

# LEGISLATIVE REFORM OF THE EUROPEAN UNION INTRODUCED BY THE TREATY OF LISBON

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**ABSTRACT:** *The aim of the reforms introduced by the Treaty of Lisbon was to simplify and make more transparent the system of Union legal sources and that of the decision-making procedures.*

*This paper examines that how the system of Union legal sources and that of the previous legislative and decision-making procedures were modified and changed with the entry into force of the Treaty of Lisbon. The study also deals with the question whether the European Union has progressed due to the new legal system or not, that is to say whether the objectives of making the legal system of the European Union more simple and more transparency as set out in the Laeken Declaration have been achieved or not.*

**KEYWORDS:** *Treaty of Lisbon, legislative reform, legal acts, legal sources of the EU, legislative acts, delegated acts, implementing acts, comitology, legislative procedures, simplification, transparency of decision-making procedures*

**JEL CLASSIFICATION:** *K00, K 33*

## 1. INTRODUCTION

The aim of the reforms introduced by the Treaty of Lisbon was to simplify and make more transparent the system of Union legal sources and that of the decision-making procedures. However, the need for a comprehensive reform was put on the agenda long before the Treaty of Lisbon since, in the framework of the Union based on the three pillars, the legislative competences of the Union institutions were characterized by the democratic deficit<sup>1</sup> and by casuistic, rather complicated and thereby not transparent legislative and decision-making procedures. This can be stated even if we take into account the amendments of Treaties, especially the adoption of the Treaty of Amsterdam which has increased the legislative competences of the European Parliament to significant

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<sup>1</sup> Those institutions of the European Union which are entitled to adopt legislative acts and other measures are such in which the legitimacy of the decisions are low, having regard to the fact that the decision-makers are not elected directly by the Union citizens, and up to now there are only attempts for ensuring the citizens' democratic participation.

extent. Moreover, with the more extensive application of the comitology procedures which increased the role of the Commission in the field of legislation, and having regard to the fact of the increasing number of Union agencies, the need for reforms of legislative nature to an even more increased extent was raised up from the mid 90s.

The Laeken Declaration on the Future of the European Union adopted by the European Council in 2001 declared that the institutional framework and the legal system of the European Union have to be made more democratic, more transparent and more effective, especially by emphasising the purpose of simplifying the system of legislative procedures and that of the legal acts. After the Declaration, the European Convention was convened in 2002, which has elaborated the draft Treaty establishing a Constitution for Europe<sup>2</sup> by July 2003 which aimed to create the constitutional basis of the European Union. One of the most important innovations of the Constitutional Treaty was the radical modification of the system of legislative procedures and that of the Union legal sources, namely by introducing new legal acts (European law, European framework law, European regulation, European decision<sup>3</sup>), the new hierarchy of legal sources (legislative acts<sup>4</sup>, non-legislative acts<sup>5</sup>, delegated European regulations<sup>6</sup> and implementing acts<sup>7</sup>) and new legislative procedures in place of the accustomed, old system. However, the Constitutional Treaty did not enter into force because of the result, i.e. the negative vote of French and Dutch referenda held on the ratification thereof<sup>8</sup>. As a consequence, the Member States had to reconsider the opportunities of reforming the European Union, and had to take a step back from the constitutional approach which was considered, or at least it could be interpreted, as a step taken towards the creation of the United States of Europe, and had to reflect the reality of the European Union and that of the Member States in a better way through the adoption of a Reform Treaty. The Treaty of Lisbon<sup>9</sup> signed finally on 13 December 2007, despite the fact that it constituted the legal personality of the European Union and thereby abolished the former structure of the European Union based on the three pillars, did not take the form of a unified Treaty<sup>10</sup> but, returning to the application of the amendment technique, it amended the previous founding Treaties, namely the Treaty on European Union and the Treaty establishing the European Economic Community, renaming the latter and calling it as the Treaty on the Functioning of the European Union (TFEU). This solution can be considered as a step back as compared with that of the Constitutional Treaty, despite the fact that the Reform Treaty has saved, as a matter of fact, 80-90 percent of the achievements of the Constitutional Treaty, and found the

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<sup>2</sup> The document having the title 'Treaty establishing a Constitution for Europe' was signed on 29 October 2004, and it was published on 16 December 2004 in of the Official Journal of the EU (see C 310 47). It did not enter into force due to the 'unfavourable' outcome of the French and Dutch referenda.

<sup>3</sup> Treaty establishing a Constitution for Europe, Article I-33.

<sup>4</sup> Treaty establishing a Constitution for Europe, Article I-34.

<sup>5</sup> Treaty establishing a Constitution for Europe, Article I-35.

<sup>6</sup> Treaty establishing a Constitution for Europe, Article I-36.

<sup>7</sup> Treaty establishing a Constitution for Europe, Article I-37.

<sup>8</sup> See also: Zoltán ANGYAL: Az európai alkotmány szerveződések ratifikációs válsága, avagy közvetlen demokrácia és az integráció kollíziója, in: *Publicationes Universitatis Miskolcensis Sectio Juridica et Politica*, Miskolc University Press, Miskolc, 2007, pp. 175-190.

<sup>9</sup> Official Journal, C 306 2007, 17 December 2007.

<sup>10</sup> From a constitutional point of view, the most important achievement of the Constitutional Treaty would have been that it would have repealed all of the existing Treaties, i.e. all of the founding Treaties and the amending Treaties, and it would have taken the form of a unified text.

necessary consensual solutions<sup>11</sup> for most of the matters causing problems in the ratification process. The Treaty of Lisbon entered into force on 1 December 2009 after the ratification thereof in all the Member States.<sup>12</sup> This paper examines that how the system of Union legal sources and that of the previous legislative and decision-making procedures were modified and changed with the entry into force of the Treaty of Lisbon. The present paper also deals with and answers to the question whether the European Union has progressed due to the new legal system or not, that is to say whether the objectives of making the legal system of the European Union more simple and more transparency as set out in the Laeken Declaration have been achieved or not.

## 2. LEGAL ACTS OF THE EU AFTER THE ENTRY INTO FORCE OF THE TREATY OF LISBON

As a consequence of the fact that the European Union was given a single legal personality and the Treaty of Lisbon abolished the former three-pillar system of the European Union in the framework of which the pillars were functioning on the basis of different rules, significant changes have been occurred in the European Union's system of legal sources and that of the decision-making procedures with the entry into force of the Treaty of Lisbon. The number of secondary legal acts adopted by the institutions of the European Union has been decreased to a large extent and the legislative and non-legislative procedures have been defined clearly.

As regards the decrease in the number of legal acts, the number of secondary legal sources has been reduced from thirteen<sup>13</sup> to five<sup>14</sup> in the Treaty on the Functioning of the European Union. Prior to the entry into force of the Treaty of Lisbon in the first pillar five (regulation, directive, decision, recommendation, opinion)<sup>15</sup>, in the third pillar four (framework decision, decision, common position, convention)<sup>16</sup> and in the second pillar three (decision, common position, joint action)<sup>17</sup> legal acts existed, furthermore in the framework of first pillar it was possible for the Member States to conclude conventions<sup>18</sup> between them. The rationalisation of these legal acts can be undoubtedly considered as an important result since there were more types of such legal acts in the different pillars,

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<sup>11</sup> Amongst others, the principle of the primacy of Union law can be mentioned here, which has been dropped out from the main text of the Treaty, however Declaration No. 17 to the Treaties confirms the principle of primacy; the Declaration No. 1 deals with the Charter of Fundamental Rights of the European Union the text of which, contrary to the Constitutional Treaty, is not enshrined in the Corpus of the Treaty on European Union, but Article 6 thereof recognizes the legally binding status of the Charter, by which the Treaty of Lisbon saved the essence of the progress represented by Part II of the Constitutional Treaty.

<sup>12</sup> See also: Zoltán ANGYAL: Alkotmány szerződés kontra Reformszerződés, avagy az EU működésének elsődleges jogi keretei 2009 után, in: *Jogtudományi Közlöny*, 2008/4, pp. 179-190.

<sup>13</sup> There are even more types of legal acts if, by interpreting the concept of legal act extensively, we consider the common strategies applicable in the former pillar II and the guidelines determining the general principles of the Common Foreign and Security Policy (CFSP) as separate legal acts. (See Article 12 of the former Treaty on European Union.)

<sup>14</sup> Jean-Claude PIRIS: *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press, UK 2010, p. 92.

<sup>15</sup> See EC-Treaty, Article 49.

<sup>16</sup> See TEU, ex Article 34.

<sup>17</sup> See TEU, ex Articles 12, 14, 15, 24.

<sup>18</sup> See EC-Treaty, Article 293.

which had the very same name (for example the decision which existed in all the three pillars, or the common position existing in the second and third pillars), but they were completely different both regarding their content and their binding legal force.

With the entry into force of the Treaty of Lisbon, at present Article 288 of the Treaty on the Functioning of the European Union (hereinafter referred to as 'the TFEU') regulates the types of secondary legal acts, which does not follow the solution of the Constitutional Treaty which made a clear distinction between the different types of legal acts (European law, European framework law, European regulation, European decision and the traditional soft-law measures, i.e. the recommendation and opinion)<sup>19</sup>, but it has returned to the types of legal acts defined in Article 249 of the EC-Treaty. However, at the same time it indisputably realizes the numerical decrease, unification and unified application of the secondary legal acts in almost all fields of Union co-operation. According to the definition set out in the first paragraph of Article 288 of the TFEU to exercise the Union's competences, the Union institutions shall adopt regulations, directives, decisions, recommendations and opinions. Amongst the legally binding secondary legal acts it is the regulation and the directive which, besides the fact that that with the abolition of the pillar-structure they have become generally applicable in the fields of the former third pillar, have kept their former legal character, namely the regulation remained generally applicable, entirely binding legal act, which is directly applicable in all Member States, and the directive is henceforward the most important instrument for legal harmonisation which is binding, as to the result to be achieved, upon each Member State to which it is addressed.

As regards the secondary legal acts, there is an essential change which concerns the definition of decision. In fact, the decision is the only type of legal acts the definition of which has gone through a substantial change. Article 249 of the EC-Treaty defined the decisions as addressed legal acts, declaring that the 'decision shall be binding in its entirety upon those to whom it is addressed'. The non-addressed (innominate) decisions of normative nature<sup>20</sup>, or in other words called as *sui generis* decisions<sup>21</sup>, could not be classified under that definition, nevertheless they were present in the legislative practice and were 'simply' referred to as decisions in some given Articles of the Treaty on European Union and in the EC-Treaty.<sup>22</sup> Likewise, *sui generis* decisions served/serve for the determination of Union programmes, and also the European Commission was given the power for the negotiation and conclusion of various international agreements through the adoption of decisions, furthermore the provisions on certain institutional matters were also laid down in the form of such decisions. However, the official linguistic version of

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<sup>19</sup> Also the denomination of European law and European framework law refers to the legislative character of those acts, while the other legal acts, which were not called as 'law' (European regulation and European decision) constituted the non-legislative acts. The status of recommendation and opinion has not changed; they remained non-binding soft law measures.

<sup>20</sup> For example, where a decision is addressed to all the Member States, it is generally binding on them.

<sup>21</sup> See: Jürgen BAST: Grudbegriffe der Handlungsformen der EU. In: *Beiträge zum ausländischen Recht und Völkerrecht*, Band 184, 2006, pp. 445-449., Armin BOGDANDY – Felix ARNDT – Jürgen BAST: Legal Instruments in European Law and their Reform: A Systematic Approach on an Empirical Basis. In: *Yearbook on European Law*, Volume 23. Issue 1, pp. 91-136.

<sup>22</sup> For example, the decision adopted in the field of common foreign and security policy under Article 12 of the Treaty on EU, or the decision adopted concerning the conclusion of international agreements under Article 300(2) of the EC-Treaty.

some Member States<sup>23</sup> have made a definite distinction between addressed and *sui generis* decisions, which lead to disparate interpretation and triggered debates among the EU institutions, too.<sup>24</sup> The Treaty of Lisbon created a more unambiguous situation, by stating that as a general rule the decision is a legal act of normative content and it is binding in its entirety and generally. However, provided that a decision specifies those to whom it is addressed, it is binding only on them (Article 288, fourth paragraph TFEU). The decision of normative content does not have specific addressee(s), it imposes obligations on the institutions of the Union or on the Member States, but it does not have direct effect or binding effects on individuals. On the contrary, addressed decisions are binding on those to whom they are addressed, irrespective of being individuals (natural and legal persons) or Member States.

When dealing with the character of generally binding, normative decisions the question arises, whether there is any difference between the regulations and such decisions. There is a reasonable ground for arguing that the change creates a more unambiguous situation since now the definition laid down in the TFEU is in conformity with the previous legislative practice under which normative, or in other words, *sui generis*<sup>25</sup> decision have already existed.<sup>26</sup> Nevertheless, one could argue that it would have been a more practical solution to leave the two types of legal acts untouched, that is to say the form of regulation for adopting rules of general nature and that of the decision for adopting provisions of individual nature.<sup>27</sup>

### 3. CHANGES CONCERNING THE LEGAL ACTS OF THE FORMER THIRD PILLAR

Concerning the provisions on legal acts, the most important modification introduced by the Treaty of Lisbon is that the legal acts enumerated in ex Article 34(2) of the Treaty on European Union, under which those acts could have been adopted in the framework of the third pillar, were eliminated due to the fact that the Treaty of Lisbon abolished the former pillar-system. Therefore, instead of the possibility to adopt framework decisions, decisions, common positions and conventions, now the legal acts to be adopted in the field of police and judicial cooperation in criminal matters can take the form of the legal acts enumerated in Article 288 TFEU, namely the form of regulation, directive or decision.

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<sup>23</sup> For the two types of decision different terms were used in German, Dutch and Slovenian language, for example in the German linguistic version the Entscheidung and the Beschluß, in the Dutch version the Beschikking and Besluit, and in the Slovenian version the Odlocba and the Sklep were used for the addressed and the normative, *sui generis* decisions.

<sup>24</sup> See the judgment in case C-370/07, Commission v Council, points 23 and 29.

<sup>25</sup> See the judgment in case C-370/07, Commission v Council, point 29.

<sup>26</sup> Jean-Claude PIRIS highlights the unambiguous feature of the new legal framework. See: Jean-Claude PIRIS: *The Lisbon Treaty A Legal and Political Analysis*. Cambridge University Press, UK 2010. p. 94.

<sup>27</sup> De Witte, B.: Legal Instruments and Law-Making on the Lisbon Treaty p. 95-96, in Griller, S. and Jaques, Z. (eds.): *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, 2008, Wien, pp. 79-100.

By the way, the Treaty of Lisbon excludes, in a general manner, the possibility to conclude conventions between the Member States<sup>28</sup>, not only in the fields of the former third pillar, but also on the whole horizon of the Treaty. The reason of this amendment is that, because of the lack or protraction of their ratification by the Member States, those conventions were not proved to be effective forms of cooperation and probably that is why they were applied quite rarely.

In the field of police and judicial cooperation in criminal matters, the changes concerning the legal acts raise the question that how can be the renewal and the continuity of the application of those legal acts ensured which were adopted prior to the entry into force of the Treaty of Lisbon. It is Article 10 of Protocol (No 36) to the Treaty of Lisbon on transitional provisions which answers that question. Pursuant to that article, for the already existing acts adopted before the entry into force of the Treaty of Lisbon the inter-governmental character of the cooperation remains the same for five years, thus the Commission cannot bring action for infringement procedure, and the jurisdiction of the Court of Justice of the European Union does not change either, unless a given legal act is amended meanwhile. Nevertheless, despite the laying down of those transitional provisions there are still some open questions. (For example, Protocol No 36 does not contain any provision which would answer to the question whether those legal acts have direct effect or not.)

#### **4. SIMPLIFICATION OF THE LEGAL INSTRUMENTS APPLIED IN THE FIELD OF COMMON FOREIGN AND SECURITY POLICY**

The inter-governmental character of the former second pillar, i.e. the unanimous decision making, has not been altered by the Treaty of Lisbon. Nevertheless, the terminology of the legal acts has become simpler, since as from 1 December 2009 the Council or the European Council may adopt the necessary measures solely in the form of decisions, instead of the different former types of legal acts, namely the joint actions, common positions and decisions. At a first glance this change is welcomed as it serves for simplification, however, on the other hand, it can be considered as a disquieting change having regard to the fact that from now on the rather diverse objectives of the common foreign and security policy can be only by means of adoption of decisions. Moreover, as a matter of fact, these decisions certainly do not correspond with the decisions defined in Article 288 TFEU. It is because if we presume that the decisions adopted in this field do correspond with the decisions defined in Article 288 TFEU, which could be conceivable through the adoption of normative decisions, as a consequence, such an act would be recognized in the field of common foreign and security policy, which has direct effect within the Member States' legal system.<sup>29</sup> Thus, the peculiarities of the former second pillar do remain in the future, that is why it is inevitable to make the legal nature of the decisions adopted in the field of common foreign and security policy clear.

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<sup>28</sup> As regards the first pillar, it was ex Article 293 of the EC-Treaty and as for the third pillar it was ex Article 34 of the TEU which contained the general legal basis.

<sup>29</sup> De Witte, B.: *Legal Instruments and Law-Making on the Lisbon Treaty* p. 95-96, in Griller, S. and Jaques, Z. (eds.): *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, Wien, 2008, p. 90.

## 5. CHANGES IN THE SYSTEM OF LEGAL SOURCES

One of the innovations of the Treaty of Lisbon which aims to strengthen the transparency of the system of Union legal sources is the sharp distinction made between the legislative acts and non-legislative acts. As regards the non-legislative acts the Treaty names two types of acts, namely the delegated acts and the so-called implementing acts.<sup>30</sup> It introduces a transparent hierarchy among the different legal acts by establishing a delimitation between the legislative acts and that of the delegated and implementing acts.

Through the detailed examination of the Treaty's provisions we can identify a fourth, other category for all those legal acts, which cannot be classified under the aforementioned three categories. Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures (Article 296 TFEU). Regulation, directive and decision can be adopted in all the three categories.

Although it was not apparent in the text of the Treaty, a kind of hierarchy could have been already set up among the legal acts so far in the Community legal order. It is because the case-law of the European Court of Justice has distinguished the secondary legal sources according to their legal basis which serve for the adoption thereof. On the one hand, those legal acts belonged to one of the categories the legal basis of which were the provisions of the Treaty, and have been adopted in accordance with the procedures prescribed therein. On the other hand, those acts were classified under the other category the legal basis of which was provided in an act adopted by the institutions of the Union. According to the current hierarchy these latter acts were the implementing acts and could have taken various forms.

Considering this, the creation of the third category of legal acts, namely the delegated acts is a novelty.<sup>31</sup> The reason why this new category of legal acts was created is that it occurred quite often that for the amendments and the tiny modifications of the original legal acts the Council acted in accordance with a simplified procedure, on the basis of the secondary legal basis thereby avoiding the rather complicated legislative procedure. The application of secondary legal basis became a customary practice in the field of many Community policies. It was used with preference for example in the agricultural and fishery policies or as regards the structural funds. As for the legitimacy of this practice, that is to say whether it was allowed in the institutional system of the Community to delegate legislative powers, it should be pointed out that the European Court of Justice (hereinafter referred to as 'the ECJ') has supported in its former case-law<sup>32</sup> the idea that the creation of such a new system of legal sources is needed in which there is a clear distinction between the legislative and non-legislative powers. In its

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<sup>30</sup> See Articles 289, 290 and 291 TFEU.

<sup>31</sup> This cannot be considered as a solution without antecedents, since Article I-36 of the Constitutional Treaty created the category of *delegated European regulation* the adoption of which would have been based on the delegation of power and would have served to supplement or amend certain non-essential elements of the European law or European framework law, in accordance with the delegation of power provided for by the latter.

<sup>32</sup> See also: judgment of the ECJ in the Köster case 25/70 of 17 December 1970; case 16/88, Commission v Council; judgment in case C-93/00, European Parliament v Council of 13 December 2001 (ECR 2001., p. I-10119); C-378/00, Commission v Council (LIFE) (ECR 2003 p. I-937).

judgment<sup>33</sup> annulling paragraphs 29(1), 29(2), 36(3) of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, it reached the conclusion, that the creation of secondary legal basis<sup>34</sup> cannot be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action.<sup>35</sup> The ECJ has also pointed out in its judgement that the existence of an earlier practice of establishing secondary legal bases cannot reasonably be relied upon.<sup>36</sup> The afore-mentioned judgment of the ECJ overwrote the statements laid down in the *Köster* case in 1970<sup>37</sup> which acknowledged the legality of the comitology procedure by requiring that a transitional category should exist between the legislative and the implementing acts for the modification of the non-essential elements of the legal acts. This intention was detectable at the level of legislation even before the adoption of the Treaty of Lisbon and that is why in the regulatory procedure with scrutiny was established, as a new type of comitology procedures.<sup>38</sup> In the followings we will analyse the categories established by the Lisbon Treaty.

### 5.1 Legislative acts

Pursuant to Article 289(3) TFEU legal acts adopted by legislative procedure constitute legislative acts. Thus, under the new rules, those Union legal acts which are adopted directly on the basis of the provisions of the Treaty in accordance with the ordinary legislative procedure or special legislative procedures constitute legislative acts. Therefore, the concept of legislative act is not determined by its content but by the form of procedure applied. That concept reflects the unifying aspirations and makes clear that only the provisions of the Treaties can serve as legal basis for the adoption of legislative acts, and that they can be adopted only in accordance with the legislative procedures (being both the ordinary and special legislative procedures). This solution makes the legislative procedures of the Union more clear and transparent since before that the EC Treaty prescribed different legal acts and decision-making procedures concerning every common policy and legal basis, which led to legal debates between the institutions in many cases.

However, this solution can cause problem, too. As an example it can be mentioned that the measures relating to the support of the training of the judiciary and judicial staff are to be adopted in accordance with the ordinary legislative procedure. Consequently, the

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<sup>33</sup> C-133/06 *European Parliament v Council* (ECR 2008 p. I-3189).

<sup>34</sup> In the referred case, as it is pointed out in Advocate General Maduro's opinion, the European Parliament claimed that the Council established a secondary legal basis in order to avoid the co-decision procedure prescribed in Article 67(5) of the EC-Treaty. In that case, the question was raised whether the Community legislatures have the opportunity to create secondary legal basis or not.

<sup>35</sup> Case C-133/06, paragraphs 59-67.

<sup>36</sup> *ib* para 60.

<sup>37</sup> Case 25/70 *Köster* of 17 December 1970. See: Hoffman, H.: *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality*, *European Law Journal* (15) 2009, pp. 482-505, 494-496.

<sup>38</sup> See the Article 5a of Council decision 1999/468/EC as amended by decision 2006/512/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

European Judicial Training programme also constitutes a legislative act, however, as for its content it is rather an act of administrative nature.<sup>39</sup>

Concerning the initiation of legislative acts it should be mentioned that the former initiative monopoly of the Commission, prevailing in the first pillar, has been changed under Article 289(4) TFEU provides that besides the Commission's right to initiate, legal acts can also be adopted on the initiative of a group of Member States or of the European Parliament or on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank. On the one hand, this change is the consequence of the abolition of the pillar-system and, on the other hand, it can be regarded as a step to strengthen the institutional balance.

## 5.2. Delegated acts

Pursuant to Article 290 TFEU 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 difference between the delegated acts and the implementing acts is that the preceding can amend the basic legislative act, thus its content affects a legislative act, but it does not take the form of a legislative act. However, the Treaty requires appropriate authorisation for the adoption of such acts and the procedure is submitted to the control of the institution which delegated the power. The Treaty prescribes as a requirement that the objectives, content, scope and duration of the delegation of power has to be explicitly defined in the legislative acts. The delimitation of the duration of the delegation of power, the so-called sunset clause ensures that the delegation of power cease to exist after the prescribed duration and the legislative institutions, i.e. the Council and the European Parliament get back their legislative power. However, the accurate determination of the objectives, content and scope will probably be challenge for the legislative institutions. The principle settled in the second part of Article 290(1) serves as a guarantee since, as a line of demarcation between the legislative and non-legislative acts, it declares that the essential elements of a legislative act cannot be supplemented or amended through the adoption of delegated acts, those can only be regulated in legislative acts.

The conditions of the delegation of power have to be defined, in an obligatory manner, in the basic legislative act in which the delegation of power is conferred on the Commission. Article 290(2) disposes two opportunities. According to the first one, the European Parliament or the Council may decide to revoke the delegation. The other opportunity for exercising control can be realized by regulating that 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. Thus, while the first one ensures a rather general, one-time control, the latter ensures a continuous control, exercised on a case-by-case basis. Neither of the cases makes possible for the Council or for the European Parliament to submit an amended proposal. To judge which method of control is more

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<sup>39</sup> De Witte, B.: *Legal Instruments and Law-Making on the Lisbon Treaty* pp. 95-96, in Griller, S. and Jaques, Z. (eds.): *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Springer, Wien, 2008, p. 92.

effective<sup>40</sup>, the time lapsed since the Treaty of Lisbon entered into force is not sufficient; and the interpretation of Article 290(2) TFEU concerning the conditions for exercising the delegated powers, also raises questions. (E.g. whether these conditions are illustrative or exhaustive). Nevertheless, it is clear that the conditions for exercising the delegation of power have to be defined in the legislative acts, and for the sake of the clear delimitation the adjective ‘delegated’ has to be inserted in the title of delegated acts.

### 5.3. Implementing acts (Article 291 TFEU)

Similarly to the delegated acts, the word ‘implementing’ shall be inserted in the title of implementing acts. Due to the principle of conferral it is primarily the Member States who have to adopt all measures of national law necessary to implement legally binding Union acts.<sup>41</sup> However, where uniform conditions for implementing legally binding Union acts are needed, those acts confer implementing powers on the Commission, or, in duly justified specific cases, on the Council.<sup>42</sup> Article 291 TFEU does not mention the agencies of the Union among those who exercise implementing powers despite the growing number of the Union’s agencies and that many of them have regulatory power besides their role in the decision-making process.<sup>43</sup> It should also be noted that the field of common foreign and security policy is a specific policy since the High Representative of the Union for Foreign Affairs and Security Policy takes part in the execution.

Comparing the two categories of non-legislative acts, i.e. the delegated acts and the implementing acts, it can be stated that it is exclusively the Commission who can adopt delegated acts on the basis of delegation of powers. On the other hand, acts of implementing nature can be adopted by the Member States, and in exceptional cases, by the Council and by the High Representative of the Union for Foreign Affairs and Security Policy, too. The two groups differ also concerning their right of control since in the case of delegated acts it is exercised by the European Parliament and by the Council, while in the case of implementing acts it is the comitology committees consisting of the representatives of the Member States who control the adoption thereof by the Commission.

### 5.4. Other legally binding acts

Besides the legal acts referred to in Articles 289, 290 and 291 TFEU, there are some other legally binding acts regulated in the Treaties, which do not belong to either of the above categories. For example the decisions adopted in the field of common foreign and security policy, the international agreements concluded by the Union (Article 216 TFEU), moreover the interinstitutional agreements of a binding nature (Article 295

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<sup>40</sup> According to Hoffman’s opinion the most effective control can be achieved by combining the above two opportunities. See: Hoffman, H. Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, *European Law Journal* (15) 2009 pp. 482-505, 491-493.

<sup>41</sup> Article 291(1) TFEU

<sup>42</sup> Article 291(2) TFEU

<sup>43</sup> See Hoffman, H. Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, *European Law Journal* (15) 2009 p. 482-505, 502-504

TFEU) and the non-implementing acts of the agencies can be mentioned in this regard. Although their number has decreased as compared with the situation before the Treaty of Lisbon, nevertheless, due to their specific character and/or function they constitute a separate group.

## 6. LEGISLATIVE PROCEDURES

Simplification of the system of legislative procedures was among the priorities of the Laeken Declaration. Before analysing the procedures, it is worth highlighting briefly the changes carried out concerning the qualified majority voting.<sup>44</sup> The present so-called weighted voting system remains in force until 1 November 2014. According to that, 255 weighted votes out of the total 345 votes, representing at least half of the Member States<sup>45</sup>, is needed for the adoption of a legal act. However, where the Council does not act on a proposal from the Commission the support of the two thirds of the number of Member States is needed. Moreover, each Member State may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. In cases where due to an opt-out or an enhanced cooperation not all the Member States take part in the voting, the number of votes needed for the qualified majority changes accordingly.

As from 1 November 2014, the rules on the so-called ‘double majority’ will come into force, thus a legal draft will be adopted provided that, on the one hand, at least 55 % of the Member States support it<sup>46</sup> and, on the other hand, these Member States represent at least 65% of the population of the Union. At least 4 Member States are needed to prevent the adoption of a legal act (blocking minority). Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority is defined as at least 72 %<sup>47</sup> of the members of the Council. These rules are complemented by two further provisions in the period from 1 November 2011 to 31 March 2017. During that transitional period, in cases where a draft legal act affects a politically sensible theme for a Member State, the Member State concerned may request that it be adopted in accordance with the previous rules on qualified majority. Furthermore, during that period they can refer to an opportunity which is similar to the so-called Ioannina compromise, namely, that instead of the 4 Member States required for the blocking minority the three-quarter of them, i.e. already 3 Member States could initiate to prevent the adoption of a legal act. This facilitated rule on blocking minority will probably make the decision-making in the Council difficult; and it will stimulate the Council to reach consensus even in cases falling under the rules on qualified majority.

Besides the counting of votes, another important change is that, by extending the ordinary legislative procedures to new areas, the areas falling under the qualified majority rule have been also increased (e.g. transport, intellectual property rights and the area of freedom, security and justice). Many experts take the view that the modifications carried

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<sup>44</sup> Article 238 TFEU and Title II of Protocol No. 36.

<sup>45</sup> Currently 14 votes are needed.

<sup>46</sup> Currently this means at least 15 Member States.

<sup>47</sup> Counting with the current Member States it is 20 Member States.

out concerning the qualified majority is a benefit, since the system can become simpler, namely there is no need to re-consider the weighted votes each time when a new Member State joins the Union, and the significance of the disparities arising from the system also decreases.<sup>48</sup> Those who are less optimistic highlight that due to the transitional period the complexity of the present system remains until 2017, and under the new system the medium sized Member States will be under represented.<sup>49</sup>

### 6.1. Procedure for the adoption of legislative acts

As it was mentioned when dealing with the legal acts, the legal acts are adopted in accordance with the ordinary or special legislative procedures.

An innovation of the Treaty of Lisbon is that draft legislative acts have to be forwarded to national Parliaments as well, which may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of the subsidiarity.<sup>50</sup> The former co-decision procedure, which is called as the ordinary legislative procedure, is applied in forty new cases and, on the whole approximately eighty-five legal basis order to apply this procedure, where the European Parliament and the Council acts as equal co-legislators.

Without enumerating all the areas falling under the ordinary legislative procedure, it is worth highlighting some specific policies. Probably the most significant modification is that the entire former third pillar, i.e. the field of police and judicial cooperation in criminal matters is placed under the ordinary legislative procedure. It is not negligible that the Treaty classifies under that co-legislative competence such important policies like the agriculture, border control, asylum, immigration and, notwithstanding some exceptions,<sup>51</sup> the entire field of judicial cooperation in civil matters. Even new policies fall under the ordinary legislative procedure, just like the field of intellectual property rights, sport, space, administrative cooperation, energy, tourism and the civil protection. It is also an important change that the new rules on comitology and the provisions on the citizens' initiative have to be adopted in accordance with the ordinary legislative procedure by the European Parliament and the Council.

From a substantial point of view, the course of the ordinary legislative procedure has not been changed as compared with the former so-called co-decision procedure<sup>52</sup>; the Treaty of Lisbon introduced merely some formal changes. For example, every single phase of the procedure is regulated in a separate subparagraph, furthermore due to a rather symbolic change which intends to indicate the equality of the two institutions, both the European Parliament and the Council accept its position after the first reading.<sup>53</sup>

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<sup>48</sup> In the framework of the present weighted votes e.g. in the case of Germany one vote represents 2.8 million citizen, while in the case of Malta, 1 vote represents 0.3 million citizen.

<sup>49</sup> See van den Bogaert, S.: Qualified majority voting in the Council: the first reflections on the new rules 15 MJ 1 (2008) pp. 97-108, 101-105.

<sup>50</sup> See Protocol No. 1 and No 2 to the Treaty of Lisbon.

<sup>51</sup> E.g. measures concerning family law regulated in Article 81(3) TFEU which are adopted by the Council, acting in accordance with a special legislative procedure: the Council acts unanimously after consulting the European Parliament.

<sup>52</sup> See Article 251 EC Treaty.

<sup>53</sup> Whilst under Article 251 EC Treaty, the European Parliament accepted an opinion and the Council a common position, now under Article 294 (3) and (4) TFEU both institutions accept its position.

Nevertheless, the very wide application of the ordinary legislative procedure is the result of some compromises. The Commission's 'monopoly' of the right to initiate is now abolished as it is reflected in the wording of Article 17(2) TEU: '*Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise*'. In certain institutional questions<sup>54</sup> the Commission exercises its right to initiate together with the European Central Bank and the European Court, and in the field of judicial cooperation in criminal matters and police cooperation legal acts can be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States.<sup>55</sup> In certain areas of Union cooperation the Treaty of Lisbon makes it possible to suspend the legislative procedure for four months and to refer the draft measure to the European Council. The so-called emergency break mechanism can also be used for legislative acts to be adopted in the field of social security if a Member State declares that a draft legislative act would affect important aspects of its social security system.<sup>56</sup> Within four months of the suspension, after discussion, the European Council: refers the draft back to the Council, which terminates the suspension of the ordinary legislative procedure, or it takes no action or requests the Commission to submit a new proposal. In the latter case the act originally proposed is deemed not to have been adopted. Similarly to Article 48 TFEU, the applicability of the emergency break mechanism is also provided in the field of judicial cooperation in criminal matters. The emergency break mechanism can be used where a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system concerning the minimum rules on criminal procedure<sup>57</sup> and the minimum rules concerning definition of criminal offences and sanctions<sup>58</sup>. In such cases, after discussion, and in case of a consensus, within four months of the suspension the European Council refers the draft back to the Council, which terminates the suspension of the ordinary legislative procedure. In case of disagreement, at last 9 Member States can decide to establish enhanced cooperation on the basis of the draft directive concerned. The concerned Member States notify the European Parliament, the Council and the Commission, and continue to negotiate.

The other form of the legislative procedure is the special legislative procedure. Mostly, that is the case where the Treaty prescribes for the European Parliament a role differing from the co-decision and where an act is adopted by the Council not by qualified majority but when it acts unanimously. Also those procedures fall under this category where the European Parliament acts on its own initiative. The European Parliament acting by means of regulations on its own initiative can, after seeking an opinion from the Commission and with the consent of the Council, lay down the regulations and general conditions governing the performance of the duties of its Members and that of the duties of the Ombudsman. The establishment of the annual budget can also be classified as a special legislation procedure. Similarly, those cases where the Council acts with the consent of the European Parliament are also special legislative procedures. The following questions belong to the latter: adoption of the provisions on the European elections, actions to combat discrimination, provisions to strengthen the rights of the citizens of the

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<sup>54</sup> Article 129 (3), 28 and 258 TFEU

<sup>55</sup> Article 76 TFEU

<sup>56</sup> See Article 48 TFEU.

<sup>57</sup> Article 82(3) TFEU

<sup>58</sup> Article 83 TFEU

Union, furthermore the rules on the implementation of the Union's own resources and the establishment of the multiannual financial framework.

The other type of the special legislative procedures where the Council acts by qualified majority after consulting the European Parliament. E.g. the specific programmes in the field of research and technological development can be adopted in accordance with such procedure, after consulting the Economic and Social Committee, too.

However, even after the entry into force of the Treaty of Lisbon the Council's right for acting unanimously was maintained in several sensitive areas, even though in those questions the Council has to consult the European Parliament. The following questions belong to that, without intending to give an exhaustive list: tax harmonisation, some specific fields of the area of freedom, security and justice: passports, identity cards, residence permits, measures concerning family law with cross-border implications, the establishment of the European Public Prosecution's Office, cooperation involving the police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences of the Member States. As regards the last two cases, a group of at least nine Member States may request that the draft directives be referred to the European Council in order to reach the unanimity. In such cases, similarly to the emergency break mechanism, the procedure in the Council has to be suspended. After discussion, and in case of a consensus, the European Council, within four months of this suspension, refers the draft back to the Council for adoption.

## 6.2. Procedure for the adoption of non-legislative acts

Besides the ordinary and special legislative procedures, the other large group of binding legal acts of the Union is adopted in accordance with non-legislative procedures. A part of these procedures cover the above-mentioned delegated acts, the application of which, namely the rules on revocation of delegation, will be presumably necessary to be laid down in the framework of an interinstitutional agreement.

We have also mentioned that the Council and the European Parliament lay down in advance the rules on the adoption of implementing acts, i.e. 'the rules and general principles concerning mechanisms for control by Member States', by means of regulations in accordance with the ordinary legislative procedure.<sup>59</sup> On the one hand this means that the complicated comitology procedures regulated by the not so transparent Council Decision<sup>60</sup> may be regulated only by regulations adopted in accordance with the ordinary legislative procedure and, on the other hand, we talk about comitology only provided that a legislative act serving as a basic act confers on the Commission the right to adopt implementing acts. On the basis of the rules determined by the Treaty, the new comitology Regulation, namely Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers was adopted on 16 February 2011.<sup>61</sup> Among the innovations introduced by the new regulation

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<sup>59</sup> Article 291(3) TFEU

<sup>60</sup> Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23) as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006., p. 11)

<sup>61</sup> OJ L 55, 28.2.2011, pp. 13-19

it should be mentioned that the procedure has become simpler since the regulation reduced the number of comitology committees and procedures based on the previous Council Decisions of 1987 and that of 1999 as amended in 2006 from 4<sup>62</sup> to 2, which are the advisory procedure and the examination procedure. While under the former rules it was the Council who controlled the comitology, according to the new regulation this right is granted exclusively for the Member States, thus neither the Council nor the Parliament could intervene in the procedures, nevertheless, the Commission is obliged to inform them. The right of scrutiny for the Council and the Parliament provided for in Article 11 of the Regulation is of great importance since they can indicate to the Commission that, in their view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such cases the Commission is obliged to review the draft and to inform the Council and the European Parliament whether it intends to maintain, amend or withdraw the draft.

In addition, the scope of comitology procedure has been extended since besides the implementing acts of general scope it also includes the programmes with substantial implications, the common agricultural and common fisheries policies, the protection of the environment, the protection of the health of humans, animals or plants, the taxation and the common commercial policy. It is a novelty and can be considered as an advance that through the latter one the anti-dumping measures, which were out of the former comitology system, now fall under the scope of the new Regulation.<sup>63</sup> We can mention among the benefits of the new comitology procedure that the former rigid system has become more flexible since the Commission can choose among more options, nevertheless, the transitional parallel existence of the old system and the new procedures can raise not negligible problems. The procedures of the old system have to be made accord with the new procedures, however, it does not mean that the new rules should be applied automatically in each case since the Regulation does not affect pending procedures in which a committee has already delivered its opinion in accordance with Decision 1999/468/EC, moreover the legal effects of the PRAC procedure have to be maintained for 5 years as regards the application of the basic act which makes reference thereto.

## 7. CONCLUSIONS

In response to the questions raised at the beginning of this paper, namely whether the European integration has progressed by the Treaty of Lisbon and, in particular, whether the coherence, transparency and effectiveness of the legal system of the Union has risen and the legislation has become simpler or not, we can set forth the following statements.

The reforms introduced by the Treaty of Lisbon aimed to make the system of Union law more simply and transparent. In this respect, it is welcomed that the types of legal sources, which were formerly different concerning each pillar and, from a numerical point of view, their number was be exaggerated, became uniform and nominally

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<sup>62</sup> Advisory procedure, management procedure, regulatory procedure, regulatory procedure with scrutiny (PRAC).

<sup>63</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council, Article 2, paragraph 2

decreased, notwithstanding the fact that the specialities of the Common Foreign and Security Policy still remain.

It is also an advantage that the new legislation creates a sort of hierarchy of legal sources. The system of legislative, delegated and implementing acts promotes considerably the transparency of Union legal acts in the future although some legal acts cannot be classified under those categories. The explicit distinction made between the legislative acts and that of the delegated acts is of a great significance regarding both the delimitation of competencies and the institutional balance.

The comitology procedure became simpler and hopefully through the two procedures regulated in the new comitology Regulation adopted in accordance with the ordinary legislative procedure, namely the advisory procedure and the examination procedure, the transparency of implementing acts adopted by the Commission will increase and the interinstitutional conflicts will reduce.

The reform of qualified majority voting and the increasing application of the ordinary legislative procedure also unequivocally contribute to the simplification and the enhancement of the legitimacy of Union legislation. Nevertheless, it is clear that the system of Union legislation is still rather complex because of the transitional provisions, the exceptions and the differing procedures, thus, despite the changes, it is not easy to orientate therein. Because of the short time elapsed from the entry into force of the Treaty Lisbon the question whether those reforms as a whole could really increase the effectiveness of the Union legislation cannot be answered unambiguously, however, we have reasonable ground to believe that a significant amount of the quantitative changes can turn to a qualitative changes.

