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'Delegated' Legislation in the (new) European Union: A Constitutional Analysis

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This article brings classic constitutionalism to an analysis of delegated legislation in the European Union. To facilitate such a constitutional analysis, it starts with a comparative excursion introducing the judicial and political safeguards on executive legislation in American constitutionalism. In the European legal order, similar constitutional safeguards emerged in the last fifty years. First, the Court of Justice developed *judicial* safeguards in the form of a European non-delegation doctrine. Second, the European legislator has also insisted on *political* safeguards within delegated legislation. Under the Rome Treaty, 'comitology' was the defining characteristic of executive legislation. The Lisbon Treaty represents a revolutionary restructuring of the regulatory process. The (old) Community regime for delegated legislation is split into two halves. 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.

INTRODUCTION: CONSTITUTIONAL CONTROL OVER DELEGATED LEGISLATION

The modern democratic principle commands that laws be adopted by a representative vote of the people in parliament.[1] The idea of a 'government of the people, by the people, for the people' forms the cornerstone of democratic constitutionalism.[2] Within the ideal 'legislative state', all general norms are adopted by parliament. That the latter cannot delegate power 'is a principle universally recognised as vital to the integrity and maintenance of the [democratic] system of government ordained by the Constitution'.[3] This democratic ideal of the nineteenth century encountered the technocratic reality of the 'administrative state' in the twentieth century.[4] Modern Parliaments would simply have no time or expertise to 'master all the details of tea chemistry and packaging in order to specify the

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1 E. Zoller, *Droit Constitutionnel* (Paris: Presses Universitaires de France, 1999) 353. Cf Article I, Section 1 of the US Constitution: 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'
2 A. Lincoln, 'Gettysburg Address, 1863' in: H. S. Commager and M. Cantor (eds), *Documents of American History – Volume I* (New York: Prentice Hall, 1988) 428, 429.
3 *Field* v *Clark* 143 US 649 (1892), 692.
4 Cf G. Lawson, 'The Rise and Rise of the Administrative State' (1993-4) 107 Harv LR 1231.

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precisely allowable limits of dust, artificial coloring, and the like that would affect suitability for consumption'.[5] Industrial societies required a 'motorized legislator' – one that could accelerate the regulatory process – and found it in the executive.[6]

The advent of the legislating executive 'constitutes one of the most important transformations of constitutionalism'.[7] In the administrative state, executive legislation would become the numerical norm.[8] Executive legislation may thereby derive from two sources. It may be 'autonomous' regulatory power directly granted under the constitution;[9] or, it may be delegated to the executive on the basis of parliamentary legislation. In the latter scenario, the delegation 'distorts' the original balance of power and many constitutional orders therefore impose constitutional safeguards to control 'delegated legislation'.[10]

What are the constitutional safeguards imposed on delegated legislation in the European legal order?[11] The European legal order has developed two constitutional safeguards to protect its foundational values of federalism and democracy.[12] Judicially, the Court of Justice of the European Union endorses a 'non-delegation' doctrine. The European legislator is constitutionally prohibited from delegating essential political choices to the executive. Yet even within these substantive limits, the European legislator has traditionally been unwilling to delegate power with-

5 W. Gellhorn and C. Byse, *Administrative Law: Cases and Comments* (Mineola: Foundation Press, 1974) 62.

6 C. Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (Tübingen: Universitätsverlag Tübingen, 1950) 18.

7 Zoller, n 1 above 436.

8 H. W. R. Wade and C. F. Forsyth, *Administrative Law* (Oxford: Oxford University Press, 2000) 839 (emphasis added): 'there is no more characteristic administrative activity than *legislation*'; as well as: H. Pünder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law' (2009) 58 *International and Comparative Law Quarterly* 353 esp 355: 'in all countries compared, administrative law-making powers became the rule rather then the exception'. For a general overview, see also: A. von Bogdandy, *Gubernative Rechtsetzung* (Tübingen: Mohr Siebeck, 1999).

9 For example: the 1958 French Constitution recognises 'autonomous' regulatory powers of the executive. For an analysis of the distribution of legislative power between parliament and the executive, see J. Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992) esp Chapter 3 – 'The Division of Lawmaking Powers: The Revolution that Never Happened?'

10 B. Schwartz, 'Delegated Legislation in America: Procedure and Safeguards' (1948) 11 MLR 449.

11 A preliminary note on terminology: The Lisbon Treaty has introduced a 'formal' or 'procedural' concept of legislation (cf Article 289(3) TFEU); yet this article remains loyal to a 'material' or 'functional' conception of legislation. This is not the result of a blind traditionalism, but has analytical advantages. A procedural definition of legislation simply rests on a definitional fiat by identifying the nature of a norm through the procedure for its adoption. But this does not tell us what is 'legislative' about the procedure. Ultimately, the procedural definition is thus forced to import 'meta-constitutional' elements into its concept of legislation. A functional definition of legislation, by contrast, searches for material criteria that distinguish legislative from executive acts; and thus allows us to apply the same concept of legislation across different historical and (supra)national settings. Second, a functional conception of legislation corresponds to a functional separation of power doctrine and underlies such constitutional constructs as 'delegated legislation' or 'executive *legislation*'. To make matters more complex, the Lisbon Treaty has now also introduced a 'formal' definition of delegation. Delegated acts are now defined by the procedure established in Article 290 TFEU. However, again, this article also employs a material concept of delegation that includes 'conferrals' of 'implementing power' under Article 291 TFEU.

12 This article will not investigate constitutional safeguards protecting individual rights against excessive executive legislation.

out some political control. From the very beginning, the Council – representing the Member States – would not delegate powers to the Commission – representing a supranational executive – without some intergovernmental control. It insisted on the establishment of committees as political safeguards of *federalism*. With the rise of the European Parliament to co-legislator in the European legal order, a second value keenly claimed protection: democracy. With the democratization of primary legislation, Parliament insisted on political safeguards of *democracy* within secondary legislation.

This article aims to analyse the European Union's constitutional safeguards for delegated legislation from *inside* the classic parameters of constitutionalism.[13] How has the European Court defined the limits of the 'non-delegation' doctrine? What political control mechanisms protect the Union's foundational values of federalism and democracy against excessive executive legislation? In order to assist our understanding of the European legal order, the next section places these questions into a comparative constitutional context by analysing the constitutional safeguards developed in the United States. The third section then looks at the old structure of the executive regulatory process in the European *Community*. Against this background, the fourth section analyses the changes brought by the Lisbon Treaty. Despite the formal failure of the Constitutional Treaty, an executive revolution has indeed taken place.[14] The Lisbon Treaty significantly re-regulates the regulatory process by distinguishing between two forms of delegated legislation: 'delegated acts' and 'implementing acts'. The former are covered by Article 290 TFEU and are said to concern a delegation of 'legislative' power to the Commission. The latter are dealt with by Article 291 TFEU and are intended to regulate the delegation of 'executive' power to the Commission (or Council). What constitutional safeguards control the new forms of executive legislation? What is their respective scope of application? Tentative answers and some conclusions will be presented in the final section.

AMERICAN CONSTITUTIONAL SAFEGUARDS AND DELEGATED LEGISLATION

In order to bring a classic constitutional yardstick to an analysis of delegated legislation in the European Union, let us briefly look across the Atlantic for comparative constitutional insights. The start of the American 'administrative state' has been dated to 1887 – a hundred years after the birth of the United States.[15] The industrialising nation required ever more technical legislation, especially in the areas of commerce and competition. Congress increasingly became unable to keep up with the requested legislative speed. Yet, nineteenth century constitution-

13 For a criticism of the opposite approach, see n 182 below.

14 For the famous – opposite – conclusion after the constitutional reform leading to the Fifth Republic of France, see J. Rivero in: *Université de droit, d'économie et de science d'Aix-Marseille, Le Domaine de la loi et du Réglement* (Aix: Presses Universitaires d'Aix-Marseille, 1978) 263: 'la revolution n'a pas eu lieu'.

15 G. P. Miller, 'Independent Agencies' (1986) *Supreme Court Review* 41 – linking the start of the administrative state with the birth of the Interstate Commerce Commission.

alism, at first, opposed the idea of a delegation of legislative powers away from Congress. This opposition was manifested in the judicial 'non-delegation doctrine'. The latter fundamentally differs from the 'ultra-vires doctrine', which outlaws executive rules because they are outside their legislative mandate. The non-delegation doctrine holds that the legislative mandate itself violates the constitutional principle of the separation of powers.[16]

To whom would Congress delegate its powers? Since Congress cannot delegate legislative or executive power to a part of itself,[17] the 'natural' recipient was the executive branch and in particular its chief executive officer, the President.[18] Yet, from the very beginning, the American administrative (r)evolution was characterised by a novel constitutional phenomenon: regulatory agencies. While it would be misleading to see these as a 'fourth branch' of government,[19] their mixed character continues to pose controversial constitutional questions.[20] Be that as it may, *all* delegations of power, whether to the President or to agencies, were made subject to the same constitutional safeguards,[21] with the Supreme Court insisting on judicial safeguards and Congress on legislative controls.

From judicial to political safeguards: the rise and fall of the non-delegation doctrine

Nineteenth century constitutionalism opposed the demands of the administrative state by insisting on the non-delegation doctrine: 'That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution.'[22] This absolute principle of non-delegation would soon be relativised to allow for the regulatory thirst of the administrative state. The Supreme Court soon allowed for Congressional delegations of power to the President as long as the latter had 'no discretion'. Whenever the President acted 'simply in execution of the act of Congress', this 'was not the making of law'.[23] This interpretation of the non-delegation doctrine allowed for delegations, but denied that the power so delegated was 'legislative' in character. This strategy was soon extended to the 'power to fill up the details', as long as Congress had laid down an 'intelligible'

16 *Mistretta* v *United States* 488 US 361 (1989) 371: 'The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.'
17 Cf *Metropolitan Washington Airports Authority* v *Citizens for the Abatement of Aircraft Noise* 501 US 252 (1991) esp 274–6.
18 L. Tribe, *American Constitutional Law* (New York: Foundation Press, 2000) 141.
19 G. P. Miller, n 15 above, 64–5: 'This model has some vitality as a descriptive theory', but '[t]he fourth branch theory, however, cannot be reconciled with the written constitution.'
20 Cf P. Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 *Colum LR* 573; as well as: S. G. Calabresi and K. H. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1991-92) 105 Harv LR 1153.
21 On the various control models for administrative acts, see the brilliant analysis by D. S. Rubenstein, '"Relative Checks": Towards Optimal Control of Administrative Power' (2009-10) 51 *William and Mary Law Review* 2169.
22 *Field* v *Clark* 143 US 649 (1892) 692.
23 *ibid*, 693.

legislative principle.[24] This linguistic strategy of denying that the delegated powers were legislative powers showed that the Supreme Court was aware that the absolute non-delegation doctrine 'ill accorded with reality', and it thus 'pretended, by word juggling, that the non-delegation doctrine was unimpaired'.[25]

Yet, the Court could soon no longer pretend that the powers delegated were not legislative powers. And after the 'New Deal',[26] the Supreme Court switched rationales. It replaced the absolute non-delegation doctrine with a relative delegation doctrine. In *Schechter Poultry Corporation* v *United States*[27] (*Schechter*), the petitioners had been charged with a violation of the 'Live Poultry Code'. The code had been adopted under the 1933 National Industrial Recovery Act, which authorised the President to approve 'codes of fair competition'.[28] The 'Live Poultry Code' had fixed the number of working hours per week and established a minimum hourly wage. The petitioners had violated the Code and, in their defence, claimed that the code represented 'an unconstitutional delegation by Congress of legislative power'.[29] The Supreme Court agreed; yet, in doing so produced a *new* rationale behind the non-delegation doctrine:

> The Congress is not permitted to abdicate or to transfer to others the *essential legislative functions* with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly . . . But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained . . . *In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.* We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.[30]

The new rationale behind the non-delegation doctrine was a relative rationale: Congress was entitled to delegate legislative power, but this delegation had to find a constitutional limit in its 'essential legislative functions'. What were these

24 *United States* v *Grimaud* 220 US 506 (1911) 516: 'Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power'. See also: *Hampton & Co* v *United States* 276 US 394, 409: 'If Congress shall lay down by legislative act an intelligible principle to which the person or body authorised to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.'

25 W. Gellhorn and C. Byse, n 5 above, 62. In the words of another author, the Supreme Court followed an ingenious syllogism: '(1) *Major Premise*: Legislative power cannot be constitutionally delegated by Congress; (2) *Minor Premise*: It is essential that certain powers be delegated to administrative officers and regulatory commissioners; (3) *Conclusion*: Therefore, the powers thus delegated are not legislative powers' (Cf L. Fisher, 'Delegating Power to the President' (1970) 19 *Journal Public Law* 251, 252–3 (quoting: R. Cushman).

26 On the 'New Deal' see W. E. Leutchenburg, *Franklin D. Roosevelt and the New Deal: 1932–1940* (New York, Harper & Row, 1963).

27 *Schechter Poultry Corporation* v *United States* 295 US 495 (1935).

28 Cf the National Industrial Recovery Act 1933, s 3(a) and (b).

29 *Schechter* n 27 above, 519.

30 *ibid*, 529–542 (emphasis added).

'essential' legislative choices? This question is a hard nut and the Supreme Court has never cracked it. In its post-*Schechter* jurisprudence, not a single delegation of powers has ever been deemed unconstitutional on the ground that it encroached the legislature's prerogative.[31] The non-delegation doctrine was soon widely regarded as a disappointment, since it 'failed to provide needed protection against unnecessary and uncontrolled discretionary power'.[32] The Supreme Court had given in to the demands of the administrative state. In its own words: 'in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.'[33] But the decline of this *judicial* safeguard to executive power was compensated by the rise of a *legislative* safeguard to executive power – the 'legislative veto'.

From 'hard' to 'soft' political safeguards: the rise and fall of the legislative veto

In order to compensate for the broad delegations of its powers, Congress insisted on a political control mechanism: the legislative veto. 'After 1932 veto clauses proliferated like water lilies on a pond (or algae in a swimming pool, depending on one's point of view).'[34] The legislative veto was the political response to a fundamental conflict within the administrative state – the conflict between democracy and technocracy, in other words 'between political accountability and the necessary complexity of regulatory decision-making'.[35] The legislative veto would allow Congress to veto an *intra vires* executive act, where its substance conflicted with the will of the democratic majority in Congress. Importantly, both branches of Congress could – independently – exercise the veto. The negative control of the executive branch was thus easier than the positive adoption of primary legislation.

The legislative veto was designed to 'promot[e] democratic accountability',[36] and this function it discharged for half a century. Yet, after fifty years of constitutional practice, the Supreme Court invalidated the constitutional theory behind the veto in *Immigration and Naturalization Service* v *Chadha*[37] (*Chadha*). The case concerned the power of Congress to veto the exercise of delegated power by the Attorney General. Chadha's student visa had expired and the Immigration and Naturalisation Service ordered him to be deported. He applied to the Attorney General for a suspension of that order, the Attorney being the official authorised

31 Cf G. Lawson, 'The Rise and Rise of the Administrative State' (1993-94) 107 Harv LR 1231, 1240: 'The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935. This has not been for lack of opportunity.' However, for the argument that the Supreme Court only 'relocated' the doctrine, see C. R. Sunstein, 'Nondelegation Canons' (2000) 67 *U Chi L Rev* 315.

32 K. C. Davis, 'A New Approach to Delegation' (1969) 36 U Chi L Rev 713.

33 *ibid*, 372.

34 S. Breyer and R. B. Stewart, *Administrative Law and Regulatory Policy* (Boston: Little Brown, 1992) 93.

35 *ibid*, 93–4.

36 L. Tribe, n 18 above 142.

37 *Immigration and Naturalization Service* v *Chadha* 462 US 919 (1983).

by Congress to grant suspensions.[38] Having granted the suspension on humanitarian grounds, the House of Representatives used its legislative veto.[39] Chadha appealed to the Supreme Court, and the latter found, surprisingly, that the legislative veto was unconstitutional. In the view of the Court, Congress could only overrule an executive rule with a legislative rule – and the latter was subject to the 'ordinary' legislative procedure.[40] The latter required, inter alia, the cooperation of both legislative chambers – the House of Representatives and the Senate.[41]

The conclusion of the Court has been criticised. That bicameral cooperation is required for amendments of executive legislation must be accepted. But the insistence on bicameralism for vetoing executive legislation disregards constitutional and logical principles.[42] The constitutional critique can be found in the (dissenting) opinion of Justice White:

> The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandise itself at the expense of the other branches – the concerns of Madison and Hamilton. Rather, *the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the Nation's lawmaker.* While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.[43]

This constitutional argument is grounded in a foundational value of constitutionalism: the establishment of a system of checks-and-balances. The latter demands that if executive power is increased (through delegation), Congress' controlling power must equally be increased to retain a constitutional equilibrium.[44] But apart from constitutional common sense, the finding that the legislative veto violated the separation of powers principle also flew into the face of formal logic. If the making of executive rules does not require the consent of both branches of

38 The Immigration and Nationality Act 1952, s 244 (c) (1) provided: 'Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.'

39 *ibid*, s 244 (c) (2): 'if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law'.

40 *Chadha* n 37 above, 952.

41 On the 'presentment' requirement, see *Chadha ibid*, 946 *et seq*.

42 This view is controversial, and the Court has received significant academic support; see G. Lawson, n 31 above and L. Tribe, n 18 above.

43 *Chadha* n 37 above, 973 (emphasis added).

44 For an analysis of this point, see P. L. Strauss, 'Was there a baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision' (1983) 32 *Duke* LJ 789.

government, why would their unmaking require bicameralism? Or else: if *positive* consent between *both* branches is required to make the delegation (and assuming that the consent must extend to every single act based on that delegation), then the *negation* of a *single* branch is surely sufficient to eliminate that consent. This follows from basic arithmetic: $-(1+1) = (-1) + (-1)$. Yet, sadly, the Supreme Court was out on its own to prove once more that the life of the law was not logic but experience, and committed the most famous mathematical mistake in the history of American constitutional law.

With the legislative veto declared unconstitutional, how has American constitutional doctrine compensated the decline of democratic control on executive legislation? The simple answer is: it has not. While there has been a push to place all agencies under the control of the (elected) President,[45] Congress has never been able to redevelop similarly 'hard' legislative safeguards of democracy.[46] It thus had to fall back on the classic 'soft' congressional safeguards: 'watchdog committees',[47] congressional investigations, and the power of the purse. Moreover, American constitutionalism has sought salvation in 'privatising' democratic control through the involvement of interested parties in administrative legislation.[48] However, this 'corporatist' form of direct democracy suffers severe limitations.[49]

We shall see in the next two sections how this decline of public control mechanisms in the United States contrasts strikingly with the rise of such mechanisms in the European Union. Here, the development of constitutional safeguards started out with the protection of 'federal' values. Not only would the European Court of Justice develop a judicial non-delegation doctrine, the Union legislator equally insisted on political safeguards of federalism when the (intergovernmental) Council delegated power to the (supranational) Commission. With the rise of the European Parliament the European Union legal order subsequently developed political safeguards of democracy. But the parliamentary legislative veto over executive legislation took much longer to arrive. The Lisbon Treaty now constitutionally entitles the European Parliament to such a legislative veto. And unlike American constitutionalism, the

45 On this point, see S. G. Calabresi and K. H. Rhodes, n 20 above and L. Lessig and C. R. Sunstein, 'The President and the Administration' (1994) 94 Colum LR 1.

46 This conclusion is not called into question by the 1996 Congressional Review Act (CRA). The latter requires agencies to submit major regulatory acts to Congress for review. While expedited in some minor ways, Congress can still only negate executive rules by following the 'ordinary' legislative procedure set out in Article I of the US Constitution. On the CRA and its shortened congressional committee process, see Note, 'The Mysteries of the Congressional Review Act' (2008–09) 122 Harv LR 2162.

47 On these committees, W. Gellhorn and C. Byse, n 5 above 113–116.

48 Cf Administrative Procedure Act 1946, § 553: 'Rule-Making'. The provision provides in subsection (c) that: 'the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation'.

49 For a masterful diagnosis of the representational 'imbalance' within this 'surrogate political process', see R. B. Stewart, 'The Reformation of American Constitutional Law' (1974-75) 88 *Harv* LR 1667, 1713 *et seq.* In the words of the author (*ibid*): 'It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests. Such overrepresentation stems from both the structure of agency decisionmaking and from the difficulties inherent in organizing often diffuse classes of persons with opposing interests.'

European constitutional solution provides for an alternative veto power for both branches of the Union legislature. With these introductory words and without further ado, let us now analyse the constitutional safeguards to delegated legislation in the (new) European Union.

DELEGATED LEGISLATION IN THE EUROPEAN COMMUNITY

The 1957 Rome Treaty identified the Council as the principal 'legislative' organ of the European (Economic) Community.[50] Yet despite a sternly worded Article 7 EC,[51] the treaty makers had anticipated that the Council alone would not be able to legislate on all matters falling within the scope of the Treaty. The Treaty provided the possibility of a transfer of power from the Council to the Commission. Article 211 EC entitled the Commission to 'exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'.

Would there be constitutional limits around these delegated powers? In other words, has the European legal order developed a non-delegation doctrine along American lines? And even if this were the case, would it also allow for political safeguards within delegated legislation? After all, every delegation of power from the *intergovernmental* Council to the *supranational* Commission would have a significant unitary effect on the decision-making in the European Community. The Council thus indeed insisted on the establishment of committees, staffed with representatives of the Member States, that would control the Commission's exercise of delegated powers. This system became known as 'comitology'. It was *the* political safeguard of federalism for delegated legislation. With the rise of the European Parliament, a second value would increasingly claim protection within comitology: democracy. Should the Parliament be entitled to democratically control the adoption of secondary legislation? Would there be – unlike the American constitutional solution – a legislative veto in the European legal order?

The first section of this part presents the answers generated in the (old) Community legal order. We shall start with the judicial safeguards, before analysing the political safeguards imposed on delegated legislation.

Judicial safeguards: constitutional limits to delegated legislation

Delegation to the Commission

Has European constitutionalism adopted the American non-delegation doctrine? As we have seen Article 211 EC entitled the Commission to 'exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'. Where there limits to this power? The Court was asked to establish the

50 For a short analysis of the inter-institutional differences between the European Coal and Steel Community and the European Economic Community, see R. Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) 46 *Common Market Law Review* 1069, 1070 *et seq.*

51 The provision read: 'Each institution shall act within the limits of the powers conferred upon it by this Treaty.'

constitutional parameters of the delegation doctrine in *Köster*.[52] A German farmer had challenged the legality of a legislative scheme, set up by the Commission, that established import and export licences for cereals. It was alleged that 'the power to adopt the system in dispute belonged to the Council', which should have acted according to the 'normal' legislative procedure established in Article 37 EC.[53] The Court disagreed:

> Both the legislative scheme of the [EC] Treaty, reflected in particular by the last indent of Article [211], and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognised in all the member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. 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 [37]. 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. On the other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in Article [37], either by the Council itself or by the Commission by virtue of an authorization complying with Article [211].[54]

In essence, while basic elements of the policy area must be decided in accordance with the institutional balance prescribed by the Treaty, non-essential elements could be delegated and adopted by a simpler procedure. This followed from the scheme of the Treaty, in particular Article 202 EC and the common constitutional tradition of all the Member States.

But what was the dividing line between 'basic elements' and 'non-essential' elements? And what was the normative relationship between the 'basic act' and the 'delegated act'? In *Rey Soda*,[55] the Court tackled the first question. Pointing to the institutional balance between Council and Commission, the Court held that the delegation mandate 'must be interpreted strictly'; yet, despite this limitation the Court insisted that 'the concept of implementation must be given a wide interpretation'.[56] Only the Commission would be able to continuously follow trends in agricultural markets and regulate quickly if the situation so required. The Council was thus entitled 'to confer on the Commission *wide powers of discretion and action*.'[57] The scope of these extensive powers was to be judged in light of the objectives of the enabling act 'and less in terms of the literal meaning of the enabling word'.[58] However, subsequent jurisprudence confirmed three constitutional limits to a delegation of powers. First, for 'an enabling provision to be valid, it must be sufficiently specific – that is to say, the Council must clearly specify the bounds of the

52 Case 25/1970 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster et Berodt & Co* [1970] ECR 1161 (*Köster*).
53 *ibid* at [5].
54 *ibid* at [6]. See also Case 46/86 *Romkes* v *Officier van Justitie for the District of Zwolle* [1987] ECR 2671 at [16].
55 Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* (1975) ECR 1279.
56 *ibid* at [9]–[10].
57 *ibid* at [11] (emphasis added).
58 *ibid* at [14].

power conferred in the Commission'.[59] Second, 'provisions which are intended to give concrete shape to the fundamental guidelines of Community policy' are beyond delegation.[60] Third, the Commission cannot use its wide implementing powers in one policy area to interfere with the powers of the Council in another.[61]

We turn now to the normative relationship between the enabling act and the delegated act. In many legal orders, a hierarchy of norms answers this question. The enabling act is superior to the delegated act. The supremacy of primary over secondary legislation means that the latter cannot amend the former.[62] The Community legal order did however not develop an absolute hierarchical solution. While it confirmed the subordinate status of secondary legislation vis-à-vis the enabling act on which it was based,[63] this relative subordination would be suspended where the enabling act expressly envisaged the subsequently amendment of the basic act.[64] There was hence no clear distinction between delegated 'legislative' and delegated 'executive' power within the Community legal order.[65] However, the Commission's amendment power for primary legislation encountered a limit in the 'basic elements' of the primary act.[66] This external limit to the amendment power logically followed from the constitutional limits to the delegation doctrine. The European Court has nonetheless shown a marked preference for executive legislation in the past and allowed for significant amendments of primary legislation.[67]

59 Case 291/86 *Central-Import Münster GmbH & Co. KG* v *Hauptzollamt Münster* [1988] ECR 3679, at [13]. But see also: Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, at [41]-[2].

60 *Germany* v *Commission ibid* at [37].

61 Case 22/88 *Industrie- en Handelsonderneming Vreugdenhil BV and Gijs van der Kolk – Douane Expediteur BV* v *Minister van Landbouw en Visserij* [1989] ECR 2049 at [16]-[25].

62 This constitutional rule has exceptions. On so-called 'Henry VIII Clauses' in British constitutional law, see H. Pünder, n 7 above.

63 Case 38/70 *Deutsche Tradex GmbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] 145 at [10].

64 Case 100/74 *Société CAM SA* v *Commission* [1975] ECR 1393, in which the Court confirmed the legality of Article 4 of (Council) Regulation 2496/74 amending the prices applicable in agriculture for the 1974/75 marketing year. That this technique has not been overruled by Case C-93/00 *Parliament* v *Council* [2001] ECR 10119, see only Commission Regulation No 413/2010 amending Annexed III, IV and V to Regulation No 1013/2006 of the European Parliament and the Council on shipments of waste so as to take account of changes adopted by OECD Council Decision C(2008) 156 ([2010] OJ L119/1). The amendment power of delegated legislation is not confined to provisions in an annex, cf Case 417/93 *Parliament* v *Council* [1995] ECR I-1185.

65 K. Lenaerts and A. Verhoeven, 'Towards a Legal Framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision' [2000] 37 *Common Market Law Review* 645, 652.

66 Cf Case 230/78 *SpA Eridania-Zuccherifici nazionali et al* v *Minister of Agriculture and Foresty et al* [1979] ECR 2749 at [8]; as well as: Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671 at [16]: 'an implementing regulation . . . must respect the basic elements laid down in the basic regulation'. See more recently: Case C-303/94 *Parliament* v *Council* [1996] ECR 2943 at [30]-[33].

67 See in particular: Case C-156/93 *Parliament* v *Commission* [1995] ECR 2019. The case has led C. F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (Oxford: Oxford University Press, 2005) 234 to comment the Court's past position in the following way: '[I]n a number of rulings the Court struck the balance between the notion of "implementation" – the scope for legislation adopted in accordance with simplified procedures – and "the basic elements" – requiring the use of normal procedures – in such a way as to encourage rather than prevent the Council and the Commission from outflanking the European Parliament.'

Delegation to the Council

Could the Council delegate powers to itself; and if so, could the Council adopt secondary legislation on the basis of a simpler decision-making procedure? American constitutionalism absolutely prohibits the delegation of legislative power to a branch of the legislature. But the European Court was to show no constitutional concern: 'the provisions implementing basic regulations may be adopted by the Council according to a procedure different from that'.[68] In light of this judicial minimalism, the Council's self-delegation soon developed into a 'full alternative to the delegation of implementing powers to the Commission'.[69] Yet the Single European Act textually tilted this balance in favour of the Commission. The (then) newly introduced third indent of Article 202 EC provided that the Council could delegate implementing powers to itself only 'in specific cases'.[70] This identified the Commission as the principal beneficiary of delegated powers. But how special would 'specific cases' have to be before the Council could justify a delegation of powers to itself?

Few constitutional pointers on this issue have crystallised in the past. In *Commission* v *Council (Budgetary Powers)*, the Court simply stated that 'after the amendments made to Article [202 EC] by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision.'[71] Did this impose a soft – formal – duty on the Council; or, would the Court of Justice establish hard – substantive – limits protecting the executive prerogative of the Commission? In *Commission* v *Council (Visa Policy)*,[72] the Commission alleged that the Council had reserved implementing power to itself 'improperly *and* without giving adequate reasons for doing so'.[73] This invoked a substantive *and* a formal violation of the delegation doctrine. Substantially, the Commission contested that 'the specific nature of the implementing measures provided for by the contested regulations was such as to justify the exercise of implementing powers by the Council'.[74] Formally, the Commission alleged that 'the Council failed to comply with the obligation to state reasons laid down in Article 253 EC'.[75]

68 Case 230/78 *SpA Eridania-Zuccherifici nazionali et al* v *Minister of Agriculture and Forestry et al* [1979] ECR 2749 at [7].

69 K. Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' (1993) 18 *European Law Review* 23, 34. However, the Court has (occasionally) clarified that the Council could not 'derogate' from its own general acts by means of specific decisions; cf Case 119/77 *Nippon Seiko KK and others* v *Council and Commission* [1979] ECR 1303 at [24]: 'The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article [133] of the [EC] Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom the law applies.'

70 This phrase suggested the existence of clear guidelines. They would not be provided in the (subsequently adopted) Comitology Decisions. Bradley has thus heavily criticised the comitology system as failing to respect the wording of Article 202 EC. It 'deprives the requirement that the Council supply detailed reasons for reserving the exercise of implementing powers of its raison d'être' (cf K. St Clair Bradley, 'Comitology and the Law: Through a Glass, Darkely' (1992) 29 *Common Market Law Review* 693, 716).

71 Case 16/88 *Commission* v *Council* [1989] ECR 3457 at [10].

72 Case 257/01 *Commission* v *Council* [2005] ECR 345.

73 *ibid* at [33] (emphasis added).

74 *ibid* at [34]-[37].

75 *ibid* at [38].

The Court's answer concentrated on the formal duty to give reasons. '[T]he Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that . . . it is the Commission which, in the normal course of event, is responsible for exercising that power'.[76] The Court criticised the Council's explanations as 'both general and laconic'. However, it justified this explanatory minimalism by reference to the policy area in which the delegation had taken place.[77] In light of the specific constitutional regime for Title VI of the EC Treaty (Visas, Asylum and Immigration) – a regime that provided the Council with more rights than elsewhere in the EC Treaty, 'the Council could reasonable consider itself to be concerned with a specific case'.[78] And because of this intergovernmental predisposition of the specific policy area, the Council had – although in very few words – discharged its formal duty to state the reasons for delegating implementing powers to itself. The Court thus appears to recognise substantive differences between policy areas within the European Union.

Delegation to Agencies

As we have seen, the dramatic rise of 'agencies' had been a constitutional phenomenon in the United States since the first half of the twentieth century.[79] The European Union followed this trend in the second half of that century.[80] But unlike the American legal order,[81] the European Union rejects the delegation of discretionary powers to agencies.

This constitutional path began with *Meroni* v *High Authority*[82] (*Meroni*). The applicant had complained that the High Authority – the 'Commission' within the European Coal and Steel Community – had delegated to an agency 'powers conferred upon it by the Treaty, without subjecting their exercise to the conditions which the Treaty would have required if those powers had been exercised directly by it'.[83] The Court of Justice had little trouble in finding that this could not be done. Even if the delegation as such was constitutional, the Community 'could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty'.[84] In a second argument the Court then analysed the constitutional limits to a delegation of powers to agencies as such. While noting that Article 8 ECSC did not

76 *ibid* at [51].
77 *ibid* at [53].
78 *ibid* at [59].
79 P. Strauss, 'The Place of Agencies in Government: Separation of Powers and the Fourth Branch' (1984) 84 Colum LR 573.
80 While a few agencies emerged in the 1970s, there has been a real 'agencification' of the European legal order since the 1990s. Today, almost 40 European agencies exist in the most diverse areas of European law. For an inventory and functional typology of European agencies, see S. Griller and A. Orator, 'Everything under control?: the "way forward" for European agencies in the footsteps of the Meroni doctrine' (2010) 35 *European Law Review* 3 (Appendix).
81 See Section 2, above.
82 Case 9/56 *Meroni & Co, Industrie Metallurgiche, SpA* v *High Authority of the European Coal and Steel Community* (1958) ECR 133.
83 *ibid*, 146.
84 *ibid*, 150.

provide any power to delegate,[85] the Court nonetheless found that such a constitutional possibility 'cannot be excluded'. It was inherent in the powers of the High Authority 'to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision' if such delegation was necessary for the performance of the Community's tasks. These tasks were set out in Article 3 ECSC – a provision that laid down 'very general objectives', which could not always be equally pursued. The Community thus had to make political choices, and these political choices could not be delegated to an agency:

> Reconciling the various objectives laid down in Article 3 [ECSC] implies a real discretion involving difficult choices, based on a consideration of the economic facts and circumstances in the light of which those choices are made. The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, *or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.* A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.[86]

This judgment clarified two things. First, a delegation to bodies not mentioned in the Treaties – even 'bodies established under private law' – was constitutionally legitimate. However, such delegations 'can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority'.[87] This followed from the 'balance of powers which is characteristic of the institutional structure of the Community'. To delegate 'a discretionary power' to 'bodies other than those which the Treaty has established' would render that guarantee ineffective. Subsequent judicial and academic commentary has concentrated on this last passage. *Meroni* came to stand for a constitutional non-delegation doctrine according to which the European institutions could not delegate *any* discretionary power to European agencies.[88] And while this expansive reading may not have been originally intended,[89] constitutional folklore continues to

85 Article 8 ECSC read: 'The High Authority shall be responsible for assuring the fulfilment of the purposes stated in the present Treaty under the terms thereof.'

86 *Meroni* n 82 above, 152 (emphasis added).

87 *ibid.*

88 The most drastic expression of this expansive reading of *Meroni* is Case 98/80 *Romano* v *Institut national d'assurance maladie-invalidité* [1981] ECR 1241 at [20]: 'it follows both from Article [202] of the [EC] Treaty, and in particular by Articles [230] and [234] 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.'

89 In *Meroni* n 82 above, the Court repeatedly referred to the '*wide* margin of discretion' that was delegated to the agency (*ibid*, 153 and 154; emphasis added). A close historical analysis could thus narrow the ruling to an early expression of the 'basic elements' principle: the High Authority was simply not allowed to delegate *basic* choices to an agency. For a similar reading, see Griller and

pay homage to a 'Meroni Doctrine'. This constitutional choice has prevented European agencies from exercising *political* choices involving discretionary power.

Political safeguards within the community legal order

The Humble Birth of Comitology

Has European constitutionalism developed political safeguards similar to the American legislative veto power? Article 211 EEC perceived the Council as (absolute) delegator. Within the constitutional limits established by the Court, it could freely determine the content of the delegation. This view gave rise to a famous 'logical' argument: if the Council was able to withhold the delegation altogether, it must – *a fortiori* – be able to impose 'conditions' on the delegation. These 'conditions' translated into 'committees', which would control the exercise of delegated powers by the Commission.

A first type of committee emerged in the area of competition policy and obliged the Commission to seek advice from a committee composed of representatives of the Member States.[90]

A second type of committee was subsequently established in the context of the common agricultural policy. Actively involved in the decisional management of the policy, it became known as the 'management committee'. In the exercise of delegated powers, the Commission was here obliged to submit a proposal to a Committee that was composed of representatives of the Member States. The latter decided matters – like the Council – by qualified majority. However, regardless of the opinion by the committee, the Commission could adopt the measure; yet, where the committee had opposed the proposal, the Council could subsequently overrule the Commission, acting itself by qualified majority. The Council thus acted like a 'Court of Appeal'.[91] This management procedure thus led to an *inversion* of the European decision-making structure: the absence of agreement in the Council *strengthened* the decisional powers of the Commission. Decisional intergovernmentalism in the Council translated into decisional supranationalism of the Community writ large.[92]

Orator, n 52 above. The Court has itself (occasionally) signalled its willingness to limit the *Meroni* doctrine to a 'basis elements' doctrine for agencies, see Case C-164/98P *DIR International Film Srl et al* v *Commission* [2000] ECR I-447; and albeit in a different context, Case C-154-155/04 *R (On the application of Alliance for Natural Health)* v *Secretary of state for Health* [2005] ECR I-6541, especially at [90].

90 Regulation 17/62: First Regulation implementing Articles 85 and 86 of the [EEC] Treaty (OJ English Special edition: Series I Chapter 1959–1962, 87), Article 10(3): 'An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty.'

91 C. Bertram, 'Decision-Making in the E.E.C.: The Management Committee Procedure' (1967-68) 5 *Common Market Law Review* 246, 259.

92 Inactivity of the Council would lead to a positive confirmation of the Commission legislation; and even if the Council came to act, a minority of the Member States would be sufficient to back the Commission decision. While not having overlooked this dynamic (cf J. Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 267, 290.), its undervaluation may constitute a – major – crack in Professor Weiler's famed dual supranationalism thesis.

In order to contain the effects of this 'inverted intergovernmentalism' a third committee type arose in the 1960s: the regulatory committee. The regulatory committee further strengthened the control powers of the Council. In the event of a negative opinion by the committee, the Commission was no longer entitled to take a positive decision. The Commission proposal would pass to the Council, which could itself take a decision by qualified majority. The regulatory procedure came close to the 'primary' legislative procedure, except where it contained a 'safety net' (*filet*). Here, where the Council failed to act within a specified time, the Commission would be allowed to adopt the executive act.[93] Inactivity in the (intergovernmental) Council thus continued to favour decision-making by the (supranational) Commission. The Council soon devised a counter-mechanism. This counter-mechanism was the 'double-safety net' (*contre-filet*) procedure. It allowed the Council – where it had failed to act by a qualified majority – to nonetheless veto the subsequently enacted Commission legislation by a simple majority.[94] This arrangement thus strengthened the political safeguards of federalism: a simple majority of the Member States could veto supranational legislation.

Was 'comitology' constitutional? In *Köster*,[95] the Court of Justice was asked whether comitology violated 'the Community structure and the institutional balance as regards both the relationship between institutions and the exercise of their respective powers'.[96] The Court denied this was the case, developing its argument in two steps. First, it underlined the 'optional' nature of a delegation of power to the Commission under Article 211 EC. If the Council was free to decide whether to delegate or not, it would also be free to decide under which conditions a delegation was to take place. Second, the comitology committee would not have the power to take a decision itself.[97] It informed the Commission of the interests of the Member States; and, ultimately, only operated as an 'alarm system' that invited the Council to 'substitute its own action for that of the Commission', where the committee had opposed the delegated legislation. 'The system is therefore arranged in such a way that the implementing decisions adopted by virtue of the

93 This procedural device was originally developed in the context of the common commercial policy, cf Article 12–14 of Regulation 802/68 on the common definition of the concept of the origin of goods (OJ English Special Edition: 1968 I/165), especially Article 14(3)(c): 'If, within three months of the proposal being submitted to it, the Council has not acted, the proposed provisions shall be adopted by the Commission.'

94 Cf Article 7 of Council Directive 69/349 amending the Directive of 26 June 1964 on health problems affecting intra-Community trade in fresh meet (OJ English Special Edition: 1969 II/431); and Directive 74/63 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs (OJ 1974 L 38/31), whose Article 10 would be subject to judicial review in Case 5/77 *Tèdeschi* v *Denkavit* [1977] ECR 1555 (*Tèdeschi*). The fourth paragraph of the provision read: 'The Commission shall adopt the measures and implement them forthwith where they are in accordance with the Opinion of the Committee. Where they are not in accordance with the Opinion of the Committee, or if no Opinion is delivered, the Commission shall without delay propose to the Council the measures to be adopted. The Council shall adopt the measures by a qualified majority. If the Council has not adopted any measures within 15 days of the proposal being submitted to it, the Commission shall adopt the proposed measures and implement them forthwith, except where the Council has voted by a simple majority against such measures.'

95 *Köster* n 52 above.

96 *ibid* at [4].

97 *ibid* at [12].

basic regulation are in all cases taken either by the Commission or, exceptionally, by the Council.'[98] The constitutionality of comitology could thus not be contested in light of the institutional structure of the Community.[99] The Court indeed subsequently held that Article 211 EC 'allow[ed] the Council to determine *any conditions* to which it may subject the exercise by the Commission of the power granted to it'.[100] This was a constitutional *carte blanche*.[101]

Towards (quasi-)constitutional Order: The Comitology Decisions

For almost three decades, comitology developed in the undergrowth of the Rome Treaty. It was given textual foundations by the Single European Act. An amended Article 202 EC now expressly provided that the Council should – except in 'specific cases' – '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 could thereby 'impose certain requirements in respect of the exercise of these powers'. These requirements had to be established – in advance – by the (unanimous) Council.

From the start, the constitutional import of this provision was controversial. Some saw it as a constitutional revolution, which recognised the autonomous – not delegated – executive power of the Commission.[102] Two arguments contradicted this view. Textually, Article 202 EC spoke the language of delegation. It imposed an obligation on the Council to '*confer* on the Commission' powers for the implementation of rules. This recognised the Commission as the principal holder of executive power, but this executive power was still 'delegated' executive power. Secondly and symbolically, the constitutional position chosen for comitology by the Single European Act was Article 202 EC – dealing with the powers of the Council – and *not* Article 211 EC specifying the powers of the Commission. The teleological message was, therefore, that executive power was constitutionally rooted in the Council – not the Commission.

Fundamentally, the new Article 202 EC obliged the Council to lay down *in advance* the conditions for any delegation of power to the Commission. This called

98 *ibid.*

99 *ibid* at [10].

100 Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* n 55 above at [12] (emphasis added).

101 *Tedeschi* n 94 above esp at [53]–[56]. *Tedeschi* dealt with the 1969 'General Programme for the Elimination of Technical Barriers to Trade'. The latter contained a decision that in principle all directives that delegate power to the Commission should follow the regulatory committee procedure. This had been done with regard to feedingstuffs (cf Directive 74/63 – n 94 above). The Directive allowed the Commission, with the assistance of the Standing Committee for Feedingsstuff, to amend the basic directive but had thereby used the 'double safety net' procedure in Article 10(4). In *Tedeschi*, the Italian Government had tried to get the Standing Committee to amend Directive 74/63 to include 'potassium nitrates'. Italy did not wait for the requested amendment and banned the substance – invoking its right to apply unilateral safeguard measures. The Court not only confirmed the power of a Member State provisionally to ban undesirable substances, despite the existence of a European machinery to amend legislation, but also gave its approval to the double-safety net procedure. The Court's answer in this respect as sibylline: it recognised that the Council could stop the Commission from adopting (safeguard) measures under the double-safety net procedure; yet this was not regarded as 'paralysing the Commission'. For an extensive discussion of this difficult case, see Bergström, n 67 above at 142 *et seq*).

102 For this view, see K. Lenarts and A. Verhoeven, n 65 above, 653.

for a comitology 'code' that would formally define the types of committees that could be used.[103] The Council used this power three times in 1987, 1999, and 2006.

The 1987 Comitology Decision codified past constitutional practice into three exclusive procedures.[104] This *numerus clausus* brought (some) order into the chaos of committees;[105] yet, the Decision provided no criteria for the choice of committee procedures and thus left this to the political discretion of the European legislator. Parliament voiced constitutional objections to the comitology decision. Having gained a more active role in the adoption of primary legislation it demanded a parallel involvement in the adoption of secondary legislation. Parliament particularly objected to the 'double safety net' procedure,[106] which allowed the Council *unilaterally* to reject a Commission proposal – even in those areas that now required parliamentary cooperation. In *Parliament* v *Council (Comitology)*, it requested help from the Court of Justice – a request that the Court famously refused.[107]

After a decade of inter-institutional 'war',[108] a second Comitology Decision was adopted in 1999 with three principal improvements in mind.[109] First, it was

103 The normative or hierarchical status of these Comitology Decision appeared to be 'in between' the EC Treaty and ordinary legislation, cf Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937 at [39]-[42].

104 Council Decision 87/373 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197/33). According to its Article 1, the Council was henceforth obliged to use control mechanisms 'which must be in conformity with the procedures set out in Articles 2 and 3'. Article 2 codified three main committee procedures. Procedure I concerned the advisory committee. Procedure II concerned the management committee, which was codified in two variants: Variant (a) and Variant (b). Procedure III set up the regulatory committee in two variants too, whereby Variant (b) codified the 'double safety net' procedure: 'If, on the expiry of a period laid down on each act to be adopted by the Council under this paragraph but which may in no case exceed three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission, save where the Council has decided against the said measures by a simple majority.' Finally, Article 3 dealt with safeguard measures.

105 'There is little doubt that such reform was required, given that there were more than 30 variants of the committee procedures in play at the time of the SEA, and that considerable energy was spent during the legislative process wrangling about the precise procedure to be incorporated in the primary regulation or directive.' Cf P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006) 107.

106 For a brief overview of the European Parliament's position, see K. St.C.Bradley, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 *European Law Journal* 230, 231 *et seq.*

107 Case 302/87 *Parliament* v *Council (Comitology)* [1988] ECR 5615. The Commission also tried to attack on the management committee procedure in Case 16/88 *Commission* v *Council* [1989] ECR 3457, claiming that the latter 'encroached upon the Commission's power under Article [270] of the [EC] Treaty to implement the budget on its own responsibility' (*ibid* at [15]). The Court however rejected this claim (*ibid* at [16]).

108 Cf Resolution of the European Parliament from 13 December 1990 on the Executive Powers of the Commission (comitology) and the Role of the Commission on the Community's External Relations (OJ 1991 C 19/273), 274: 'In the first reading, Parliament should systematically delete any provisions for procedures III(a) or III(b) and replace it by procedure II(a) or II(b) or, for proposals concerning the internal market put forward under Article 100a of the EEC Treaty, procedure I.' For the years of war and the various 'peace treaties' in the form of inter-institutional agreements, see Bergström, n 67 above, Chapter 4.

109 (Council) Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred n the Commission (OJ 1999 L 184/23).

to provide 'greater consistency and predictability in the choice of type of committee'.[110] The second purpose behind the reform was 'to simplify the requirements for the existence of implementing powers' and 'to improve the involvement of the European Parliament' in areas in which it acted as co-legislator.[111] This generally required – thirdly – providing sufficient information to the European Parliament.[112] How were these two objectives fulfilled? While the Decision indeed established some guidelines in its Article 2, these criteria would be of a 'non-binding nature'.[113] However, the 1999 reform simplified the comitology committee procedures and strengthened the powers of the Commission.[114] But more importantly, it also strengthened the prerogatives of the Parliament. The latter was henceforth entitled, in areas in which it acted as co-legislator, to alert the Council to its view that the Commission had exceeded its delegated powers.[115] However, in the event of parliamentary objection the Commission was only obliged to 're-examine the draft measure'; and, if it so wished, could maintain the latter as long as it informed the Parliament of its intended action.[116]

While the Second Comitology Decision had increased the powers of the European Parliament;[117] the latter was far from an equal footing with the Council in the executive sphere. Should Parliament have the right to act as

110 *ibid*, preamble 5.
111 *ibid*, preamble 9.
112 *ibid*, preamble 10.
113 Article 2 offered a range of 'soft' criteria for the choice of committee. The Court subsequently clarified that the soft nature of the guidelines did not deprive them of all 'legal effects'. In Case C-378/00 *Commission* v *Parliament and Council (Comitology II)* [2003] ECR 937, the European legislator had selected the regulatory procedure – a choice that departed from the comitology criteria. The Court confirmed the non-binding character of the selection criteria in the 1999 Decision, but held that 'contrary to the contentions of the Parliament and the Council, the fact that the criteria laid down in Article 2 of the second comitology decision are not binding in nature does not prevent that provision from having certain legal effects, and in particular does not prevent the Commission legislature from being subject, when it departs from those criteria, to the obligation to state reasons on that point in the basic instrument adopted by it' (*ibid* at [50]). The European legislator was thus entitled to depart from the criteria, but had to sufficiently justify this departure (*ibid* at [62]). In this case, the legislator had failed to do so (*ibid* at [69]) and the relevant provision in the Regulation was consequently annulled.
114 Most importantly: the new Comitology Decision removed the two variants under the management and regulatory procedure (as well as the two variants of the safeguard procedure). The reformed core of the regulatory procedure was now contained Article 5(6) – third indent: 'If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.'
115 *ibid*, Article 4(3) and 5(5). And to allow Parliament to exercise its right of legislative supervision, it obtained the right to 'be informed by the Commission of committee proceedings on a regular basis' (*ibid*, Article 7(3)).
116 *ibid*, Article 8.
117 G. Schusterschitz and S. Kotz, 'The Comitology Reform of 2006 – Increasing the Powers of the European Parliament without Changing the Treaties' [2007] 3 *European Constitutional Law Review* 68, 72: 'Although the European Parliament did not get equal rights, the amended Decision reflected, for the first time, the shift in the institutional balance due to the introduction of the co-decision procedure with the Treaty of Maastricht.' For a much more critical evaluation, see K. St. C. Bradley, 'Delegated Legislation and Parliamentary Supervision in the European Community' in: A. Epiney et al (eds), *Challenging Boundaries* (Baden-Baden: Nomos, 2007) 286, 288: 'At best, the 1999 decision paid lip-service to Parliament's claims for a greater role in supervising the adoption of measures to implement co-decision acts.'

co-executive; or was the institutional imbalance justified by 'the logic of executive federalism'?[118] This problem was tackled by a third decision under Article 202 EC.[119] The 2006 Comitology Decision did not repeal its predecessor but amended it substantially. The most significant amendment was the introduction of a new regulatory procedure: the 'regulatory procedure with scrutiny'. This new procedure would be legally binding for all measures falling within its scope.[120] Article 2(2) of the amended Comitology Decision defines it scope as follows:

> Where a basic instrument, adopted in accordance with the procedure referred to in Article 251 of the [EC] Treaty, provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, *inter alia* by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be adopted in accordance with the regulatory procedure with scrutiny.

The procedure was thus to apply to legislative powers delegated to the Commission under co-decision, that is where the Council and the Parliament act as co-legislators. Yet, not all acts adopted by co-decision would be subject to the new procedure. It only covered 'measures of general scope', which would 'amend non-essential elements' of the primary legislation.[121] This limitation was explained by the desire to 'enable the legislator to scrutinise the adoption of "quasi-legislative" measures implementing an instrument adopted by co-decision'.[122] How had this been achieved? The regulatory procedure with scrutiny was defined in Article 5a and entitled the Parliament to veto (draft) delegated legislation on four grounds: lack of competence, substantial incompatibility with the basic instrument, subsidiarity and proportionality.[123] Through the legislative veto, the new procedure 'put the two legislators on an equal footing for the first time'.[124] However, the 2006 Decision failed to do the same with regard to executive acts that 'implement' primary legislation.[125]

118 In this latter sense: K. Lenaerts and A. Verhoeven, n 65 above, 680. This has also been said to reflect the position of the Council (cf Editorial Comment 'In the meantime . . .' (2006) 43 *Common Market Law Review* 1243, 1247).

119 (Council) Decision 2006/512 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 2006 L200/11).

120 Recital 5 refers to the legally binding nature of the criteria applicable for the regulatory procedure with scrutiny, and Article 2(2) of the (amended) 1999 Decision states that the relevant measures 'shall be adopted' in accordance with the procedure.

121 The exclusion of individual decisions from the scope of the regulatory procedure with scrutiny was, according to Bradley, 'a bitter pill' for the European Parliament (cf K. St.C. Bradley, 'Halfway House: the 2006 Comitology Reforms and the European Parliament' (2008) 31 *West European Politics* 837, 846).

122 Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred in the Commission (OJ 2006 C 255/1).

123 Article 5a(3)(b) of the (amended) 1999 Comitology Decision.

124 G. Schusterschitz and S. Kotz, n 117 above, 68. The main exception occurs in the event of a negative opinion of the Committee. Here, the Council is completely free to reject the Commission proposal, while the Parliament must justify its rejection by means of one of the four grounds.

125 For this excellent point, see Bradley, n 117 above, 300.

With the Constitutional Treaty having failed in 2005, the last Comitology Decision had been adopted in the constitutional interregnum which ensued. It had reformed – at the legislative level – the structure of the executive function partly in light of the discussions of the European Convention.[126] Much of the Constitutional Treaty has found its way into the Lisbon Treaty, which has since entered into force. What constitutional safeguards has the latter imposed on the delegation of powers? Has the comitology system survived? Have Parliament's participatory powers increased? The Lisbon Treaty has indeed radically re-structured executive law-making in the European Union. The nature of its 'revolutionary' reform is discussed in the next section.

THE LISBON TREATY: THE REVOLUTION THAT HAPPENED

The Lisbon Treaty revolutionises the constitutional principles governing executive legislation. When did the revolution begin? The European Parliament and the Commission had long harboured ideas on a radical re-structuring of the regulatory process within the Union.[127] These ideas surfaced in 2001 with the Commission's White Paper on 'European Governance'.[128] It demanded that it should 'be clearer who is responsible for policy execution'.[129] The 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'.[130] This was an invitation to question the constitutionality of comitology,[131] and required constitutional reform along the following lines:

> This adjustment of the responsibility of the Institutions, giving control of executive competence to the two legislative bodies and reconsidering the existing regulatory and management committees touches the delicate question of the balance of power between the Institutions. It should lead to modifying [EC] Treaty Article 202 which permits the Council alone to impose certain requirements on the way the Commission exercises its executive role. That article has become outdated given the co-decision procedure which puts Council and the European Parliament on an equal footing with regard to the adoption of legislation in many areas. Consequently, the Council and the European Parliament should have an equal role in supervising the way in which the Commission exercises its executive role. The Commission intends to launch a reflection on this topic in view of the next Inter-Governmental Conference.[132]

This reformist reflection took a revolutionary turn, when the 'Declaration on the Future of the European Union' convened a European Convention 'to consider the

126 On the temporal connection between the Constitutional Treaty and the 2006 Comitology Decision, see Editorial Comment, n 118 above, 1246.
127 Bergström, n 67 above, 320 *et seq.*
128 European Commission, *European Governance: A White Paper* COM(2001) 428.
129 *ibid*, 29.
130 *ibid*, 20.
131 'If these orientations are followed the need to maintain existing committees, notably regulatory and management committees, will be put into question.' *ibid.*
132 *ibid.*

key issues arising for the Union's future development'.[133] One of the key issues was the simplification of the Union's legal instruments; and in particular, whether a distinction between legislative and executive measures was needed in the European legal order. A Working Group was called to report on constitutional possibilities for simplification.[134] Building on the advice of three legal experts,[135] the Final Report on Simplification proposed the introduction of a 'new category of legislation': 'delegated acts'. In the view of Working Group, the Community legal order knew 'no mechanism which enables the legislator to delegate the technical aspects or details of legislation *whilst retaining control over such legislation*'. The legislator could, as things stood, solely 'entrust to the Commission the more technical or detailed aspects of the legislation *as if they were implementing measures*'. The concept of 'delegated act' would fill that constitutional gap.[136]

The Constitutional Treaty took up these proposals; and the Lisbon Treaty has retained them. What is the Lisbon Treaty's constitutional regime for delegated powers? The Treaty has split the Community's single constitutional regime for delegated legislation under Article 202 EC into two halves. Under the old regime, the wide concept of 'implementing power' had comprised acts that *amended* and acts that merely *implemented* primary legislation.[137] 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. While both constitutional regimes identify the Commission as the principal delegee of Union power,[138] they differ in the control mechanisms they establish over the exercise of delegated power. The delegation of legislative power is subject to the constitutional safeguards established in Article 290 TFEU. The delegation of implementing power is subject to the constitutional regime established by Article 291 TFEU.

The delegation of 'legislative' power: Article 290 TFEU

The novel constitutional regime for a delegation of power to the Commission to amend primary legislation is set out in Article 290 TFEU. The constitutional

133 Laeken Declaration of 15 December 2001 on the Future of the European Union.

134 Final Report of Working Group IX on Simplication, CONV 424/02.

135 The Working Group's 'scientific committee' was composed of J. C. Piris, M. Petite, and K. Lenaerts. The view of the third of these (cf WGIX – WD7) 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 (*ibid*, 2). Within the category of 'executive acts', a distinction was made between 'delegated legislation' and 'executive acts *sensu stricto*' (*ibid*, 4). 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' (*ibid*, 5). 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' (*ibid*, 6).

136 Final Report of Working Group IX (Simplification), 8 (emphasis added).

137 On the wide notion of 'implementation' under Article 202 EC, see above.

138 In exceptional cases, the Council may be the delegee under Article 291 TFEU, see below.

conditions and limitations for this delegation are defined in the first paragraph of the provision:

> 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 act. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be subject of a delegation of power.[139]

The provision continues and discontinues the constitutional status quo. The Lisbon amendments continue three aspects of the 'old' delegation doctrine. First, Article 290 TFEU confirms 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.[140] Second, Article 290 TFEU codifies the 'non-delegation' doctrine: the European legislature cannot delegate the power to adopt 'essential elements' of the legislative act.[141] Finally, Article 290 TFEU codifies the 'specificity principle': '[t]he objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative act'. However, 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.[142]

139 Emphasis added.

140 J. Bast, 'Legal Instruments and Judicial Protection' in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, Oxford 2009) 345, 391. For a similar conclusion derived from comparative constitutional law, see J. P. Jacque, 'Introduction: Pouvoir Législatif et Pouvoir Exécutif Dans L'Union Européenne' in J-B. Auby and J. Dutheil de la Rochère, *Droit Administratif Européen* (Bruxelles: Bruylant, 2007) 25, 45: 'Dans les États membres, l'acte adopté par délégation a généralement valeur législative lorsque le législateur le confirme explicitement ou implicitement.'

141 Unfortunately, Article 290 TFEU contains the seeds for two possible definitions of the 'essential elements' doctrine. A first formulation refers to 'non-essential elements *of the legislative act*' (emphasis added), while the second formulation is broader and refers to the 'essential elements *of an area*' (emphasis added). This semantic ambivalence may well give rise to an uncertainty that has plagued the concept of 'minimum' standard in the context of complementary competences. There it is unsettled whether the Member States' power to adopt stricter measures must be viewed against each legislative act or against the policy area in general (cf R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) 272 *et seq*).

142 In the past, 'implementation' under Article 202 EC comprised both general and specific acts, cf Case 16/88 *Commission* v *Council* [1989] ECR 3457 at [11]: 'The concept of implementation for the purposes of that article comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application.' The reasons for a morphological restriction of 'delegated acts' to material legislation could be manifold. First, the Constitutional Treaty had itself defined 'legislative acts' by reference to the instrumental matrix of 'regulations' and 'directives'. It had therefore also endorsed a material criterion for the definition of 'legislation' (cf R. Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms: Reflections on the Draft Constitutional Treaty's Regime for Legislative and Executive Law-Making' (EIPA Working Paper 2005/01) 11). Second, as discussed above, the 'regulatory procedure with scrutiny' established by the 2006 Comitology Decision had already been confined to generally applicable acts. Third, one could argue that where the Union adopts an individual decision in the

What is the scope of Article 290 TFEU? Is the provision restricted to acts adopted under the 'ordinary' legislative procedure?[143] This view projects the limited scope of the 2006 Comitology decision to Article 290 TFEU. Textually, this restriction is not mandated by the Treaty; and to increase the ability of the European legislator to concentrate on essential political matters, the better view therefore suggests a wide understanding of 'legislative act' that includes the special legislative procedures.[144] However, the scope of Article 290 is confined to situations where a Commission act amends or supplements primary legislation. Was this 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'? The Commission appears to support the second view;[145] and this would, indeed, seem to follow from the constitutional structure established under the Lisbon Treaty.[146] Supplementation thus ought to mean amendment through the inclusion of additional rules having the same status as primary legislation.

What are the new political safeguards that can be imposed to control delegated 'legislative' power? These are defined in the second paragraph of Article 290 TFEU, which constitutionalises the political safeguards of federalism and democracy. Legislative acts may allow the European Parliament or the Council 'to revoke the delegation' (subparagraph (a)), or to veto the adoption of the specific delegated act (subparagraph (b)). The Parliament must thereby act by a majority of its component members, which makes the control of the delegation generally

form of a 'legislative act', this derogation from a functional separation of powers principle should only be allowed for politically 'essential' choices that would, if that reasoning is accepted, be beyond the substantive limits set by Article 290(1) TFEU.

143 The Treaty on the Functioning of the European Union distinguishes between an 'ordinary' and 'special' legislative procedures. The former is defined by Article 289(1) TFEU by reference to the co-decision procedure (cf Article 294 TFEU). As regards the 'special legislative procedure', Article 289(2) simply states: 'In the specific cases provided for in 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.'

144 This position is advocated by the Commission, cf Commission Communication: Implementing Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, 3: 'A delegation of power within the meaning of Article 290 is possible only in a legislative act. However, it makes little difference whether or not the legislative act was adopted jointly by Parliament and the Council, because Article 290 does not distinguish between the ordinary legislative procedure (formerly co-decision) and special legislative procedures.'

145 *ibid*, 4 (emphasis added): 'Firstly, [the Commission] believes 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 . . . Secondly, the Commission wishes to stress the importance that should be attached to the verb, "supplement", the meaning and scope of which are less specific than those of the verb, "amend". The Commission believes that in order to determine whether a measure "supplements" the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to "supplement" the basic instrument. *Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures*.'

146 On the mutual exclusivity of Articles 290 and 291 TFEU, see below.

harder than the adoption of primary legislation.[147] The Council, by contrast, will act by a 'normal' qualified majority, which will make, where the legal basis in the Treaties requires unanimity, revocation even easier than the adoption of primary legislation. The Lisbon Treaty therefore continues to grant a slight preference to the Council in enforcing the limits of delegation.[148]

From a democratic point of view, Article 290 represents a constitutional revolution. 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. With the Lisbon Treaty, the Council or the European Parliament may, independently of each other, oppose or revoke delegated legislation. And in establishing an *alternative*, as opposed to cumulative, veto power, the European constitutional solution avoids the mathematical mistake committed by the American Supreme Court in *Chadha*. 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. With regard to both alternatives mentioned in Article 290(2) TFEU, the Lisbon amendments thus place the Parliament on a roughly equal footing with the Council in politically controlling delegated acts amending primary legislation.

Substantially, Article 290 also changes the status quo fundamentally. The provision contains, unlike Article 202 EC, no legal basis for the adoption of a 'comitology law'. This constitutional absence should be seen as a deliberate choice. Admittedly, Article 290(2) uses the conditional 'may' in relation to the two political safeguards discussed above. However, this should not be interpreted to allow the European legislator *carte blanche* to determine, in each legislative act, which conditions to impose.[149] The 'may' in Article 290(2) should simply be seen as

147 Cf Article 231 TFEU: 'Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast.' For the application of this rule to the context of the ordinary legislative procedure, see Article 294(13) TFEU.

148 In this sense: K. Lenaerts and M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' [2005] 11 *European Law Journal* 744, 755.

149 To allow for a free choice beyond the control mechanisms expressly mentioned would be a serious constitutional retrogression. Ever since the Single European Act, the European legal order had insisted – in the pursuit of legal order and transparency – that the conditions imposed on delegated legislation be set *in advance* of the specific delegating act. From this teleological perspective, it is problematic to claim that it would be 'perfectly open to the institutions concerned (the Commission, the Council, and the European Parliament) to agree among themselves more far-reaching conditions to apply to any basic act after the entry into force of the Treaty of Lisbon' (D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution: Law, Practice, and Constitutionalism* (Oxford: Oxford University Press, 2009) 123). If we accept that these additional conditions would need to be (exhaustively) defined *in advance*, on what legal basis should the 'Article 290 Comitology Regulation' be based? Article 291 TFEU? Article 352 TFEU appears to rule itself out on procedural grounds, since it does not allow for co-decision; and Article 114 TFEU would seem to exclude itself on substantive grounds for it is confined to the internal market. However, the view that Article 290 TFEU does not limit the power of the European legislator is unsurprisingly shared by the European Parliament, cf (Non-legislative) Resolution of 5 May 2010 'Power of Legislative Delegation' (INI/2010/2021) para 2: 'Article 290 TFEU gives the Legislator the freedom to choose which control mechanism(s) to put in place; considers that the

allowing for the constitutional option of using *both* mechanisms or *none* in a legislative act; or of excluding either the European Parliament or the Council, depending on the special legislative procedure used, as beneficiaries of these political safeguards.[150] Teleologically then, we should assume that the Lisbon Treaty did not wish to revoke the idea of a *numerus clausus* of political safeguards that could be constitutionally imposed.[151] If this reading is accepted, Article 290 abandons the idea of committees of representatives that provide formal control over, not just informal advice on, the exercise of the Commission's delegated powers.[152]

The abolition of comitology with regard to delegated acts will significantly reduce the ex-ante control by the Union legislator. And while this decline is partly balanced by increasing the ex post control mechanisms,[153] Article 290 appears to indeed satisfy the Commission's demands to enhance its executive autonomy.[154] For the 'legislative veto' granted to the Council and the Parliament

two examples enumerated in Article 290(2), objection and revocation, are purely illustrative and that one could envisage subjecting a delegation of power to other means of control, such as an express approval by Parliament and the Council of each delegated act or a possibility of repealing individual delegated acts already in force.'

150 We should presume that where the primary legal base envisages the Council as the principal decision-maker, the (special) legislative act is unlikely to grant Parliament identical control powers for delegated acts.

151 For the same conclusion, albeit by a wrong route, see H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality' (2009) 14 *European Law Journal* 482, 493: '[T]here are reasons to argue that Article 290 TFEU contains a closed enumeration. One of these arguments is the exceptional nature of the delegation of legislative powers to the executive body, the Commission. The delegation being the exception, indicates the necessity of a narrow interpretation of the exception *vis-à-vis* the rule.' The problem with this argument is that the control mechanism in Article 290(2) TFEU can be seen as political *limitation* to the 'exception' of executive legislation and should, following the author's argument, be interpreted widely.

152 The Commission has already indicated its willingness to 'concede' influence to national authorities and experts, cf Commission Communication, n 144 above, 6–7 (emphasis added): 'Except in cases where this preparatory work does not require new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted. This consultation will be carried out in plenty of time, to give the experts an opportunity to make a useful and effective contribution to the Commission. The Commission might form new expert groups for this purpose, or use existing ones. The Commission attaches the highest importance to this work, which makes it possible to establish an effective partnership at the technical level with experts in the national authorities. *However, it should be made clear that these experts will have a consultative rather than an institutional role in the decision-making procedure.*'

153 The Lisbon Treaty grants the European legislator henceforth the 'harsher' option of revoking the delegation altogether. The Comitology system established under the EC Treaty had not contained a call-back mechanism (C. Bertram, 'Decision-Making' n 91 above, 246): '[T]he Council has no discretion to withdraw what it has once delegated. Having transferred powers to the Commission on the Commission's proposal, it can only take them back by the same procedure, *i.e.*, on the Commission's initiative.'

154 Cf *European Governance: A White Paper* n 128 above. For the academic view that sees the Commission as the 'winner' of the Lisbon reform, see P. Craig, 'The Hierarchy of Norms' in T. Tridimas and P. Nebbia (eds), *EU Law for the Twenty-First Century, Volume I* (Oxford: Hart, 2004) 75, 81. However, we must not forget that one of the principal aims of the Lisbon reform was to encourage the European legislator to delegate more 'legislative' powers to the Commission. Whether the new regime will indeed have this effect is debated. A positive answer has been advocated by the Convention Working Group IX on Simplification, n 134 above, 9. For the opposite view, see C. F. Bergström, n 67 above, 358: 'To abolish comitology in the context of delegated acts (and reduce it in the context of implementing acts) will deprive all members of the Council – the Govern-

grants them solely the power to negate Commission acts. It will not include the positive power to amend executive legislation. This 'take-it, or leave-it' choice of the Union legislator will thus increase the Commission's independence in formulating (non-essential) policy choices embedded in secondary legislation.

The 'conferral' of executive power: Article 291 TFEU

The Lisbon Treaty constitutionalises the idea that the nature of the constitutional control mechanism should take account of the nature of the powers 'delegated' to the Commission.[155] But if a delegation of *legislative* power is subject to political control of the legislature, who is to control the exercise of *executive* or 'implementing power'? Should there be constitutional limits to the scope of 'implementing' powers? And what political safeguards can be established?

The constitutional regime for 'implementing acts' is set out in Article 291 TFEU. The provision states that '[w]here 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 Article 24 and 26 TEU, on the Council'.[156] The provision thus envisages the Commission *and the Council* as possible recipients of 'delegated' implementing power.[157] But strangely, Article 291 TFEU does not mention substantive limits to such a conferral. Will the non-delegation principle or the specificity principle thus not apply? What are the 'specific cases' that allow the Council to 'delegate' implementing power to itself? Did the drafters assume that the Community's constitutional *acquis* would automatically continue and thus extend to 'implementing acts'?[158] Or, should Article 291 TFEU perhaps not be viewed from a horizontal separation of powers perspective? Indeed, as we shall see below, a vertical perspective viewing Article 291 TFEU within the context of Europe's executive federalism best explains the constitutional significance of the provision.[159]

ments of their most valuable means for influence and continuous control. This, in turn, is likely to have a negative effect on their readiness to entrust the Commission with any potentially significant powers to adopt delegated acts.'

155 Despite the formal(ist) distinction between 'delegated' and 'implementing power', the acts adopted under Article 291 TFEU are, too, the result of a delegation in a primary act. On the material notion of 'legislation' and 'delegation', see n 11 above.

156 Article 291(2) TFEU. Articles 24 and 26 TEU are part of Title V of that Treaty dealing with specific provisions on the Common Foreign and Security Policy.

157 The confirmation of the constitutional option of a 'self-delegation' by the Council has been criticised as 'an anomaly in the overall picture of separation of functions' (cf K. Lenaerts and M. Desomer, n 148 above at 756). The fact that 'agencies' were not mentioned as direct recipients of implementing powers appears to confirm their subordinate and auxiliary status below the formal Union institutions.

158 In this sense, see H. Hofmann, n 151 above, 488: 'One of the weak points of this non-delegation clause introduced into the new typology of acts is that it is explicitly only formulated for delegated acts under Article 290 TFEU. From a teleological point of view, however, it should also be applicable for the distinction between legislative and implementing acts under Article 291 TFEU.'

159 On the European Union's executive federalism, see R. Schütze, 'Executive Federalism in the (new) European Union' [2010] 47 *Common Market Law Review* 1385.

What about the political safeguards that can be used to control the exercise of Union implementing power? To control the exercise of implementing power by the Commission – not the Council[160] – the European legislator is called to 'lay down in advance the rules and general principles concerning mechanisms for control by Member States'.[161] This formulation stands in the constitutional tradition of Article 202 EC; yet it appears to envisage different mechanisms of control. Article 291 TFEU indeed gives contradictory signals. On the one hand, it answered Parliament's wish to be involved in the adoption of a future Comitology 'law': Council *and* Parliament 'acting by means of regulations in accordance with the ordinary legislative procedure' shall adopt the political control mechanisms for delegated powers.[162] This could have pointed to a future broadening of the powers of Parliament in controlling the implementation powers of the Commission. On the other hand, the provision charges the European legislator to establish 'mechanisms for control by *Member States*'. This formulation appears to exclude as *ultra vires* any direct participation of Parliament (as well as the Council) in a future Comitology system.[163]

The Commission had chosen this reading in its proposal for a new Comitology Regulation.[164] The new provisions on implementing acts, set out in Article 291, 'do not provide for any role for the European Parliament and the Council to control the Commission's exercise of implementing powers'. This control 'can only be exercised by the Member States'. In line with the Union's choice in favour of executive federalism, they are 'naturally responsible for implementing the legally binding acts of the European Union' and as such must also be 'responsible for controlling the Commission's exercise of these implementing powers'.[165] The Commission's line of argument refuted 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 implement-

160 The Lisbon Treaty presumes that there is no need to control the exercise of implementing powers exercised by the Council. This view indirectly cements the argument in favour of an exclusion of the European Parliament from the constitutional control regime established under Article 291 TFEU *for the Commission*. For while it may make little constitutional sense to provide for a mechanism of Member State control over actions of the Council, the European Parliament would theoretically have a legitimate interest in controlling the exercise of implementing power here. The exclusion of the Parliament from the control of implementing powers by the Council could thus be interpreted to mean that the Lisbon drafters wished generally to exclude the European Parliament for the control mechanisms to be established.

161 Article 291(3) TFEU. This power has now been exercised through the adoption of Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (Comitology Regulation) (2011) OJ L 55/13.

162 The fact that the new Comitology 'code' takes the form of a regulation means that some of its provisions may have direct effect; and, as such, be challengeable in national courts.

163 Cf P. Craig, 'The Role of the European Parliament under the Lisbon Treaty' in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Wien: Springer, 2008) 109, 123.

164 Commission Proposal for a 'Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers' COM(2010) 83 final.

165 *ibid*, 2.

ing of European law lies principally with the Member States. Not only are the Commission's powers thus subsidiary to those of the Member States;[166] it is the Member States, not the European legislator, that will control the exercise of these powers.

This (executive) federalist view posed a dramatic challenge to the constitutionality of the old Comitology system. In that system the Member States were only indirectly involved in the control of executive legislation.[167] Where a management or regulatory committee delivered a negative opinion, the ultimate decision on the political desirability of a Commission's act was with the Council (and since 2006, partly the Parliament). Directly involved in the control of the Commission's implementing powers were thus solely the Community institutions – not the Member States.[168] And according to the Commission, this would have to change as a result of the phrase 'mechanisms for control by the Member States'.

Surprisingly, the European Parliament and the Council have accepted the Commission's view! The new Comitology Regulation consequently abandons the existing management and regulatory committees. There are henceforth only two types of committees: the (old) advisory committee and a (new) 'examination committee'.[169] The criteria for the selection would be legally binding, with the former seen as the residual category.[170] The examination procedure would apply to 'implementing acts of general scope', but may also include individual measures in important policy areas of the Union.[171] The novelty of the examination procedure is that it is the (Member State) committee itself that has the power to veto a Commission act.[172] It is thus the Member States directly – not the Union institutions – that take part in the decision-making process.

166 Article 5(3) TEU (Lisbon).

167 Cf *Köster* n 52 above at [9]: 'The management committee does not therefore have the power to take decisions 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.'

168 This involvement of European institutions – as opposed to the Member States – has been criticised as a 'une méconnaissance profonde des principles de base de la comitology' (H. Kortenberg, 'Comitologie: le retour' (1998) 34 *Revue Trimestrielle de Droit Européen* 317, 319). For Kortenberg, the Council had in the past only been chosen because a conference of the Member States would have been impractical (*ibid*, 320): 'On aurait certes pu, pour bien marquer la distincion, envisager un retour à une conference des repésentantes des Etats membres, mais cette hypothèse soulevait des difficultés practiques don't celle du regime contentieux des actes qui auraient ete adoptés dans un tel cadre. L'evocation par le Conseil était la seule solution permettant d'assurer l'unité du droit communautaire.'

169 European Commission, Proposal for a new Comitology Regulation cf 2011 'Comitology Regulation' n 1624 above, 3. According to the eighth preamble of the Regulation, the Commission will exercise its implementing powers 'in accordance with one of only two procedures, namely the advisory procedure or the examination procedure'.

170 *ibid*, Article 2.

171 *ibid*, Article 2(2). Sub-paragraph (b) enumerates, inter alia, the common agricultural and fisheries policies and the common commercial policy.

172 *ibid*, Article 5(3): '[I]f the committee delivers a negative opinion, the Commission shall not adopt the draft implementing act.' However, the Commission – as chair of the committee – can still refer the draft act to an 'appeal committee' (Article 6). The appeal committee – staffed by Member States – can either confirm the negative opinion or replace it by a positive opinion (Article 6(3)).

Distinguishing the two constitutional regimes for delegating power

What will the scope of Article 291 be? Will it be limited by the scope of Article 290; or will the two provisions overlap? In other words, will the European legislator be able to choose, whether it prefers the constitutional safeguards under Article 291 to those under Article 290? This freedom of choice would contradict the intention of the Treaty-makers.[173] Indeed, the better view is that '[t]he authors of the new Treaty clearly intended the two articles to be mutually exclusive'.[174] What then are their respective spheres of application? The Commission has answered this question in the following way:

> [I]t should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. 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. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions. When it receives the power to adopt delegated acts under Article 290 the Commission is authorised to supplement or amend the work of the legislator. Such a delegation is always discretionary: the legislator delegates its powers to the Commission in the interests of efficiency. In the system introduced by Article 291 the Commission does not exercise any 'quasi-legislative' power; its power is purely executive. The Member States are naturally responsible for implementing the legally binding acts of the European Union, but because it is necessary to have uniform conditions the Commission must exercise its executive power. Its intervention is not optional but compulsory, when the conditions of Article 291 are fulfilled.[175]

The argument advanced is that Articles 290 and 291 follow different constitutional rationales. The former concerns the voluntary delegation of legislative power in the interest of efficiency – and thus deals with the horizontal separation of powers. The latter concerns the compulsory delegation of executive power, where the national implementation leads to an unacceptable degree of diversity, and thus deals with the vertical separation of powers. Article 291 must therefore be placed within the constitutional context of 'executive federalism' within the European Union.[176]

But even if we accept that the constitutional logic underlying Articles 290 and 291 is fundamentally different, will this mean that the two provisions never overlap? Assuming that the European legislator establishes the essential elements in a legislative act, will it be entitled to immediately confer on the Commission the power to adopt 'implementing regulations' that flesh out the bare bones of the primary legislation?[177] Can the European legislator, in other words, freely choose

173 Cf Final Report of the Working Group on Simplification above, n 134 above.
174 Commission Communication, n 144 above, 3.
175 *ibid*, 3–4.
176 Cf R. Schütze, n 159 above. For the view that already regarded the 'old' comitology system through the federal lens, see K. Lenaerts and A. Verhoeven, n 65 above, 654 *et seq.* as well as J. P. Jacque, 'L'éternel retour: reflexion sur la comitology' in G. Vandersanden et al (eds), *Mélanges en hommage à Jean-Victor Louis: Volume 1* (Bruxelles: Université de Bruxelles, 2003) 211 *et seq.*
177 This has happened in the recent Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/12. Article 11 of the Regulation not

between a 'delegated regulation' and an 'implementing regulation' as the proper form of executive legislation? If so, there would be a functional overlap between Articles 290 and 291 TFEU. For while both regulations are, from the formal perspective of the hierarchy of norms, different acts;[178] they are, from the substantive perspective of the morphology of norms, identical. To avoid this material overlap between Articles 290 and 291, one needs indeed to insist with the Commission 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.

In conclusion, to avoid a functional overlap between Article 290 and Article 291, both provisions must be seen from different constitutional perspectives. The former is designed directly to protect democratic values, while the latter is primarily designed to protect federal values.[179] 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,[180] it would not be automatically able to act under Article 291 as every exercise of 'delegated' implementing power under Article 291(2) will be subject to the principle of *executive* subsidiarity.[181] Where the Union legislator thus chooses to delegate the power to adopt additional rules through 'implementing acts' instead of 'delegated acts', the Commission loses its right automatically to exercise its delegated power. Delegation under Article 291 is thus a constitutional minus.

CONCLUSION: CONSTITUTIONAL SAFEGUARDS FOR DELEGATED POWERS

This article has tried to bring classic constitutionalism to an analysis of delegated legislation in the European Union. The constitutional regime governing executive legislation must indeed be understood from *inside* the classical para-

only delegates the power to adopt regulatory technical standards under Article 290 TFEU, but also grants the Commission the power to adopt 'implementing acts pursuant to Article 291 TFEU' under Article 15 of the Regulation.

178 No implementing act can 'amend' the basic act – this function is now exclusively reserved to 'delegated acts'. Implementing acts can thus provide 'supplementary' rules, but these 'supplementary' (implementing) rules will not supplement *the legislative act*. They stand below the legislative act.

179 Article 290 TFEU *indirectly* protects federal values also as the European legislator is mixed and thus incorporates the views of the Member States in the Council.

180 The argument goes as follows: as the 'delegated act' only concerns 'non-essential' elements and since the delegation mandate must expressly and clearly specify the 'objectives, content, scope and duration of the delegation' (Article 290(1) TFEU), all future delegated acts should be seen as covered by the subsidiarity analysis of the basic legislative act.

181 On this point, see R. Schütze, n 159 above, 1411.

meters of constitutionalism.[182] To facilitate such a constitutional analysis, we have started with a comparative excursion by locating the constitutional parameters developed in the United States of America. American constitutionalism had originally invented judicial and political safeguards to protect the federal and democratic values inherent in the legislative process.

In the European legal order, these two types of constitutional safeguards have also emerged to protect federalism and democracy.[183] First, the Court of Justice has insisted on judicial safeguards, the most prominent of which was the non-delegation doctrine. Accordingly, the European legislator is prohibited from delegating essential political choices to the Commission and no political choices to agencies. Due to the mixed composition of the European legislator, the doctrine protects federal and democratic values. In addition to judicial safeguards, the European legislator has also insisted on political safeguards within delegated legislation. These safeguards began as procedural devices protecting federalism. The Council imposed an ex ante control by committees composed of representatives of the Member States. Comitology became the defining characteristic of executive legislation under the Rome Treaty. Three Comitology decisions would subsequently 'order' the regulatory process. The 1999 Comitology decision – after its 2006 amendment – thereby significantly strengthened the political safeguards of democracy over delegated legislation.

The argument behind this article has been that the Lisbon Treaty represents a revolutionary re-ordering of the regulatory process. The (old) Community's constitutional regime for delegated legislation under Article 202 EC is split into two halves. Article 290 TFEU henceforth governs delegations of 'legislative' power. Executive legislation is here subject to judicial safeguards (non-delegation doctrine) and political safeguards (legislative veto). By contrast, Article 291 TFEU establishes the constitutional regime for delegations of 'executive' power. The provision does not mention the non-delegation doctrine and the political safeguards established by the (Lisbon) 'Comitology Regulation' signify a major break with the constitutional status quo. The explanation offered here for this dramatic

182 Contra, J. H. H. Weiler: 'Constitutional or unconstitutional? Formally, the question makes sense. *Comitology* is neither. It is non-constitutional – outside the classical parameters of constitutionalism . . . It is evident that unlike some who may celebrate the constitutionalisation of *Comitology,* I regard it as a normative disaster. If constitutionalism is to be brought to *Comitology* without its subversive effects, the Court would have to recognise the infranational character of the phenomenon, which defies the normal constitutional categories constructed in the context of a supranational understanding of the Community.' (cf J. H. H. Weiler, 'Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy' in C. Joerges and E. Vos, EU *Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999) 339, 343 and 346.) I find it hard to make (much) sense of this statement, but if it is intended to mean that considerations such as federalism and the democracy are not an integral part of comitology, it is clearly wrong. In this sense also, see inter alia K. Lenaerts and A. Verhoeven, n 65 above, 650: 'The lack of an adequate legal framework governing executive action at Community level is one of the causes of the so-called democratic deficit in the Union'; as well as J. P. Jacque, n 176 above, 212 and 221: 'La comitology a souvent été considerée comme une question technique. Mais derrière l'apparente technicité des procedures se dissimule une question constituionnelle importante, celle de la nature du « fédéralisme » que l'on souhaite construire.'

183 There do exist special judicial safeguards to protect individual rights against executive legislation in the Union legal order, but these are beyond the scope of this article.

change is to place Article 291 into the context of executive federalism. This would explain why the 'old' judicial safeguards – developed in the horizontal separation of powers context – may no longer be needed. This reading is supported by the formulation of the new political safeguards within Article 291 that refers to 'mechanisms for control by *Member States*'.[184]

Be that as it may, some conclusions are in order. First, the new European Union's constitutional safeguards for delegated legislation are, as a rule, structurally stronger in protecting federal and democratic values than their equivalent in the United States. Not only has the European legal order a lively non-delegation doctrine with regard to agencies, the constitutionalisation of the 'legislative veto' for *both* branches of the Union legislator in Article 290 TEU has significantly strengthened the democratic control over executive legislation. The European constitutional solution thus avoids the bad mathematics of American constitutionalism. Moreover the European Union prefers, unlike the United States, the public participation of the legislator to the private participation of 'interested parties' to indirectly legitimate delegated legislation. Structurally, then, the 'democratic deficit' lies on the other side of the Atlantic.[185] Second, the European Union still suffers a constitutional malaise when it allows for delegations of power to the Council. While the Lisbon reforms have now limited this to delegations of implementing power, American constitutionalism prohibits this option altogether and is thus better in tune with the separation of powers principle. For how can a branch of the legislator transform itself into an executive body, and that without the political control of the other part?[186] Third, the European constitutional order appears to have adopted not only a subtle balance between the nature of the power delegated and the constitutional safeguards applicable, it also appears to balance these safeguards against the recipient of the powers so delegated. But this argument needs to be subject to a separate analysis.

In sum the Lisbon Treaty has established a more democratic constitutional structure for the adoption of delegated legislation. But whether the new constitutional theory will lead to a more democratic practice, depends on how the former is put into action by the Union's institutions.[187] And this will only become clearer once the revolutionary dust has settled down.

184 Article 291(3) TFEU (emphasis added).

185 For the 'legitimacy crisis' within the American administrative process, see J. O. Freedman, 'Crisis and Legitimacy in the Administrative Process' (1974-75) 27 *Stanford Law Review* 1041.

186 The 'Comitology Regulation' will, as we saw above, not apply to delegations to the Council.

187 For a first example of a 'delegated act' adopted under 290 TFEU, see Commission Delegated Regulation 1059/2010 supplementing Directive 2010/30/EU with regard to energy labelling of household dishwashers [2010] OL L314/1.