cannot reach agreement on an act, it shall not be adopted.
2. In the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.

The Constitutional Treaty contained no language expressly dealing with legislation (as opposed to legislative acts) of the EU. It did, however, purport to explain what non-legislative acts were. Its Article I-35 was entitled “Non-legislative acts” and read as follows.

1. The European Council shall adopt European decisions in the cases provided for in the Constitution.
2. The Council and the Commission, in particular in the cases referred to in articles I-36 and I-37, and the European Central Bank in the specific cases provided for in the constitution, shall adopt European regulations and decisions.
3. The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Constitution provides that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt recommendations.

Articles I-36 and I-37, to which Article I-35(2) referred, dealt, respectively, with delegated European regulations (*i.e.* European regulations adopted by the Commission in exercise of the power granted to it in European laws or European framework laws) and with implementing acts (*i.e.* acts adopted on the basis of some other act by either the Commission or the Council). Finally, subparagraphs 2 – 6 of paragraph 1 of Article I-33 set forth types of acts.

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

It thus stands to reason that, as suggested in the Final Report of Working Group IX, delegated European regulations and implementing acts ended up not being legislative according to the Constitutional Treaty. Looking at the three criteria of legislative acts (definition, adoption procedure and type of act), the Constitutional Treaty would seem to follow the Final Report in respect of types of act: according to subparagraphs 2 and 3 of paragraph 1 of Article I-33 only European laws and European framework laws are legislative acts. With some hesitation it could also be opined that the Constitutional Treaty followed the Final Report in respect of adoption procedures: while there were more than “some” exceptions from the rule that European laws and European framework laws were to be adopted via ordinary legislative procedure (co-decision), that procedure was certainly the most noticeable one; in any case, the alternative (special legislative procedure) maintained – like the ordinary legislative procedure – the requirement that both main political institutions of the EU (*i.e.* the Council and the Parliament) participate.

However, consideration of procedures could cause one to re-think the conclusion that the Constitutional Treaty followed the Final Report on the issue of types of legislative acts. Legislative acts (European laws and European framework laws) could under the Constitutional Treaty be adopted via special legislative procedure: by the Council with participation of the Parliament or *vice-versa*. Sometimes that participation would consist of granting consent,¹¹¹⁵ sometimes – of giving an opinion.¹¹¹⁶ European regulations and European decisions, which according to subparagraphs 4 and 5 of paragraph 1 of Article I-33 of the Constitutional Treaty were not legislative acts, could however be adopted in exactly the same way: for instance competition law was proposed to be regulated precisely by such non-legislative acts (European regulations of the Council adopted after consulting the Parliament¹¹¹⁷).

While in view of the wording of Articles I-33 – I-37 of the Constitutional Treaty it could not have successfully been argued that such acts were legislative within the meaning of those provisions, it does raise the question what is meant by the “type” of legislative acts. Determination of the type should not fall back on the adoption procedure: that was a separate criterion. Looking at effect of legislative acts, it would not seem to differ from that of non-legislative acts bar recommendations and decisions; they are all binding, both groups include directive-style acts binding as to the result to be achieved and in both groups only regulation-style acts are said to be mandatorily of general application.¹¹¹⁸ Both legislative and (relevant) non-legislative acts were to be published in exactly the same way with the same *vacatio legis* (Article I-39 of the Constitutional Treaty). Both legislative acts adopted via special legislative

¹¹¹⁵ See, for example, Article I-54(4) of the Constitutional Treaty.

¹¹¹⁶ See, for example, Article I-54(3) of the Constitutional Treaty.

¹¹¹⁷ Article III-163(1) of the Constitutional Treaty

¹¹¹⁸ Article I-33 of the Constitutional Treaty

procedure and relevant non-legislative acts (those adopted via similar procedure) were to be signed by the same person: the president of the adopting institution (Article I-39 of the Constitutional Treaty).

Leaving aside the differences in adoption procedure (which, as mentioned, constitute a separate criterion, and hence cannot be considered relevant for determining type – unless one wants to conflate the two criteria),¹¹¹⁹ there is no difference in type between (at least some) legislative and non-legislative acts in the Constitutional Treaty. The only difference is in name.

Where things get even more problematic is the “definition” criterion. It is useful to set it out anew:

legislative acts are adopted directly on the basis of the Treaty and contain the essential elements and the fundamental policy choices in a certain field. The scope of such a concept is to be determined on a case-by-case basis by the legislator. It is consequently for the legislator to determine the degree of detail of a legislative act in a given field and whether and to what extent certain elements of the act should be delegated by way of “delegated” acts.¹¹²⁰

While Article I-33 of the Constitutional Treaty did say that European laws were to be of general application, there was no such statement in the Constitutional Treaty in respect of European framework laws. That might be thought surprising since European framework laws essentially corresponded to directives, and there was explicit case law of the ECJ to the effect that directives were of general application.¹¹²¹ Be that as it may, there was no language in the Constitutional Treaty mandating that legislative acts contain any essential elements of a given field or any fundamental policy choice. In practice such a requirement would seem untenable: it would preclude the Council and the Parliament from employing a legislative act to modify a non-essential element of an already existing legislative act leaving such amendments to be made exclusively via “delegated” acts. Leaving aside the issue of the different institutional bias of the Commission (which according to Article I-36 of the Constitutional Treaty was to adopt delegated European regulations) compared to that of the Council and the Parliament, it is worth recalling any “delegation” was – according to the Final Report – to be in the discretion of “the legislator”. If that legislator cannot decide to change its own acts itself, but must grant that power to someone else, it has no discretion in this respect. Furthermore, looking at particular legal bases it might be difficult to imagine how a legislative act adopted under, for instance, Article III-319 of the Constitutional Treaty and authorising the grant of macro-financial assistance to a particular third country could include any essential elements

¹¹¹⁹ Such differences existed at least in some cases: compare a European regulation with a European law adopted via ordinary legislative procedure.

¹¹²⁰ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 10

¹¹²¹ See paragraphs 15 – 17 of *Gibraltar v Council* discussed in section 4.4.1 above.

for the relevant field (*i.e.* any elements essential to the field of granting macro-financial assistance to third countries).¹¹²²

Thus the Constitutional Treaty adopted only one of the three criteria suggested by Working Group IX (procedure), and even that one criteria did not distinguish legislative acts from all other acts: some special legislative procedures were the same as several non-legislative procedures, for instance the one for adoption of rules regulating competition law. In essence, the distinction between legislative and non-legislative acts seems to have existed first and foremost in name. At this point it is difficult to disagree with the following opinion of Liisberg.

In the end, the introduction of a distinction between legislative and non-legislative acts in the Constitutional Treaty, along with attempts to introduce separation of powers and a norm hierarchy will not change the genetic code of the EU. The Treaty provides no definition of legislation, neither procedural nor material, but simply a formal definition, reserving the designation “legislation” to two instruments, European laws and European framework laws, which will produce effects and be adopted according to procedures not always different from the effects and procedures pertaining to non-legislative regulations. The aim of a genuine hierarchy of norms is not accomplished.¹¹²³

Looking finally at the statement of the Praesidium that legislative acts were to be adopted only by the legislator, unless that statement is likewise understood as a formality – since those acts are called “legislative”, therefore their adopter is the legislator – the statement would seem very confusing. One option would be to understand it as meaning that the Council and the Parliament are the legislators (in some substantive sense) because they adopt legislative acts. While the Constitutional Treaty contains no such statement, one could – as suggested by Praesidium – imply that. The consequences of such implication would be unclear. Would the Council when not acting via a procedure which even reminds a legislative procedure¹¹²⁴ still have been a legislator? If yes, it is unclear why the resulting acts would not have been not legislative. If not, then it stands to reason that the legislator (the Council and/or the Parliament) is the substantive legislator only when acting jointly.

If so, however, why would the Council not be a legislator when it acts jointly with the Parliament via a procedure which is not called a legislative procedure, but which exactly copies another one which is called legislative (as was the case with the Council in the field competition law – Article III-163(1) of the Constitutional Treaty)? The only difference lies in the name. Yet, if it was the legislator in case of Article III-163(1) of the Constitutional

¹¹²² The corresponding provision of the TFEU (Article 212) has been employed for doing so. See the judgment of the ECJ in case C-409/13, paragraph 2. The judgment is discussed at length in section 1.3.2 of this thesis.

¹¹²³ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 43

¹¹²⁴ For example when adopting the common customs tariff under Article III-151(4) of the Constitutional Treaty. The corresponding provision in the TFEU is Article 31. It likewise does not even reminisce of a legislative procedure within the meaning of Article 289 TFEU.

Treaty, it would again be unclear why the resulting acts are not legislative.¹¹²⁵ Thus, it stands to reason that the legislator (the Council and/or the Parliament) is the substantive legislator only when acting via a procedure called a legislative procedure.

More importantly, if one compares a Commission's European regulation with a European law, it is difficult to see much difference between the two as far as the type of the act goes. The adopter and the procedure for their adoption are different, but they have the same effect, apply in the same way, are signed upon adoption in the same way and are published in the same way. The task set out in the Final Report of ensuring that

acts which have the same nature and the same legal effect must be produced by the same democratic procedure,¹¹²⁶

was not achieved.

It would thus seem that the contention that the Constitutional Treaty adopted the approach under which legislative acts are always adopted by the legislator is untenable in any bar the formal sense explained by Liisberg.

The actual discussions which took place within the Working Group IX do not offer any clarification. Bearing in mind that the Constitutional Treaty ended up containing a formal (shorthand-like) definition of legislative procedure and that the Final Report advocated a material-procedural definition, it should not be surprising that different views were expressed within Working Group IX. According to the Secretariat of the European Convention the majority of members of Working Group IX

consider that the concept of legislative act should be defined by its content and not by the adoption procedure[, while] some propose defining a legislative act as one which determines the fundamental principles and general guidelines in a given area, embodies political choices or establishes the essential elements of implementing measures in the field in question.¹¹²⁷

It is curious then that the Constitutional Treaty did not incorporate such concept.

The majority of members of Working Group IX seem to have further thought that

designation of an act should depend on its content,¹¹²⁸

and that

a distinction must be *introduced* in the treaty between what is legislation and what is implementation.¹¹²⁹

¹¹²⁵ As mentioned, there are no differences in terms of type between legislative acts and non-legislative acts (within the meaning of Article I-33 of the Constitutional Treaty): they have the same effect, apply in the same way, are signed upon adoption in the same way and are published in the same way. The difference exists in names.

¹¹²⁶ Final Report of Working Group IX on Simplification (29th November 2002), CONV 424/02, page 2

¹¹²⁷ Working Document 13 of Working Group IX (6th November 2002), page 4

¹¹²⁸ Working Document 13 of Working Group IX (6th November 2002), page 4

The latter statement would seem to suggest that majority of the members of Working Group IX were of the opinion that there was no such distinction at the time when Working Group IX was meeting. Considering that as far as legislative procedures are concerned not much has changed with the Lisbon Treaty compared to the EC Treaty and that Article 290 and 291 TFEU do not deal with types of acts or power to adopt them, but with mechanisms of control over the power granted, it would seem to follow that, should the opinions of the members of Working Group IX be correct, no such distinction would exist in current EU law either – bar that which is constituted by the use of “legislative act” as a term of art. That distinction did, however, exist in the EC Treaty (although the terminology differed: see Article 202 EC and Article 251 EC).

Of individual members of Working Group IX Matti Vanhanen seems to have advocated most explicitly a content-based approach to legislative acts arguing that

a legislative act has to be defined by its content, the substance, and not by its adoption procedure.¹¹³⁰

He further supported introduction of the distinction between legislation and implementation and expressly criticised “legislative procedure” as a misleading term arguing that should it be adopted, it would not mean that legislation is not adopted via different procedures.¹¹³¹

Admittedly, approaches which were based neither on the content of acts nor on the procedure for their adoption were advocated within the Working Group IX as well. For instance Johannes Voggenhuber suggested that all legislative acts (laws and framework laws) be adopted via legislative procedure.¹¹³² That could be understood as advocating a procedural concept of legislation as well as implying some other concept, but dealing expressly only with – on that assumption – a separate issue how legislative acts should be adopted. Michel Petite seems to have advocated an institutional concept of legislation suggesting that laws were acts adopted by the legislator.¹¹³³ That would however have necessitated determination of the legislator – a task which according to Jean-Claude Piris, a rapporteur of Working Group IX and the then director of the Council’s legal service, would have been very difficult to complete.

¹¹²⁹ Working Document 13 of Working Group IX (6th November 2002), page 3

¹¹³⁰ Working Document 24 of Working Group IX (15th November 2002), pages 2 and 6

¹¹³¹ Working Document 24 of Working Group IX (15th November 2002), pages 4 and 6

¹¹³² Working Document 26 of Working Group IX (20th November 2002), page 3. See to the same effect Johanna Maij-Weggen’s opinion on page 3 of Working Document 18 of Working Group IX (13th November 2002).

¹¹³³ Working document 08 of Working Group IX (31st October 2002), page 5. Liisberg further notes that it was opined in the Working Group that

[w]here acts are adopted by the Commission, there can be no question as to whether an act is legislative or non-legislative in nature, since it is not able to adopt legislative acts,

and that

[i]n the end, it was not material criteria, but rather procedural and institutional criteria that helped the drafters decide how to label most, but not all, of the treaty-based powers of the institutions.

See Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), footnote 44 and page 26. That is a clear example of an identity-based concept of legislative act. See to the same effect the end of page 19 and the beginning of page 20 of Liisberg’s paper.

Be it noted first that it would be very difficult to transpose to the Union the **customary clear distinction between legislative and executive authority**, i.e. between some institutions empowered only to pass laws and others merely implementing legislation or issuing regulations. It is certainly open to the Treaty's authors, should they see fit, to undertake such a project, but the powers conferred on the institutions by the Treaties are so convoluted that such a distinction between legislative and executive authority could not be made without upsetting the existing balance. The present institutional system of the Union is not modelled on that of a State.¹¹³⁴

The point has, even more forcefully, been made by Armin Von Bogdandy and Jürgen Bast who have opined that endowing the EU with legislative power

could only be achieved at the price of restructuring the Union's system, from the ground up, uprooting the current network of authorities.¹¹³⁵

Piris's own position as regards legislative acts (unlike the position of the members of Working Group IX his position concerned *lex lata*) seems, at first glance, most akin to that of Konstadinides (discussed in section 4.2.2 above): for him all second-level rules, *i.e.* rules adopted directly on the basis of the constitutive treaties, seem to constitute legislative acts (regardless of who adopts them; he explicitly mentions ECB in this respect).¹¹³⁶ However, he would then seem to immediately contradict himself by suggesting that regulatory and executive acts may be adopted directly on the basis of the constitutive treaties as well.¹¹³⁷ First, unless one postulates a procedural criterion (which according to aforementioned opinion of Piris is virtually impossible), for that distinction to exist one would need to assume some content-based criterion of legislation – to distinguish between legislative acts, on the one hand, and regulatory and executive acts, on the other (all of which are adopted on the basis of the constitutive treaties). Second, it is unclear how – in view of Piris's own aforementioned point about the nature of the EU – it is possible for any act of the EU to be “executive”.

Writing about the preparatory work for the Constitutional Treaty Liisberg has concluded that for all the attempts at defining legislative function *vis-à-vis* the executive one¹¹³⁸ or at

¹¹³⁴ Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002), Working document 06 of the Working Group IX (6th November 2002), page 20

¹¹³⁵ Armin von Bogdandy and Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Laws and Prospects for Its Reform*, (2002) 39 *Common Market Law Review* 253

¹¹³⁶ Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002), Working Document 06 of the Working Group IX (6th November 2002), page 21. In doing so he seems to rely on the judgment of the ECJ in case C-202/88 discussed above in section 4.4.2 of this thesis.

¹¹³⁷ Speaking Note to Working Group IX "Simplification of legislative procedures and instruments" of the Convention on the future of the Union (17th October 2002), Working Document 06 of the Working Group IX (6th November 2002), page 22

¹¹³⁸ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 12

distinguishing legislation from implementation¹¹³⁹ or at formulating legislative nature (it having been frequently assumed during the drafting that some powers were *a priori* of legislative nature)¹¹⁴⁰ the distinction between legislative and non-legislative acts ended up having little real significant.¹¹⁴¹

[T]he distinction between legislative and non-legislative acts should not be able to sustain false expectations or fears of a transformation of the EU in the image of a national democracy – the EU is still an “unidentified political object” under the Constitutional Treaty, regardless of the imported language of legislation from national democracies. /.../ The new distinction between legislative and non-legislative act, it seems, is basically a harmless ornament in the European construction, the added value and beauty of which mainly depend on the eyes of the beholder.¹¹⁴²

It is, perhaps, more correct to say that other than in name the Constitutional Treaty contained no such distinction at all. And even naming of some acts as legislative and of others as not legislative was to a large extent random.¹¹⁴³

Summing up the foregoing analysis of the Constitutional Treaty, it is possible to say that the meaning of legislative act under the Constitutional Treaty – to the extent that one purports to endow it with something other than Liisberg’s formal sense¹¹⁴⁴ – was just as unclear as it was before the Constitutional Treaty. It has been opined that before the Constitutional Treaty “legislation” was basically a term of convenience in EU law, and that there was no desperate need for a definition of that term.¹¹⁴⁵ The foregoing analysis shows that all the Constitutional Treaty succeeded in doing was assign significance as a matter of EU law to that term of convenience.

As for the preparatory materials of the Constitutional Treaty, they seem to differ so considerably from the treaty itself that not much could be taken away from them. Furthermore, the opinions expressed by the drafters are frequently very different one from the other. To the extent that a similarity may perhaps be found (support for some content-based concept of legislative act) among their opinions, that similarity went “unfinished”: there was no debate about legislative or non-legislative nature of various legal bases (the EU may act

¹¹³⁹ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 13

¹¹⁴⁰ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 26

¹¹⁴¹ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 3

¹¹⁴² Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 45

¹¹⁴³ See the text to footnote 303 above.

¹¹⁴⁴ “The Treaty provides no definition of legislation, neither procedural nor material, but simply a formal definition, reserving the designation “legislation” to two instruments, European laws and European framework laws /.../” See text to footnote 1123 above.

¹¹⁴⁵ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 9

only on specific legal bases).¹¹⁴⁶ In any event, the aspect in which there was such similarity of opinions (a content-based concept of legislative act) did not find its way into the Constitutional Treaty.

It is submitted that in such a situation an attempt to show how and to what extent the meaning of “legislative act” found in the Constitutional Treaty was transferred into the Lisbon Treaty would serve no purpose. Since there is no such clear meaning aside from a very formal one (European laws and European framework laws as legislative acts) akin to that found in the TFEU (a regulation, a directive or a decision adopted via ordinary or special legislative procedure), any result of such an exercise will not be able to offer any additional insight.

4.6. Conclusion

Section 2 of this thesis enabled the formulation of a simple concept of legislative act: a regulation, a directive or a decision adopted via ordinary or special legislative procedure; all other acts are not legislative. The analysis shows that such an approach faces several difficulties.

- It is inconsistent with some parts of the constitutive treaties, but consistent with others.
- There is considerable case law of the CJEU which assumes legislative act to have some different meaning.
- Academic commentary has been mostly critical of that concept.
- The institutional features which are needed for legislation to fulfil its mandate (enhancing legitimacy, avoiding oppression, enhancing the rule of law) are, to a large extent, absent as far as acts which are legislative on that concept are concerned.

Furthermore, the term “legislative act” has on several occasions lead legal professionals into confusion and error. Consideration of the Constitutional Treaty, if anything, muddies the waters even further: no clarity may be found there.

That is the position even without tackling complex questions such as whether an inter-institutional agreement (Article 295 TFEU) is a legislative act,¹¹⁴⁷ why is Parliament’s power legislative in procedures where all it does is offer its opinion about an act¹¹⁴⁸ or when does legislative power of the Council (or the Parliament arise).¹¹⁴⁹ Without being able to deal with

¹¹⁴⁶ Jonas Bering Liisberg, *The EU Constitutional Treaty and Its Distinction between Legislative and Non-legislative Acts – Oranges into Apples?*, Jean Monnet Working Paper 01/06 (NYU School of Law 2006), page 27

¹¹⁴⁷ De Witte has suggested that it is not, but his reasoning seems somewhat too narrow for EU law. See *Legal Instruments and Law-Making in the Lisbon Treaty*, in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008 SpringerWienNewYork), page 103.

¹¹⁴⁸ See, for instance, the judgment of the ECJ in case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, paragraph 42.

¹¹⁴⁹ In its judgment in case C-151/98P *Pharos SA v Commission of the European Communities*, at paragraph 22 the ECJ suggested that in what is now a special legislative procedure the Council’s legislative power arises only once the Commission has submitted its proposal for the act. It furthermore suggested that Council’s legislative power was necessary to modify the Commission’s proposal.

the simpler problems (such as finding a consistent concept), there is hardly any chance of successfully answering these more exotic questions.

The analysis disclosed no concept of legislative act which would be reconcilable even simply with all provisions of the current constitutive treaties. Looking at legal practice, it seems highly likely that in all cases where the constitutive treaties expressly make something hinge on an act being legislative,¹¹⁵⁰ the ECJ (in the event of a dispute) would base its decision on the wording of the constitutive treaties, *i.e.* on the concept formulated in section 4.1. More importantly, in some cases the concept of legislative act would not even seem to matter at all in practice: there may be different ways of achieving the same result.¹¹⁵¹

It is submitted that ultimately the concept formulated in section 4.1 being the correct one in law is a proposition difficult to justify. First, that concept may at best represent part of the entire story.¹¹⁵² It gives no indication and none may be found otherwise as to what the other part may be. And if there are some acts which are legislative by virtue of application of some other criteria, then what was the point of saying that a regulation, a directive or a decision adopted via ordinary or special legislative procedures are is a legislative act? There seems to be no answer to that question.

Second, it should be remembered that the entire exercise of introducing language of legislation into the constitutive treaties was undertaken with a view to enhancing legitimacy of the EU and the rule of law in the EU. The concept formulated in section 4.1 is unable to do that: being based on shorthands that concept itself is nothing more than a shorthand (“legislative act” standing for any of a regulation, a directive or a decision adopted via ordinary or special legislative procedure). If anything, that concept makes EU law more

¹¹⁵⁰ As is the case with, for instance, application of Protocol (No 1) on the Role of National Parliaments in the European Union and Protocol (No 2) on the Application of the Principles of Subsidiary and Proportionality. Important parts of either of them only apply to draft legislative acts (see Article 2 of each protocol).

¹¹⁵¹ Article 290 TFEU is a good example. Jürgen Bast has opined that “only a legislative act has the capacity to include a delegation pursuant to Article 290 TFEU.” See Jürgen Bast, *New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, (2012) 49 *Common Market Law Review* 893. While that might, strictly speaking, be correct, it is difficult to see what practical consequences would follow from that. Although Article 290(1)(1) TFEU does say that

[a] legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act,

it was demonstrated in section 3 above that Article 290 TFEU is mechanism for control of the exercise of the power granted to the Commission. The same controls as those mandated by Article 290 TFEU could be created *ad hoc* by providing so in the instrument by which the power, which the grantor desires to control, is granted. As for amending or supplementing non-essential elements, it has likewise been shown in section 3 that there is no distinction between supplementing, on the one hand, and (for instance) implementing on the other. Furthermore in *ESMA* the ECJ explicitly opined that even Articles 290 and 291 TFEU together do not constitute a complete legal framework under which certain powers may be granted; grant of similar powers to EU agencies was lawful in spite of no provision of the constitutive treaties not simply not providing for that, but not even mentioning that (see *ESMA*, paragraphs 78, 79 and 87). In *EURES* the ECJ went further still deeming lawful the onwards grant by the Commission to a body established by it of the powers which had been granted to the Commission by the Council and the Parliament jointly. That was lawful in a situation when that body was established in exercise of the very powers which were granted to the Commission and which it then passed on to that body. See section 3.2.2 above. That being so, Bast’s contention is strictly speaking correct, but no practical consequence follows from that correctness. Nothing hinges on an instrument being a legislative act.

¹¹⁵² For instance something else would be required to account for the language contained in Article 2 TFEU.

complex and confusing opening it up to disputes which would not have arisen prior to the introduction of the language of legislation into the constitutive treaties.

5. Conclusion

This thesis set out to answer two questions.

1. What concept of legislative act obtains in EU law?
2. Have the objectives which were sought to be achieved by means of introduction of “language of legislation” (legislative acts) into EU law been met?

To do so, the thesis began with an analysis of legislative procedures: Article 289(3) TFEU would suggest that the concept of legislative acts at the very least relies on legislative procedures. Analysing ordinary and special legislative procedures in turn, it was shown that, in reality, neither of them is a legislative procedure, but a class of procedures. Each of “ordinary legislative procedure” and “special legislative procedure” covers different procedures which, in either case, share basic features.

Via an analysis of ordinary legislative procedures it was demonstrated that legislative procedures in general are employed in all areas of competence of the EU (bar the CFSP) and in respect of subject-matters of various importance. Acts are equally adopted via legislative procedures (and indeed ordinary legislative procedures) in areas of high importance (be it for the EU or its citizens) or of – relatively speaking – low importance (be it for the EU or its citizens). Furthermore, there was no pattern to the way different legislative procedures were dispersed between different areas of competence and different subject-matters.

Analysing specifically special legislative procedures, it was demonstrated that the class is ill-defined in EU law: there are at least 41 legal bases in respect of which there is reasonable doubt whether the procedure they mandate is a special legislative procedure or a non-legislative procedure.¹¹⁵³ The case law of the CJEU (specifically the GC¹¹⁵⁴) is openly contradictory on this point, although it is worth mentioning that advocates general seem to favour considering those legal bases as mandating special legislative procedures. On that approach, legislative procedures could be seen as covering all areas of EU competence: even CFSP.¹¹⁵⁵

There are only three commonalities between all legislative procedures. First, the consent of the Council is always necessary for adopting an act via a legislative procedure. Second, the

¹¹⁵³ The doubt is occasioned by the fact that, unlike others, those legal bases do not call the procedures mandated by them “special legislative procedures” despite the fact that they mandate the adoption of a regulation, directive or decision by the Council with the participation of the Parliament. According to Article 289(2) TFEU “[i]n the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.”

¹¹⁵⁴ There are no decisions of the ECJ in point.

¹¹⁵⁵ Articles 27(3) and 41(3)(1) TEU (falling within the field of CFSP) mandate adoption of decisions by the Council after it has consulted the Parliament.

Parliament always participates in some capacity in adoption of acts via legislative procedures. Third, no legislative procedure sets any substantive criteria to the content of the act which results from it (*e.g.* the act may be general or case specific; it is not even clear whether the act needs to be binding¹¹⁵⁶). It is worth mentioning that the Commission's participation is not omnipresent in legislative procedures.¹¹⁵⁷ Nor is agreement of both the Council and the Parliament to adopt an act always sufficient for adoption of the act via a legislative procedure:¹¹⁵⁸ on occasion the consent of either the Commission (Article 226 TFEU) or of a particular member state (Articles 25(2), 172(1), 188(2), 223(1)(2) and 262 TFEU) is required.

Returning to the dispersal of legislative procedures among different subject-matters, the one pattern which does emerge from the constitutive treaties might seem surprising: the less important an issue is, the likelier it is that the constitutive treaties mandate a "heavy" procedure.¹¹⁵⁹ While there are issues of lesser importance regulated by acts adopted via "heaviest" of procedures (*e.g.* Article 195(2) TFEU mandating ordinary legislative procedure for adoption of EU measures complementing actions of member states on tourism) and issues of higher importance regulated by acts adopted via "light" of procedures (*e.g.* Article 112 TFEU mandating a non-legislative procedure altogether for adoption of intra-EU countervailing charges), it is nigh impossible to find in the constitutive treaties legal bases of lesser importance which mandate "light", *i.e.* non-legislative, procedures. Coming from a national-law-background this would seem counter-intuitive: the more important an issue, the "heavier" is the procedure which is mandated by laws of member states.¹¹⁶⁰ It is submitted that the reason for such a pattern in EU law lies in the fact that the "lighter" the procedure, the higher the relative weight of the Council, and hence of each specific member state, in such a procedure.¹¹⁶¹ Thus while national laws ordinarily seek to safeguard more direct legitimacy (*i.e.* input of citizens), EU law seeks to safeguard powers of member states (*i.e.* input of governments of member states). In this respect little has changed compared to the pre-Lisbon Treaty position.

The analysis conducted in section 2 showed that despite being called "legislative procedures" their introduction into EU law did not change the procedures for adoption of EU acts so as to make them closer to those of a classical nation state. In fact, surprisingly little – if any – substantive differences may be found between ordinary legislative procedures and special legislative procedures set forth in the Treaty of Lisbon, on the one hand, and, respectively, the co-decision procedure and procedures for adoption of acts by the Council with the

¹¹⁵⁶ See the discussion in section 2.2.1 and specifically the judgment of the ECJ in case C-77/11.

¹¹⁵⁷ Article 223(1) TFEU does not and Articles 83(2), 86(1)(1), 87(3)(1) and 89 TFEU might not grant it any role in the (special) legislative procedures they mandate.

¹¹⁵⁸ That is so even if one were to discard the extensive abilities of the Commission to abstain from initiating a legislative procedure or terminate it (by means of withdrawing its proposal) before any act is adopted.

¹¹⁵⁹ If ordinary legislative procedures are deemed the "heaviest" ones.

¹¹⁶⁰ For instance, in Estonia issues of lesser importance may ordinarily be regulated by regulations of the government or individual ministers, while issues of higher importance require an act of parliament, which at least theoretically offers a more direct form of legitimacy of public authority. Indeed, the very objective of the principle of parliamentary reservation (*Parlamentsvorbehalt*), common in countries belonging to the Germanic constitutional tradition, is to ensure that that is so (see footnote 126 above).

¹¹⁶¹ This is particularly well-demonstrated by the history what is now Article 64 TFEU. See footnote 350 above for a detailed explanation.

participation of the Parliament¹¹⁶² set forth in the Treaty of Nice, on the other. There are more legal bases in the Lisbon Treaty which mandate what are now ordinary or special legislative procedures than there were in prior incarnations of the constitutive treaties, but that is a quantitative, not a qualitative change.

It may therefore be concluded that introduction of “ordinary legislative procedure” and “special legislative procedure” is essentially nothing more than a labelling exercise. The analysis contained in section 2 showed that “ordinary legislative procedure” and “special legislative procedure” are nothing more than terms of art employed as shorthands for denoting the procedures described in Articles 289(1) and 294 TFEU (ordinary legislative procedures), and 289(2) TFEU (special legislative procedures). Aside from situations where some particular legal basis expressly says otherwise, nothing more may be attributed to or read into those terms. They bear no connotation at all, and certainly none which could somehow, however remotely, be linked with the common understanding of the meaning of “legislation” under national laws.

Having reached that conclusion, the thesis then turns to the issue of Articles 290 and 291 TFEU, *viz.* delegated and implementing acts. The objective is to assess the relationship between Articles 290 and 291 TFEU, on the one hand, and legislative acts, on the other.¹¹⁶³ Via an analysis of the case law of the ECJ (as well as the 2016 inter-institutional agreement on better law-making and some soft-law instruments¹¹⁶⁴) it was demonstrated

- that the grantor of power (the “EU legislature”) has¹¹⁶⁵ a discretion which article of the two to resort to in a given case,
- that the extent of the power granted to the grantee (ordinarily the Commission) was not a criterion in deciding which article of the two must be resorted to. The discretion of the grantee was, in fact, wholly irrelevant for that purpose,¹¹⁶⁶
- that the two articles in no way constitute a code on grant of power (by the “EU legislature”): grant of power otherwise than under either of those articles is perfectly lawful,¹¹⁶⁷ and
- that the standard of judicial review by the ECJ as to whether a recourse to either of the two articles is lawful in any given case is doubly loosened: the ECJ only looks for manifest errors in whether the EU legislature could reasonably have thought that Article 290 or 291 TFEU, as the case may be, should be employed.

Furthermore, that analysis enabled to “sharpen” the point where there seem to arise difficulties with delimiting the scope of Article 290 TFEU from that of Article 291 TFEU.

¹¹⁶² Or *vice-versa*. There was no common name for such procedures under the Treaty of Nice.

¹¹⁶³ How do Articles 290 and 291 TFEU relate to legislative acts and legislative power? Are the powers referred to in both of them legislative? Or only in one of them? In that case, which one? Or might neither article be about a power which is legislative? If the power to which set forth is legislative, are the acts adopted on their basis likewise legislative? If no, then why not?

¹¹⁶⁴ See section 3.3 for details.

¹¹⁶⁵ Subject to hard limits. See text to footnote 1169 below.

¹¹⁶⁶ See, *inter alia*, *Visas* discussed in section 3.2.3 above.

¹¹⁶⁷ See *ESMA*, discussed in section 3.2.8 above, as well as Articles 182(5) and 311 TFEU, mentioned in the text to footnote 130 above and in that footnote itself.

Such difficulties arose between supplementing (referred to in Article 290 TFEU) and implementing (referred to in Article 291 TFEU). Amending, to which Article 290 TFEU likewise refers, has a clear, although (like legislative procedure) formalistic meaning: it essentially stands for making orthographical changes by the grantee of power in the instrument by which the power was granted to it; the content of the changes does not matter.

It was then demonstrated that virtually all treatments of Articles 290 and 291 TFEU found in scholarship are very difficult – if indeed not impossible – to square with the case law of the ECJ.¹¹⁶⁸ They all rely on assumptions which either are contradicted by the case law or, on a deeper analysis, are shown not to be supported by the constitutive treaties. A conceptualisation of Articles 290 and 291 TFEU, which is fully in accordance with the case law and the constitutive treaties as well as the practice which has developed since the Lisbon Treaty was offered in section 3.5. Articles 290 and 291 TFEU are not about acts or power of the grantee at all. Both use “acts” as a shorthand and both assume existence of granted power and at least two level of acts: the granting one and the one adopted in exercise of the granted power. The articles don’t even necessarily regulate powers of control of the grantor either: they are merely default catalogues of mechanisms of control which the grantor of power (ordinarily the Council and the Parliament acting jointly) may employ. While there are some “hard” limits when either of the two articles may not be employed,¹¹⁶⁹ most of the time both articles are triggered so that the EU legislature has a choice which one to resort to. That choice is essentially political, and the ECJ will not interfere with it; the ECJ will only interfere if either of those articles is resorted to in violation of the hard limits. The doubly loosened standard of judicial review ensures that: it is sufficiently extensive to determine when either of those articles has been resorted to without having been “triggered”, but at the same time ensures that when the article has been “triggered” the ECJ does not interfere with the political choices of the competent institutions. Articles 290 and 291 TFEU essentially represent a partial “treatification” of pre-existing comitology.

Being nothing more than default catalogues of controls¹¹⁷⁰ over the power granted by some institution (ordinarily the Council and the Parliament acting jointly) to another, the question whether Article 290 and 291 TFEU power or acts are legislative cannot arise. Posing it is a category error. How do Articles 290 and 291 TFEU relate to legislative acts and legislative power? – Speaking in terms of hierarchy of acts or structure of EU norms, they do not: neither is about acts at all.

Finally, the thesis tackles the differences between legislative and non-legislative acts. A concept of legislative act is offered based on chapters 2 and 3 a (*i.e.* based on legislative procedures and the meaning of Articles 290 and 291 TFEU): a regulation, a directive or a decision adopted via ordinary or special legislative procedure;¹¹⁷¹ all other acts are not legislative. Somewhat surprisingly, perhaps, such a concept finds fierce opposition from most

¹¹⁶⁸ Treatments by Kieran St C Bradly and Jürgen Bast are notable exceptions here. See sections 3.4.8 and 3.4.9 above.

¹¹⁶⁹ For instance, Article 290 TFEU controls may not be employed when the power is granted to the Council. See the text to footnote 866 and that footnote itself.

¹¹⁷⁰ As evidenced by *ESMA* the creation of *ad hoc* controls is perfectly lawful.

¹¹⁷¹ This is essentially the concept which is contained in Article 289(3) TFEU.

academic commentators. While the concepts which they offer in its stead differ (ranging from purely procedural to content-based ones), the reason why they offer such alternatives seems to be constant. It lies in the fact that introduction of the concept of legislative act into EU law was said to have as its objective the increase of democratic legitimacy and transparency of the EC as well as simplification of the instruments employed by it when exercising public authority.¹¹⁷² The concept formulated on the basis of chapters 2 and 3 is unable to attain, or even further the attainment of, any of these objectives: being based on legislative procedures and hence shorthands that concept itself is nothing more than a shorthand (“legislative act” standing for any of a regulation, a directive or a decision adopted via ordinary or special legislative procedure). Regardless of whether such concept of legislative acts is ultimately correct as a matter of EU law, a jurisprudential analysis (conducted in section 4.2.2) showed that such concept of legislative act has very little in common with legislation as understood in jurisprudence. If the EU as a polity is conceptualised in the same way as a nation-state and its legislative acts are then assigned the same role in the EU as legislation in a nation state, then – jurisprudentially speaking – it would at least be arguable that legislative acts of the EU would come close to being legislation in opposition of the rule of law. On the concept formulated on the basis of section 2 and 3 of this thesis, EU legislative acts would simply not have the institutional features which are necessary for legislation to fulfil its mandate. That concept of legislative act should not, jurisprudentially speaking, be deemed a concept of legislation at all.

Thus, the position of commentators is understandable. Might the concept of legislative act be different from the one initially formulated on the basis of sections 2 and 3 of this thesis? Is any of the concepts which the commentators perhaps offer tenable as a matter of EU law? An analysis of the constitutive treaties and the case law of the ECJ answers these questions with a “yes” and a “no” respectively.

The analysis of the constitutive treaties shows that the concept of legislative acts as nothing more than regulations, directives or decisions adopted via ordinary or special legislative procedure is irreconcilable with some parts of the constitutive treaties (*e.g.* Article 2 TFEU) and requires so convoluted an argument to be reconciled with others (*e.g.* Articles 24(1)(2) and 31(1) TEU) as to make the concept very doubtful. The case law of the ECJ on legislative acts (or power) offers no help in this respect. There are, by and large, two strands to it. One strand, developed on the basis of instruments regulating access to documents, shows itself to ultimately turn on the objective of those instruments. Hence no general conclusions about legislative acts may reliably be drawn from it. The other strand likewise suffers from problems. Most (although not all) authorities in it pre-date the Lisbon Treaty. Different language versions of the judgments are difficult to reconcile with one another, and these differences are precisely in issues which are of critical importance for present purposes. Thus the most (if anything) that may be taken away from it is that it would seem to mandate some content-based concept of legislative acts (possibly even legislative acts as general acts).

¹¹⁷² See Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001), especially pages 22 and 23 (the so-called “Laeken Declaration”), SN 300/1/01 REV 1.

However, the more modern and more consistent case law on standing of private parties to bring direct actions at the CJEU on the basis of the “regulatory-option” in Article 263(4) TFEU (which lest it is forgotten was a Lisbon Treaty innovation) would seem to contradict it. While it is submitted that the case law on the “regulatory-option” in Article 263(4) TFEU is not yet fully developed, the existing case law does clearly preclude virtually any content-based concept of legislation. If the concept of legislation were content-based, it would be simply impossible to rely on regulative-option contained in Article 263(4) as currently interpreted by the ECJ.¹¹⁷³

Thus, it would seem possible to say that the concept of legislative act in EU law cannot be content-based. The only seeming exception to that (*i.e.* the only concept which the case law on Article 263(4) TFEU would not seem to preclude) might be a content-based concept of legislative act relying squarely on the doctrine of essential elements. However, on a closer analysis that concept likewise turns out to be difficult to sustain. First, it was shown¹¹⁷⁴ that the *Frontex* rule on essential elements cannot repartition the division of competences between different institutions of the EU. Essentially it was argued that on a proper construction *Frontex* does not reserve any decision to the EU legislature; it reserves decisions on essential elements in respect of some subject matter to the institution which is tasked by the constitutive treaties with regulating that subject matter. In *Frontex* the Council and the Parliament jointly were the institutions so tasked. Yet, it is not difficult to see that in other situations other institutions, for instance the Commission (under Article 106(3) TFEU), may be so tasked. Thus, on a content-based concept of legislative act relying squarely on the doctrine of essential elements any act of any institution which act is adopted on the basis of the constitutive treaties could, but need not be legislative. Whether it is would depend on minute analysis of its content.

Second, as a result of that legal certainty and clarity would decrease: reasonable people might disagree with whether a particular rule is an essential element or not. In substance, the Lisbon Treaty would be achieving something which is close to exact opposite to the objectives set forth in the Laeken Declaration.

Third, an essential-elements-based concept of legislation would mean that an act of the Council and the Parliament by which they amend a provision of their own legislative act, which provision is not essential to the subject-matter envisaged by a legislative act¹¹⁷⁵ is not legislative even though the amending act might in all other respects be equivalent to the act being amended.¹¹⁷⁶ Fourth, it would be completely unclear why it was deemed necessary to provide in the constitutive treaties that a regulation, a directive and a decision adopted via legislative procedure was a legislative act. Fifth, the ECJ has had the opportunity to connect the doctrine of essential elements with legislative acts on numerous occasions (not least in *Frontex* itself, decided after the entry force of the Lisbon Treaty). It has not done so. Nor has

¹¹⁷³ See section 4.3 for a detailed analysis and reasoning.

¹¹⁷⁴ See the text to footnote 891 above.

¹¹⁷⁵ That they can do so is not in doubt. See the judgments of the ECJ in cases 16/88 and C-359/92 mentioned, respectively, in footnotes 390 and 470 above.

¹¹⁷⁶ It must be noted that under any national law of any member state of the EU an act of parliament amending pre-existing act of parliament which pre-existing act of parliament is a legislative act would itself be legislative.

it ever used the words “legislative act” in such a sense post-Lisbon Treaty. Finally, if that were the concept of legislative act, how would the situation be different from the pre-Lisbon Treaty one?

An analysis of the preparatory materials of the Constitutional Treaty (which purported to be the first constitutive treaty speaking of legislative acts and on the basis of which the Lisbon Treaty was drafted) offers no guidance. Virtually no clear meaning or intention may be discerned from the preparatory materials. To the extent that some such meaning may be found it did not find its way into either the Constitutional Treaty or the Lisbon Treaty. Finally, the concept of legislative act contained in the Constitutional Treaty was essentially a name-based concept, *i.e.* even less than a shorthand for essentially similar instruments were in some cases called legislative acts and in others not.

Thus, the analysis disclosed no one single concept of legislative act obtaining in EU law. It is therefore possible to answer the first question of the thesis, *viz.* what concept of legislative act obtains in EU law, by saying that no single concept may be formulated. Article 289(3) TFEU, *viz.* a regulation, a directive or a decision adopted via legislative procedure as a legislative act, is a useful shorthand, but nothing more. No single concept may be reconciled even with the constitutive treaties alone,¹¹⁷⁷ not to speak of the EU law in general.

Perhaps more importantly, it has been shown that frequently – and perhaps surprisingly – the concept of legislative act, while having consequences hinge on it in law, does not necessarily matter in practice. EU law has always been heavily reliant on the “undergrowth” which has given us for instance comitology and implied powers, *viz.* instruments not strictly speaking provided for in the constitutive treaties (at the time), but developed nevertheless as a practical solution. The same seems to be occurring in relation to the language of legislation. *ESMA* is an excellent example of an early step here: with that one judgment the ECJ enabled considerably wider grant of (normative) powers than simply under Articles 290 and 291 TFEU; those articles were no longer the code which it might have been hoped that they would be. It is submitted that the same is likely to occur in respect of the concept of legislative act proper rendering a specific determination in respect of a particular act of whether it is or is not legislative may come to be of lesser importance.

Admittedly that is unlikely to always be the case: for example, application of Protocols Nos. 1 and 2 clearly relies on a determination that an act is legislative. It is submitted that it is likely that in the event of a dispute as to the precise concept of legislative act the CJEU would follow Article 289(3) TFEU formulation (a regulation, a directive or a decision adopted via legislative procedure as a legislative act).

Moving on to the second question of the thesis, *viz.* have the objectives which were sought to be achieved by means of introduction of “language of legislation” (legislative acts) into EU law been met, one cannot but note that not much has changed compared to EU law as it stood

¹¹⁷⁷ *E.g.* Article 289(3) TFEU provides the shorthand by reference to procedure unique to the EU, yet Article 2 TFEU seems to mandate a content-based concept which must be equally applicable to the EU and the member states while Article 263(4) TFEU as construed by the ECJ essentially excludes content-based concepts.

under the Treaty of Nice. The procedures for adoption of acts by the Council and the Parliament jointly are largely the same; the acts resulting from those procedures are precisely the same (Article 288 TFEU has not been changed); the adoption of acts on the basis of granted power is largely the same. Legislative acts have proven to be nothing more than a name generic name for acts adopted via co-decision, or by the Council with the participation of the Parliament or vice-versa (as these procedures were known under the Nice Treaty). There is no concept for which “legislative act” stands; “legislative act” is just a shorthand.

Considering that no actual change of note has occurred, it is clearly very unlikely – if not impossible – for the objectives of the introduction of the language of legislation to have been attained. By changing names of institutions which already exist it is simply impossible to augment the democratic legitimacy and transparency of the system or to simplify the instruments employed by it when exercising public authority all while having a keen eye on ensuring the rule of law.¹¹⁷⁸ It is, in fact, submitted that the introduction of the language of legislation into EU law has, at least in part, attained the opposite of the objective desired. The system has been rendered more complicated and less understandable.

The foregoing chapters have amply shown that possibilities of different constructions of Articles 289 – 291 TFEU, first introduced into EU law by the Lisbon Treaty, abound. Sections 2 and 4 demonstrate how difficult it is to develop any structured argument in respect of legislative procedures and legislative acts. Section 4.2.2 is an especially stark example in this respect: the introduction of “legislative acts” into EU law has even “succeeded” in leading professionals of EU law into error. Furthermore, introduction of legislative acts into EU law has not supplanted the existing classification of legal acts (set forth in Article 288 TFEU); it has supplemented it. In such a situation it would, if anything, be ironic to speak of clarity and simplicity.

At the same time no practical benefit has been found to flow from the introduction of language of legislation into EU law. There is nothing that can be done now that it is part of EU law, but could not have been done under the Treaty of Nice. And in a situation where legal professionals are struggling with “legislative acts” in EU law, ordinary citizens are unlikely to find the system easier to understand simply because it employs terms which they are used to. In fact, the opposite is true since those terms do not bear the same (or even similar) meaning to the ones they have in (lest it is forgotten, different) national laws.

Put bluntly, if lack of legislative acts or power in EC law was a problem, then the Lisbon Treaty is not a solution: it offers obfuscation and new terminology; it does not offer substantive changes. If lack of legislative acts or power in EC law was not a real problem (which, if the current situation under the Lisbon Treaty is not problematic, is an inevitable corollary of that not “problamaticity”), then the Lisbon Treaty attempted to fix something which did not need fixing in the first place.

¹¹⁷⁸ See Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001), especially pages 22 and 23 (the so-called “Laeken Declaration”), SN 300/1/01 REV 1.

To sum up, there is no single concept of legislative act which currently obtains in EU law. In fact, there is no single concept of legislative act which it is possible to square the constitutive treaties. “Legislative act” as employed in Article 289(3) TFEU is nothing more than a shorthand meaning an act adopted via a certain procedure (which existed long before the Lisbon Treaty). The introduction of language of legislation into EU law has not enabled to attain the objectives of the Lisbon Treaty¹¹⁷⁹ (or even helped in this respect) – not much changed compared to EC law aside from the added complexity introduced by the language of legislation (resulting in further disagreements and disputes¹¹⁸⁰). Thus the better view would seem to be that the introduction of language of legislation into EU law (in the way it was done) has, in fact, hindered attainment of those objectives.

However, the foregoing must not be misunderstood as a call for amendment of the constitutive treaties. While it has been demonstrated that EC law as it stood under the Treaty of Nice was substantively much the same as EU law as it stands under the Treaty of Lisbon, and the EC law furthermore had the advantage of being clearer and simpler, the foregoing has also demonstrated that making changes to law is liable to create more problems than it solves (especially if the existing system works and there is no clarity and single-mindedness to the changes; considering the institutional characteristics surrounding any change of the constitutive treaties, those qualities are very difficult to achieve). Furthermore, any changes of law need time to “bed in”, *i.e.* time is needed for the practice and the case law to develop. Before they do clarity and certainty of law is likely to be lower than the one obtaining before the changes were made. It is therefore hoped that rather than further amendments to the constitutive treaties what follows is a period of stability giving the ECJ the necessary time develop and clarify the existing law (perhaps contributing that way to attaining the objectives set by the Laeken Declaration).

¹¹⁷⁹ To increase the democratic legitimacy and transparency of the EC and simplify the instruments employed by it when exercising public authority all while having a keen eye on ensuring the rule of law. See Presidency Conclusions of the European Council Meeting in Laeken (14 and 15 December 2001), especially pages 22 and 23 (the so-called “Laeken Declaration”), SN 300/1/01 REV 1.

¹¹⁸⁰ See sections 3.2.1 – 3.2.5 above. None of the disputes to which those sections are dedicated could have arisen under EC law. It is submitted that EU law (and no citizen of the EU) is better off as a result of (the possibility of creating) those disputes.

Annexe I (list of legal bases mandating ordinary legislative procedures)

Article ¹¹⁸¹	Content	Resulting Act	Other procedural steps ¹¹⁸²	Harmonisation	Other aspects
14(1)	Conditions and principles for services of general economic interest	Regulation			
15(3)(2)	Access to documents	Regulation			
16(2)	Protection of personal data when processed by the EU or in applying EU law				
18(2)	Prohibition of discrimination on the basis of nationality				
19(2)	Incentivising combat of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation			Excluded	
21(2)	Freedom of movement				Residual power (akin to mini flexibility clause)
24(1)	Citizens' initiative				
33	Strengthening customs cooperation				
43(2)	CAP, CFP (competition rules, coordination rules, European market organisation)		ECOSOC		
46	Free movement of workers	Regulation, Directive			
48	Social security (free movement of workers)				Temporary suspension
50(1)	Freedom of establishment	Directive	ECOSOC		
51(2)	Disapplication of the rules on freedom of establishment				
52(2)	Coordination of national provisions on foreigners (public policy, public security or public health)	Directive		Coordination	
53(1)	Mutual recognition of certificates, diplomas etc & coordination of self-employment	Directive		Coordination in part	
56(2)	Extension of freedom to provide services to EU resident nationals of third countries				
59(1)	Liberalisation of specific services	Directive	ECOSOC		

¹¹⁸¹ All references to articles in this Annexe I are to articles of the TFEU unless expressly stated otherwise.

¹¹⁸² When only the name of an entity is indicated in this column, it means that consultation of that entity is mandated.

64(2)	Free movement of capital between EU and third countries				Corresponding de-regulation via special legislative procedure (Article 64(3))
75(1)	Framework for economic anti-terrorist measures for achieve freedom, security and justice			Framework	
77(2)	Visas, external border checks and internal border checks				
78(2)	Common asylum system				
79(2)	Lawful residence in EU, human trafficking				
79(4)	Incentive for integration of third-country nationals			Excluded	
81(2)	Judicial cooperation in civil matters (aside from family matters)				
82(1)(2)	Judicial cooperation in criminal matters		Could be initiated by ¼ of member states		
82(2)	Minimum rules on police and judicial cooperation on cross-border criminal matters	Directive	Could be initiated by ¼ of member states		Temporary suspension
83(1)(1)	Meaning of and sanctions for very serious or cross-border crime	Directive	Could be initiated by ¼ of member states		Temporary suspension
83(2)	Minimum rules on definition of criminal offences and sanctions	Directive	Could be initiated by ¼ of member states		Temporary suspension
84	Promotion and support of crime prevention		Could be initiated by ¼ of member states	Excluded	
85(1)(2)	Eurojust (what it is and what it does)		Could be initiated by ¼ of member states		
87(2)	Police cooperation (data protection, investigative techniques and various exchanges)		Could be initiated by ¼ of member states		
88(2)	EUROPOL (what it is and what it does)		Could be initiated by ¼ of member states		
91(1)	Common transport policy		ECOSOC, Committee of the Regions		
100(2)	Air and sea transport		ECOSOC, Committee of the Regions		
114(1)	Approximation of national laws having internal market as object		ECOSOC		

116(2)	Elimination of distortion of competition				
118(1)	Protection of IP				
121(6)	Procedure for monitoring economic developments and policies of member states				
129(3)	Amendments to the statute of the ESCB and the ECB		Could be Initiated by ECB; ECB to be consulted		
133	Use of the euro		ECB		
149(1)	Incentivising cooperation between and supporting member states in the field of employment		ECOSOC, Committee of the Regions	Excluded	
153(2)(2)	Employment, working conditions and living standards		ECOSOC, Committee of the Regions		
157(3)	Equality of sexes in employment		ECOSOC		
164	Implementing regulations for the European Social Fund	Regulation	ECOSOC, Committee of the Regions		
165(4)(1)	Education, youth and sport		ECOSOC, Committee of the Regions	Excluded	
166(4)	Vocational training		ECOSOC, Committee of the Regions	Excluded	
167(5)(1)	Culture		Committee of the Regions	Excluded	
168(4)	Medical, veterinary and phytosanitary measures		ECOSOC, Committee of the Regions		
168(5)	Protection of human health		ECOSOC, Committee of the Regions	Excluded	
169(3)	Supporting, monitoring and supplementing policies of member states on consumer protection		ECOSOC	Minimum harmonisation only	
172(1)	Trans-European networks (including loan guarantees and subsidies)	Guidelines ¹¹⁸³	ECOSOC, Committee of the Regions, member state concerned		
173(3)(1)	Supporting member states in achieving competitiveness of EU industry		ECOSOC	Excluded	
175(3)	Economic, social and territorial cohesion		ECOSOC, Committee		

¹¹⁸³ Although not exclusively

			of the Regions		
177(1)	Structural Funds (what they are and what they do)		ECOSOC, Committee of the Regions		
178(1)	Implementing regulations for European Regional Development Fund	Regulation	ECOSOC, Committee of the Regions		
178(2)	European Agricultural Guidance and Guarantee Fund, Guidance Section, and the European Social Fund		<i>Renvoi</i> to Articles 43 and 164		
182(1)	Multiannual framework programme on R&D		ECOSOC		
182(5)	European research area		ECOSOC		
188(2)	Implementation of multiannual framework programme (participation, dissemination of results, supplementary programmes)		ECOSOC, member states concerned		
189(2)	European space policy			Excluded	
192(1)	Environment		ECOSOC, Committee of the Regions		
192(3)	General action programs on environment		ECOSOC, Committee of the Regions		
194(2)	EU energy policy		ECOSOC, Committee of the Regions		Member states' choices on using natural resources and energy supply not affected
195(2)	Complementing member states' measures on tourism			Excluded	
196(2)	Civil protection			Excluded	
197(2)	Improving administrative capacity for implementation of EU law			Excluded	Resulting measures not obligatory for member states
207(2)	Framework for implementing common commercial policy	Regulation			
209(1)	Implementation of development cooperation policy				
212(2)	Economic, financial and technical cooperation with non-developing countries				
214(3)	Framework for provision of EU's humanitarian aid				
214(5)	Rules and procedures of European Voluntary Humanitarian Aid Corps	Regulation			

224	EU level political parties and their funding	Regulation			
257(1)	Creation of specialised courts	Regulation	ECJ		
281(2)	Amending the statute of the ECJ (excluding title I and article 64)		ECJ		
291(3)	Comitology	Regulation			
298(2)	EU administration	Regulation			
322(1)	Budget, finance and audit (procedure)	Regulation	Court of Auditors		
325(4)	Fighting fraud affecting EU's financial interests		Court of Auditors		
336(1)	Staff Regulations and Conditions of Employment	Regulation	Institutions concerned		
338(1)	Measures for the production of statistics				Without prejudice to ECB doing so under its statute
Statute of the ECJ, 13(1)	Appointment of and rules of service of assistant rapporteurs		Initiated by ECJ		
Statute of the ECB, 40.1	Article 129(3) TFEU		Could be Initiated by ECB; ECB to be consulted		
Protocol (No. 7) on Privileges and Immunities, 12(1)	Taxation of remuneration of EU officials and servants	Regulation	Institutions concerned		
Protocol (No. 7) on Privileges and Immunities, 14	Social security of EU officials and servants	Regulation	Institutions concerned		
Protocol (No. 7) on Privileges and Immunities, 15(1)	Determination to whom privileges of EU officials and servants apply	Regulation	Institutions concerned		

Annexe II (list of legal bases potentially mandating special legislative procedures)

Article ¹¹⁸⁴	Content	Adopter	Unanimous by Council	Input of the participating institution	Resulting Act	Other procedural steps ¹¹⁸⁵	Other aspects	Name ¹¹⁸⁶
7(1) TEU	Risk of breach of values by member states	Council	No (four fifths under Article 354 rules)	Consent		Initiated by Parliament, Commission or 1/3 of member states	Same could be done by the European Council (Article 7(2) TEU)	No
27(3) TEU	The organisation and functioning of the European External Action Service	Council	No	Consulting	Decision	Initiated by High Representative; consent of Commission		No
41(3)(1) TEU	Access to EU budget for urgent CFSP expenditures	Council	No	Consulting	Decision			No
49 TEU	Admission of new member states	Council	Yes	Consent		Parliament by majority of component members; Commission; ratification by the states concerned		No
50(2) TEU	Conclusion of withdrawal agreement	Council	No	Consent				No
19(1)	Combat of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation	Council	Yes	Consent				Yes
21(3)	Social security and social protection to ensure freedom of movement	Council	Yes	Consent			Residual power (akin to mini flexibility clause)	Yes
22(1)	Arrangements for nationals of a member	Council	Yes	Consulting				Yes

¹¹⁸⁴ All references to articles are to articles of the TFEU unless expressly stated otherwise.

¹¹⁸⁵ When only the name of an entity is indicated in this column, it means that consultation of that entity is mandated.

¹¹⁸⁶ “Yes” if the legal basis expressly calls the procedure “a special legislative procedure”, “no” – if it does not.

	state voting at and standing for municipal elections in the member state of his residence							
22(2)	Arrangements for nationals of a member state voting at and standing for elections to the European Parliament in the member state of his residence	Council	Yes	Consulting				Yes
23(2)	Facilitation of diplomatic/consular cross-protection	Council	No	Consulting	Directive			Yes
25(2)	Creation of new or strengthening of rights of EU citizens	Council	Yes	Consent		Ratification by member states		Yes
64(3)	Making a step back in free movement of capital between EU and third states	Council	Yes	Consulting			Corresponding step forward via ordinary legislative procedure (Article 64(2))	Yes
70	Arrangements for evaluation by the Commission and member states of implementation of EU policies adopted in the field entitled "Area of freedom, security and justice" with a view to facilitation of mutual recognition	Council	No	Informed		Initiated by Commission; ¹¹⁸⁷ informing national parliaments		No
74	Cooperation between departments of member states and between them and the Commission in questions pertaining to "Area of freedom security and justice"	Council	No	Consult		Initiated by Commission or 1/4 of member states		No
77(3)	Regulation of passports, ID-cards, residence permits etc.	Council	Yes	Consulting			Residual power (akin to mini flexibility clause)	Yes
78(3)	Provisional asylum measures for the benefit of member states experiencing a sudden inflow of nationals of third countries	Council	No	Consulting		Initiated by Commission		No
81(3)(1)	Judicial cooperation on family law with cross-border implications	Council	Yes	Consulting				Yes
81(3)(2)	Switching regulation of judicial	Council	Yes	Consulting	Decision	Veto held by		No

¹¹⁸⁷ Initiation by the Commission is separately mentioned only if two conditions are met: the legal basis (i) does not call the procedure a special legislative procedure and (ii) simultaneously grants the privilege of initiative to the Commission. By default, the Commission has a privilege to initiate adoption of legislative acts by virtue of Article 17(2) TEU.

	cooperation in family matters from special legislative procedure to ordinary					each national parliament		
83(1)(3)	List of areas of particularly serious crime with a cross-border dimension	Council	Yes	Consent	Decision	Initiated by Commission or ¼ of member states		No
83(2)	Minimum rules on definition of criminal offences and sanctions	Council	Depends	Depends	Directive	Could be initiated by ¼ of member states	Temporary suspension	Yes
86(1)(1)	Establishment of the European Public Prosecutor's Office	Council	Yes	Consent	Regulation	Could be initiated by ¼ of member states		Yes
87(3)(1)	Operational cooperation of national law enforcement agencies	Council	Yes	Consulting		Could be initiated by ¼ of member states		Yes
89	Conditions under which judicial authorities or law enforcement agencies of a member state may operate in another	Council	Yes	Consulting		Could be initiated by ¼ of member states		Yes
95(3)	Rules prohibiting different conditions of carriage of goods over the same transport links on grounds of the country of origin or of destination of the goods and ensuring enforcement of the prohibition	Council	No	Consulting		Initiated by Commission, ECOSOC		No
103(1)	Implementing competition rules contained in Articles 101 and 102 TFEU	Council	No	Consulting	Regulation, directive	Initiated by Commission		No
109	Implementing state aid rules contained in Articles 107 and 108 TFEU	Council	No	Consulting	Regulation	Initiated by Commission		No
113	Harmonisation of indirect taxes	Council	Yes	Consulting		ECOSOC		Yes
115	Approximation of laws directly affecting the establishment or functioning of the internal market	Council	Yes	Consulting	Directive	ECOSOC		Yes
118(2)	Language arrangements for EU IP rights	Council	Yes	Consulting	Regulation			Yes
121(2)	Broad guidelines for economic policies	Council	No	Informed	Recommen-	Initiated by		No

	of member states and of the EU				ation	Commission; European Council		
125(2)	Setting forth definition for application of financial prohibitions contained in Articles 123-125	Council	No	Consulting		Initiated by Commission		No
126(11)	Intensification of measures required of a member state to reduce excessive deficit	Council	No (Article 238(3)(a); without vote of member state concerned)	Informed		Initiated by Commission	Assumes pre-existing procedural steps (Article 126)	No
126(14)(2)	Replacement of protocol on excessive deficits	Council	Yes	Consulting		ECB		Yes
126(14)(3)	Rules and definitions for application of protocol on excessive deficits	Council	No	Consulting		Initiated by Commission		No
127(6)	Conferral on ECB of tasks regarding policies related to prudential supervision of financial institutions (except insurance ones)	Council	Yes	Consulting	Regulation	ECB		Yes
128(2)	Harmonisation of denominations and technical specifications of euro coins	Council	No	Consulting		Initiated by Commission; ECB		No
129(4)	Adoption of certain provisions required by the statute of ESCB and ECB	Council	No	Consulting		Initiated by Commission; ECB (or <i>vice versa</i>)		No
132(3)	Rules on fines and periodic penalty payments imposed by ECB on undertakings for violating ECB's rules	Council	No	Consulting		Initiated by Commission; ECB (or <i>vice versa</i>)		No
134(3)	Composition of Economic and Financial Committee	Council	No	Informed		Initiated by Commission; ECB; Economic and Financial Committee		No

140(2)(1)	Deciding whether a member state meets conditions for adoption of the euro and abrogating the derogation	Council	No	Consulting		Initiated by Commission; recommendation of Article 238(3)(a) majority of member states whose currency is euro; European Council		No
148(2)	Guidelines for employment policies of member states	Council	No	Consulting	Guidelines	Initiated by Commission; on the basis of conclusions of European Council; ECOSOC; Committee of the Regions; Employment Committee		No
150(1)	Creation of Employment Committee	Council	No (simple majority)	Consulting				No
153(2)(3)	Social security and social protection of workers, protection of workers upon termination of employment contract, representation of workers and employers and employment of third country nationals	Council	Yes	Consulting		ECOSOC, Committee of the Regions	Complementing	Yes
153(2)(4)	Switching protection of workers upon termination of employment contract, representation of workers and employers and employment of third country nationals from special legislative procedure to ordinary	Council	Yes	Consulting		Initiated by Commission		No
155(2)	Implementation of agreements of	Council	No (except	Informed		Joint request by		No

	management and labour in Article 153 matters		areas of Article 153(2)(3))			signatories; initiated by Commission		
160(1)	Creation of Social Protection Committee	Council	Simple majority	Consulting				No
182(4)	Specific programmes on R&D	Council	No	Consulting		ECOSOC		Yes
188(1)	Creation of joint undertakings or other structures for execution of EU's research, technological development and demonstration programmes	Council	No	Consulting		Initiated by Commission; ECOSOC		No
192(2)(1)	Environment (fiscal issues, water resources, town and country planning, land use, choices as to energy sources and structure of energy supply)	Council	Yes	Consulting		ECOSOC, Committee of the Regions		Yes
192(2)(2)	Switching from special legislative procedure to ordinary in Art 192(2)(1) TFEU matters	Council	Yes	Consulting		Initiated by Commission; ECOSOC; Committee of the Regions		No
194(3)	EU energy policy (fiscal issues)	Council	Yes	Consulting				Yes
203	Association of countries with the EU	Council	Yes	Consulting			Not obligatory	Yes
215(1)	Interruption or reduction of economic and financial relations with third countries	Council	No	Informed		Initiated by Commission or High Representative		No
218(3)	Authorising negotiations of international agreements and determining the negotiator	Council	No	Informed	Decision	Initiated by Commission or (where agreement is at least principally about CFSP) High Representative		No
218(4)	Addressing directives to the negotiator and designating a committee which the negotiator must consult	Council	Depends	Informed				No
218(5)	Authorising the signing and provision application of an international	Council	Depends	Informed	Decision	Initiated by negotiator		No

	agreement							
218(6)(1)	Conclusion of international agreement exclusively about CFSP	Council	Depends	Informed	Decision	Initiated by negotiator		No
218(6)(a)	Conclusion of the following international agreements which are not exclusively about CFSP: association agreements, accession to ECHR, those establishing specific institutional framework by organising cooperation procedures, those with important budgetary implication for EU, those in the fields where internal measures would require consent of the Parliament	Council	Depends	Consent	Decision	Initiated by negotiator	Consent to be granted within a time-limit if one has been agreed by Council and Parliament.	No
218(6)(b)	Conclusion of international agreements which are not exclusively about CFSP	Council	Depends	Consulting	Decision	Initiated by negotiator	Opinion of Parliament within time limit set by Council.	No
218(7)	Authorising the negotiator to approve on behalf of the EU modifications of an international agreement and setting conditions for such approvals	Council	Depends	Informed				No
218(9)	Suspension of application of an international agreement and establishment of positions to be adopted in its bodies	Council	Depends	Informed	Decision	Proposal of Commission or High Representative		No
219(1)(1)	Conclusion of international agreements on an exchange-rate system for the euro in relation to the currencies of third States	Council	Yes	Consulting		Recommendation of ECB or recommendation of Commission with ECB being consulted		No
219(1)(2)	Adoption, adjustment or abandonment of central rates of the euro within an exchange-rate system	Council	No	Informed		Recommendation of ECB or recommendation of Commission with ECB being consulted		No
223(1)(2)	Election of the European Parliament	Council	Yes	Consent		Initiated by		Yes

						Parliament; consent of the Parliament by the majority of members; ratification by member states		
223(2)	Duties of MEPs and performance of those duties	Parliament	No (yes for taxation)	Consent	Regulation	Initiated by Parliament; Commission		Yes
226(3)	Exercise of right of inquiry	Parliament	No	Consent	Regulation	Initiated by Parliament; consent of the Commission		Yes
228(4)	Performance of Ombudsman's duties	Parliament	No	Consent	Regulation	Initiated by Parliament; Commission		Yes
246(2)	Appointment of a new member of Commission upon resignation, compulsory retirement or death of a member	Council	No	Consulting		Common accord with president of Commission	Decision not to fill a vacancy is a unanimous decision of the Council upon proposal of president of Commission; Parliament does not participate (Article 246(3)).	No
262	Jurisdiction of the ECJ in the field of EU IP	Council	Yes	Consulting		Ratification by member states		Yes
286(2)(1)	Adoption of a list of member of the Court of Auditors	Council	No	Consulting		Proposals of member states		No
308(3)	Amending statute of EIB	Council	Yes	Consulting		Could be Initiated by EIB with the Commission being consulted; EIB consulted		Yes
311(3)	System of own resources of the EU	Council	Yes	Consulting	Decision	Ratification by member states		Yes
311(4)	Implementing Article 311(3) decision	Council	No	Consent	Regulation			Yes
312(2)(1)	Multiannual financial framework	Council	Yes (switch	Consent	Regulation	Component		Yes

			to no in Article 312(2)(2))			members of the Parliament		
314	Adoption of the budget of the EU	President of the Parliament	No	Consent	Atypical ¹¹⁸⁸		<i>Sui generis</i> procedure	Yes
322(2)	Procedure for making revenue from own resources available to the Commission; adoption of measures to meet cash requirements	Council	No	Consulting		Initiated by Commission; Court of Auditors		No
329(1)(2)	Authorisation to proceed with enhanced cooperation (non-CFSP)	Council	No	Consent		Initiated by Commission		No
329(2)	Authorisation to proceed with enhanced cooperation (CFSP)	Council	No	Informed		High Representative; Commission		No
332	Deciding that variable expenses of enhanced cooperation shall be borne otherwise than by participating member states	Council	Yes	Consulting			Adopted by members of the Council (as opposed to the Council)	No
333(2)	Switching from special legislative procedure to ordinary in areas where enhanced cooperation occurs	Council	Yes (but only those who participate)	Consulting				No
349(1)	Application of the treaties to overseas territories	Council	No	Consulting		Initiated by Commission		No
349(1)	Application of the treaties to overseas territories	Council	No	Consulting				Yes
352(1)	"Flexibility clause"	Council	Yes	Consent		Initiated by Commission		No
352(1)	"Flexibility clause"	Council	Yes	Consent				Yes
Statute of the ECJ, 64(1)	Language arrangements of the ECJ	Council	Yes	Consulting		Initiated by ECJ; Commission (or <i>vice versa</i>)		No
Statute of the ECB,	Adoption of certain provisions required by the statute of ESCB and ECB (called	Council	No	Consulting		Initiated by Commission;		No

¹¹⁸⁸ See the judgment of the ECJ in case C-77/11.

41	"Complementary legislation" in that article)					ECB (or <i>vice versa</i>)		
Convergence Protocol (No. 13), 6	Adoption of convergence criteria referred to in Art 140(1) TFEU which replace the protocol	Council	Yes	Consulting		Initiated by Commission; ECB; Economic and Financial Committee		No
Protocol (No. 21) on UK and Ireland in Area of Freedom, Security and Justice, 5	Deciding that a member state not bound by the Title on Area of Freedom, Security and Justice is to bear consequences of a measure adopted thereunder by which it is not bound	Council	Yes	Consulting			Adopted by members of the Council (as opposed to the Council)	No
Annexe to Protocol (No. 22) on Denmark, 9	Deciding that Denmark is to bear consequences of a measure adopted thereunder by which it is not bound	Council	Yes	Consulting				No
Netherlands Antilles Protocol (No. 31), 6(1)	Reviewing rules (contained in Articles 2-5 of the protocol) on the import of petroleum products from the Netherlands Antilles	Council	Yes	Consulting	Decision	Commission		No
ECSC Protocol (No. 37), 2(2)	Multiannual financial guidelines on managing the assets of Research Fund for Coal and Steel and technical guidelines for its research programmes	Council	No	Consulting		Initiated by Commission		No

Annexe III (table of equivalence of legal bases of the Lisbon Treaty mandating a procedure akin to special legislative procedure without calling it special legislative procedure and the corresponding legal bases of the Constitutional Treaty)

Lisbon Treaty¹¹⁸⁹	Constitutional Treaty	Act mandated by the Constitutional Treaty
7(1) TEU	I-59(1)	Non-legislative
27(3) TEU	III-296(3)	Non-legislative
41(3)(1) TEU	III-313(3)	Non-legislative
49 TEU	I-58(2)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2))) ¹¹⁹⁰
50(2) TEU	I-60(2)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2)))
74	III-263	Non-legislative
78(3)	III-266(3)	Non-legislative
81(3)(2)	III-269(3)(2)	Non-legislative
83(1)(3)	III-271(1)(3)	Non-legislative
95(3)	III-240(3)	Non-legislative
103(1)	III-163(1)	Non-legislative
109	III-169	Non-legislative
125(2)	III-183(2)	Non-legislative
126(14)(3)	III-184(13)(2)	Non-legislative
128(2)	III-186(2)(2)	Non-legislative
129(4)	III-187(4)	Non-legislative
132(3)	III-190(3)	Non-legislative
140(2)(1)	III-198(2)(1)	Non-legislative
148(2)	III-206(2)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (paragraphs 2 or 3 of Article I-35)) ¹¹⁹¹
150(1)	III-208(1)	Non-legislative
153(2)(4)	III-210(3)(2)	Non-legislative
160(1)	III-217(1)	Non-legislative
188(1)	III-253	Non-legislative
192(2)(2)	III-234(2)(2)	Non-legislative
218(6)(a)	III-325(6)(a)	Non-legislative
218(6)(b)	III-325(6)(b)	Non-legislative
219(1)(1)	III-326(1)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2)) or neither ¹¹⁹²)
246(2)	III-348(2)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2)))

¹¹⁸⁹ All references to articles in this column are to articles of the TFEU unless expressly stated otherwise.

¹¹⁹⁰ Admittedly a non-legislative act being mandated is more likely for Article I-58(2) of the Constitutive Treaty mandates consultation of the Commission. According to Article I-26(1) of the Constitutional Treaty any legislative act would have had to be proposed by the Commission (unless otherwise provided by the Constitutive Treaty which in Article I-58(2) it did not). Making consultation of the Commission a further requirement in a situation where the act was proposed by it might be considered unexpected, although not impossible.

¹¹⁹¹ Article III-206(2) of the Constitutional Treaty mandates guidelines. See the discussion in section 2.2.1 above pertaining to provisions of constitutive treaties mandating guidelines.

¹¹⁹² Article III-326(1) of the Constitutional Treaty speaks of the Council concluding an agreement. Articles I-33 – I-37 of the Constitutional Treaty, setting out legislative vs non-legislative typology do not speak of agreements at all.

286(2)(1)	III-385(2)(1)	Non-legislative
322(2)	III-412(2)	Non-legislative
329(1)(2)	III-419(1)(2)	Non-legislative
332	III-421	Non-legislative
333(2)	III-422(2)	Non-legislative
349(1)	III-421(1)	Non-legislative ¹¹⁹³
352(1)	I-18(1)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (paragraphs 2 or 3 of Article I-35)) ¹¹⁹⁴
Statute of the ECJ, 64	Statute of the ECJ, 64(1)	Non-legislative
Statute of the ECB, 41	Statute of the ECB, 41	Non-legislative
Convergence Protocol (No. 13), 6	Convergence Protocol (No. 11), 6	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (paragraphs 2 or 3 of Article I-35))
Protocol (No. 21) on UK and Ireland in Area of Freedom, Security and Justice, 5	Protocol (No. 19) on UK and Ireland in Area of Freedom, Security and Justice, 5	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2)))
Annexe to Protocol (No. 22) on Denmark, 9	Annexe to Protocol (No. 20) on Denmark, 7	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2)))
Netherlands Antilles Protocol (No. 31), 6(1)	Netherlands Antilles Protocol (No. 25), 6(1)	Unclear (could be either legislative adopted via special legislative procedure (Article I-34(2)) or non-legislative (Article I-35(2))) ¹¹⁹⁵
ECSC Protocol (No. 37), 2(2)	ECSC Protocol (No. 35), 2(2)	Non-legislative

¹¹⁹³ There is, however, no direct parallel with Article 349(1) TFEU. The latter contains two sentences both mandating the same procedure, but one calling it a special legislative procedure, and the other – not (see text following footnote 386 above). There is nothing of the sort in Article I-421(1) of the Constitutional Treaty.

¹¹⁹⁴ There is, however, no direct parallel with Article 352(1) TFEU. The latter contains two sentences both mandating the same procedure, but one calling it a special legislative procedure, and the other – not (see text following footnote 386 above). There is nothing of the sort in Article I-18(1) of the Constitutional Treaty.

¹¹⁹⁵ Admittedly a non-legislative act being mandated is more likely for Article 6(1) of the protocol mandates consultation of the Commission. According to Article I-26(1) of the Constitutional Treaty any legislative act would have had to been proposed by the Commission (unless otherwise provided by the Constitutive Treaty which in Article I-6(1) of the protocol it did not). Making consultation of the Commission a further requirement in a situation where the act was proposed by it might be considered unexpected, although not impossible.

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