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Chapter 4

Relationships between the various legal acts of the EU institutions

4.1. Regulations, directives, decisions

In this Section we will discuss another important aspect of the hierarchy of norms within the Union’s legal system; namely, the inter-relationships between the various forms of secondary law, i.e. regulations, directives and decisions, and acts of secondary law of a different nature, i.e. legislative, delegated and implementing acts.

The first subparagraph of Article 288 TFEU defines the types of legal acts that the EU institutions may adopt. Accordingly, regulations, directives and decisions constitute the main body of secondary EU legislation given that recommendations and opinions lack legally binding force.

These instruments are the same as the ones included in Article 249 EC Treaty, which was the predecessor of Article 288 TFEU. Thus, in the end, the Lisbon Treaty has not changed the typology of secondary law that had been previously in place.\(^\text{234}\) It has also left intact most of the aspects of the relationship between the various forms of secondary law. In particular, a formal hierarchical relationship – in the sense used in the context of national legal systems – still does not exist between the legal instruments included in Article 288.\(^\text{235}\) In other words, the democratic legitimisation of the authors of the act and the procedure through which the act is adopted has no role in designating the place of the act in the legal order. First, any of the institutions can adopt any of the acts listed under Article 288. Second,

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\(^{234}\) In contrast, the draft Constitutional Treaty envisaged major changes to the typology of legal acts. In particular, it listed ‘laws’, ‘framework laws’, ‘regulations’ and ‘decisions’, ‘recommendations’ and ‘opinions’ as the acts that the institutions may adopt. Under the Constitutional Treaty not only the denominations of the instruments would have differed from the current system but their nature too. ‘Laws’ would have been the equivalent of current regulations of a legislative character, ‘framework laws’ corresponded to current directives of a legislative nature, ‘regulations’ would have covered general executive acts either in the nature of current (implementing) regulations or (implementing) directives. See Article I-33, Treaty establishing a Constitution for Europe (OJ C310, 16.12.2004). For an analysis, see Lenaerts and Desomer, supra note 45 and De Witte, supra note 33, pp. 84-88.

\(^{235}\) Lenaerts and Desomer, supra note 45, p. 745.
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no definite link can be discerned between a specific legal instrument and a legislative procedure via which it has to be adopted. In this respect, however, the Lisbon Treaty has brought about changes as compared to the situation under the EC Treaty. On the one hand, it has made the former co-decision procedure the main decision-making procedure by which legislation is normally adopted in the EU, whilst other procedures are applied as an exception. This is expressed by the new terminology; in particular, the co-decision procedure is now called ‘ordinary legislative procedure’ whilst all the other procedures are ‘special legislative procedures’. On the other hand, the Lisbon Treaty has formally introduced the notion of ‘legislative act’, defining it as legal acts adopted by legislative procedure, i.e. either by the ordinary or any of the special legislative procedures. Legal acts within this category are linked together by the adoption procedure. Nevertheless, the introduction of this new concept does not bring about more homogeneity and clearer hierarchy in the normative order, as there are still multiple legislative procedures, one ‘ordinary’ and numerous ‘special’ ones, none of which is superior to the others. An act adopted by the ordinary legislative procedure does not rank higher than another act adopted by one of the special legislative procedures or vice versa. In other words, even under the new Lisbon regime it is irrelevant, from the point of view of the ranking of the various acts of secondary law, whether the Parliament has had a right of veto in adopting the act or only a right to be consulted and whether in the Council the act has been adopted by unanimous or qualified majority voting. Therefore, the stronger democratic legitimisation of the adoption procedure or the stricter voting rules in the Council do not influence the ranking of various legal instruments set out in Article 288. In this sense no hierarchy has been established between regulations, directives and decisions.

236. Article 294 TFEU.
237. Article 289(3) TFEU.
238. It has also been pointed out that there is no connection between a specific instrument and a concrete field of EU competence in the sense that neither regulations nor directives or decisions are used only in certain specific policy fields, see De Witte, supra note 33, p. 82. The only pattern that can be identified in this respect is that directives and regulations are not employed in the fields where the Union only has complementary competences and no power of harmonization, e.g. education, culture and other fields set out in Article 6 TFEU.
4.2. Legislative acts, implementing acts, delegated acts

4.2.1. System of legal acts before and after the Lisbon Treaty

Under most systems of administrative law, legislation is distinguished from executive rule-making, and legislative acts are distinguished from non-legislative acts. Legislative acts are those legal acts that are enacted by the legislature. They constitute generally applicable legally binding norms. Non-legislative acts are adopted by an executive authority; hence they are called executive acts. Executive rule-making always takes place on the basis of a specific conferral of powers by the legislature in a basic act. Executive rule-making may be aimed at implementation of the rules laid down in the basic act. The resulting implementing acts can be of general application or they can be individual acts, for example, administrative decisions. The executive branch may also exercise legislative authority on the basis of a specific delegation of such authority by the legislature. The resulting delegated act is of general application just like real legislative acts.

Legislative and implementing powers had already been distinguished in the pre-Lisbon system of Union rule-making. The formal legal basis for this could be found in Article 202 of the EC Treaty, which granted competence to the Council to confer implementing powers on the Commission:

“[...] the Council shall, in accordance with the provisions of this Treaty:
– confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself [...]”

On the flip side of the coin, Article 211 authorised the Commission to exercise implementing powers which were conferred on it by the Council:

“[...] the Commission shall:
– exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.”

Pursuant to this distinction the Court in its early case law had already acknowledged two distinct categories of acts of the EU institutions. Legislative acts are directly based on primary EU law, whilst implementing acts find

239. Article 202, third paragraph, EC Treaty.
240. Article 211, fourth paragraph, EC Treaty.
their legal basis in secondary EU law;\textsuperscript{241} namely, in the basic act which confers power on either the Commission, or exceptionally, on the Council, for adopting implementing rules of the general rules and principles laid down in the basic act. As the Court clarified:

“Both the legislative scheme of the Treaty, reflected in particular by the last indent of [Article 211 EC Treaty], and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. 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 EC Treaty]. 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 EC Treaty], either by the Council itself or by the Commission by virtue of an authorisation complying with [Article 211 EC Treaty].”\textsuperscript{242}

The Court also developed criteria in its case law according to which the legality of implementing acts is to be reviewed. In particular, the Commission or the Council, as the case may be, when exercising implementing powers (i) is bound by the terms of the conferral included in the basic act, (ii) may not go beyond the scope of conferral, and (iii) has to comply with the objectives and fundamental principles of the basic act.\textsuperscript{243} In fact, the requirement for the implementing act to comply with the legislative act on the basis of which it had been adopted is an expression of the principle of \textit{ultra vires}. The latter requires that the institution that derives a certain rule-making competence from a basic act may not exceed the boundaries of the conferral set out in the basic act when adopting measures in the course of exercising such competence.

\begin{itemize}
\item \textsuperscript{241} Hofmann, supra note 45, p. 495.
\item \textsuperscript{242} ECI, 17 December 1970, Case 25/70 \textit{Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co.}, para. 6.
\end{itemize}
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Although the Court developed the conditions for exercising implementing powers and thus, the criteria of legality of implementing acts under the provisions of the EC Treaty, there is no reason not to continue to apply these conditions under the new Lisbon regime.

Under the new Lisbon regime, the categories of ‘legislative act’ and ‘implementing act’ are formalised in the Treaty. We have seen that the definition of legislative acts under Article 289(3) TFEU uses a purely formal criterion to identify such acts. Specifically, legislative acts are those acts which are adopted by a legislative procedure. The (ordinary and special) legislative procedures are also defined in the Treaty. As regards implementing acts, Article 291 TFEU provides that primarily, the Member States are liable for implementing legally binding Union acts by way of adopting national law. However, the same provision states that:

“where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council”.

In addition to ‘legislative acts’ and ‘implementing acts’, the Lisbon Treaty introduced a genuinely new category of legal acts, namely ‘delegated acts’. The first subparagraph of Article 290(1) sets forth that:

“[a] legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act”

To be precise, the real innovation of the Lisbon Treaty is that it makes a formal distinction between ‘delegated acts’ and ‘implementing acts’, which were previously undistinguished under the category of implementing acts. As it is pointed out in academic writing, many national legal systems do draw a distinction between situations where the executive branch acts in its own field of competence and where the executive branch acts in the field of competence of the legislature. Correspondingly, the Lisbon Treaty introduced the same differentiation to the Union’s legal order. Thus,

244. Article 291(2) TFEU.
245. De Witte, supra note 33, p. 92; Hofmann, supra note 45, p. 494.
246. De Witte, supra note 33, p. 93, FN 28.
‘delegated acts’ are those legal acts which the Commission adopts in exercising legislative powers that were delegated to it by the Council and the Parliament in a legislative act (or by either the Council or the Parliament alone in an act adopted by a special legislative procedure) by way of a clearly circumscribed delegation clause. In contrast, ‘implementing acts’ are those legal acts that the Commission, or exceptionally, the Council, adopts in exercising executive powers in order to implement legislative acts of a general nature, where such implementation is not left to the Member States but to the Union’s executive branch. Technically, the difference between ‘delegated acts’ and ‘implementing acts’ is that delegated acts can only be “acts of general application” whereas ‘implementing acts’ may as well be individual acts, e.g. administrative decisions with specific addressees. Content-wise the important difference between the two is that by delegated acts the Commission is empowered to “supplement or amend certain non-essential elements of the legislative act”, whereas the other type of non-legislative acts serves merely for the implementation of the basic act.

Although the concept of ‘delegated act’ is new under the TFEU, the authorization of the Commission to amend legislative acts is not a novelty. In practice, the Commission had already been exercising such power under the aegis of ‘implementation’. This is apparent from the formerly applicable Comitology Decision. Specifically, the Decision’s provisions relating to the ‘regulatory procedure with scrutiny’ implied that the Commission had the power to modify non-essential elements of the basic act in the course of implementation:

“Where a basic instrument, adopted in accordance with [the co-decision procedure] 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.”

249. De Witte, supra note 33, p. 93; Ponzano, supra note 247, pp. 138-139; Hofmann, supra note 45, p. 495.
251. Comitology Decision, Article 2(2). On the relations between ‘delegated acts’ and acts which had previously been adopted under the ‘regulatory procedure with scrutiny’, see the Commission’s Communication, supra note 248.
Comparing the previous regime with the Lisbon changes, it is apparent that the actual new feature of the Lisbon regime is that it permits the Commission to amend the basic legislative instrument – as regards its non-essential elements – only where it exercises delegated powers under Article 290 TFEU and not when it carries out implementing tasks pursuant to Article 291. This represents a crucial difference between ‘delegated acts’ and ‘implementing acts’.

A further distinction should be drawn between ‘delegated acts’ and ‘legislative acts’ under the Lisbon regime as regards the question what may the content of these two types of acts be. The TFEU lays down the minimum content of the basic ‘legislative act’:

“[t]he objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power”.252

With regard to the essential elements of an area, the case law which had been developed under the EC Treaty with regard to the Commission’s implementing powers is indicative also to the issue of delegation of powers under the TFEU. Under that case law, the Court’s definition of ‘essential elements’ differs according to the policy area in question.253 In the field of the common agricultural policy, essential elements of a measure are “provisions intended to give concrete shape to the fundamental guidelines of Community policy”.254 This means that only high level, general aims, rules and principles need to be laid down in legislative acts; thus, the Commission may exercise delegated powers in a wide scope. In areas not related to agriculture stricter requirements may apply as to what segments of the subject matter must be dealt with in a legislative act and what can be subject to delegation.255

In addition, the legislative act must determine the objective, content, scope and duration of delegation. By definition, these are essential elements of

252. Article 290(1) second subparagraph.
254. ECI, 27 October 1992, Case C-240/90 Germany v Commission, para. 37. In this case, the Court held that imposing penalties in the framework of the common agricultural policy is not an essential element of the legislation relating to the common organization of the market, therefore, it can be delegated to the Commission.
255. ECI, 5 July 1988, Case 291/86 Central-Import Münster GmbH & Co. KG v Hauptzollamt Münster, para. 15 (protective measures against imports); ECI, 29 June 1989, Case 22/88 Industrie- en Handelsonderneming Vreugdenhil BV and Gijs van der Kolk – Douane Expeditie BV v Minister van Landbouw en Visserij, para. 17 (purpose of the rule subject to implementation was unrelated to the agricultural sphere). 

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a legislative act which delegates rule-making powers to the Commission. Further, the conditions of delegation must also be set out in the basic legislative act. These conditions may provide that the delegation is subject to revocation by the European Parliament and the Council or that the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.256 Thus, depending on which of these conditions apply to the delegation, the Commission’s power to exercise the delegation ceases to exist if (i) the Commission adopts the delegated act which is rejected neither by the Council nor by the Parliament, (ii) the delegation is revoked before the Commission adopts the delegated act, or (iii) the duration of delegation elapses (sunset clause) before the Commission adopts the act, or (iv) the act adopted by the Commission is rejected either by the Council or by the Parliament and the delegation is revoked by either of the two, or (v) the act adopted by the Commission is rejected by either the Council or the Parliament and the duration of the delegation elapses before a new act is adopted. Thus, in all these constellations, the various conditions of the delegation ensure that there is a possibility for the Council and the Parliament to regain the power which it had delegated to the Commission. If these conditions were not stipulated, the Council and the Parliament would be at risk of losing the delegated power for good, as the revocation of the delegation would require the formal amendment of the basic act which could only be done at the initiative of the Commission.257

To summarise the above, the Lisbon Treaty established a tripartite system consisting of ‘legislative acts’, ‘delegated acts’ and ‘implementing acts’ within the framework of secondary EU law. The concept of ‘legislative act’ is a purely formal one, as its definition has regard only to the procedures by which the act is adopted.258 Since the content of the act is irrelevant for the qualification as legislative act, even instruments including highly detailed technical rules may fall within this category. A further feature of the system is that no link exists between the form of the act and its nature, that is, all regulations, directives and decisions can be either legislative or executive (i.e. delegated or implementing) acts. Consequently, nine variations of legal acts exist as follows: (i) legislative regulations/directives/decisions, (ii) delegated regulations/directives/decisions, and (iii) implementing

256. Article 290(2) TFEU. Hofmann points out that when comparing the different language versions of the TFEU it is not clear whether the list of conditions to which the delegation may be made subject is exhaustive or exemplificative, see supra note 45, p. 493.
257. Chalmers, Davies and Monti, supra note 17, p. 121.
258. De Witte, supra note 33, p. 92.
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regulations/directives/decisions.\textsuperscript{259} The nature of the act becomes apparent from its denomination as the TFEU stipulates that the adjectives ‘delegated’ or ‘implementing’ must be added to the title of the instrument.\textsuperscript{260} This new regime formalises the distinction between legislation and executive rule-making whilst it also distinguishes two forms of executive rule-making; namely, the exercise of delegated legislative powers and the exercise of pure executive/implementing powers. In general and \textit{in abstracto}, in this system there is no hierarchical relationship between the legal acts of different nature. An implementing regulation has the same value as a legislative directive. The only exception to this is the case when a legislative act includes a delegation of legislative powers or a conferral of implementing powers. In such case, the delegated or implementing act adopted on the basis of the basic legislative act has to be in conformity with the legislative act, otherwise it can be annulled or declared invalid. However, not even this hierarchy between legislative acts and delegated/implementing acts is clear, as in practice it can happen that the same institution is in charge of adopting both the superior and the subordinate act. This makes the requirement of compliance with the superior act rather meaningless. This is the case when the Council in a legislative act confers implementing powers on itself,\textsuperscript{261} or the Commission in a delegated act entrusts itself with the implementation.\textsuperscript{262}

In addition, the hierarchy is incomplete, since there remains an in-between category of binding acts which are neither legislative nor delegated or implementing acts. De Witte mentions as examples of this category decisions that

\textsuperscript{259} De Witte, supra note 33, p. 94.
\textsuperscript{260} Articles 290(3), 291(4) TFEU. If no adjective is used in the title of the act, it is a legislative act.
\textsuperscript{261} Article 291(2) TFEU allows in exceptional cases conferral of implementing powers on the Council. The case where the same institution is responsible for the adoption of the basic act and the implementation thereof has to be distinguished from the situation where the Council confers the power on itself to amend the basic act by way of a simplified procedure which differs from the procedure prescribed in the legal basis provision for the basic act set out in the TFEU. The latter practice (so-called acts with secondary legal basis) was outlawed by the CJ on the ground that it is an infringement of Article 13(2) TEU and the principle of institutional balance. See on this ECJ, 13 December 2001, Case C-93/00 \textit{European Parliament v Council}, para. 39-43; ECJ, 6 May 2008, Case C-133/06 \textit{European Parliament v Council}, para. 52-58.
\textsuperscript{262} Article 291(2) TFEU mentions the implementation of ‘legally binding Union acts’, which includes ‘delegated acts’. Thus, delegated regulations, directives and decisions may confer a power of implementation on the Commission resulting in so-called sub-delegation. On the possible negative consequences of sub-delegation, see Hofmann, supra note 45, pp. 502-503.
are adopted by the Council or the European Council in the field of CFSP, where the TEU expressly excludes the adoption of legislative acts, and some other instances from the field of competition law.

**4.2.2. Comitology after the Lisbon Treaty**

One of the most important changes under the new Lisbon regime is that the distinction between the two types of executive rules, i.e. delegated acts and implementing acts, came with the removal of delegated acts from the scope of comitology.

The term comitology stands for a set of procedures under which the Commission adopts measures of an executive nature working “in tandem with a committee of representatives of national governments whose role is to oversee it”. Thus, comitology provides a framework under which the Member States can control the Commission’s exercise of implementing powers which have been conferred on it by the Union’s legislative bodies. However, comitology is much more than that. The extensive literature on comitology describes an evolution through which comitology developed from a mechanism of intergovernmental control to a system of “deliberative problem-solving”. Accordingly, nowadays comitology is understood as “an interactive network of administrators and experts rather than as a check on the Commission’s powers”. These network structures which are characterised by an intensive cooperation of administrative actors from the Member States and the EU are a unique feature of the EU’s administrative system. The positive side of this system is the involvement of national experts, which brings efficiency and expert knowledge into exe-

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263. Article 24(1) TEU.
264. De Witte, supra note 33, p. 100 referring to Article 103 TFEU and Article 109 TFEU which do not refer either to the ordinary or the special legislative procedure for the adoption of the acts for which they provide.
265. Hofmann, supra note 45, p. 499; Ponzano, supra note 247, p. 136; De Witte, supra note 33, p. 99.
266. Chalmers, Davies and Monti, supra note 17, p. 117.
267. For example, one of the most acclaimed works providing a comprehensive analysis of comitology is C.F. Bergström, *Comitology: Delegation of powers in the European Union and the Committee System* (Oxford University Press, 2005).
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cutive rule-making at the EU level. On the other hand, comitology is also widely criticized, as it lacks transparency and democratic oversight. Indeed, amongst the various forms of comitology procedures that had existed under the former Comitology Decision\(^{271}\) it was only the ‘regulatory procedure with scrutiny’ – introduced only in 2006 by way of an amendment of the Comitology Decision – that secured a role for the Parliament in supervising the decision-making process of the executive branch. In rather simplified terms, the debate on comitology centres on the tension between regulatory legitimacy, i.e. governance by expertise, and parliamentary legitimacy, i.e. guaranteeing democratic oversight of executive rule-making.\(^{272}\)

Under the pre-Lisbon regime, the adoption of all implementing acts was subject to one of the procedures set out in the Comitology Decision. As we have seen above, with the Lisbon Treaty the previously uniform category of implementing acts was split into delegated acts and implementing acts to the effect that measures of general application designed to supplement or amend non-essential elements of the basic legislative act can only be adopted by the Commission in the exercise of delegated powers. The use of comitology procedures has been maintained only with respect to implementing acts.

The fact that delegated acts have been removed from the ambit of comitology is evident from the scheme of the TFEU. The only provision which refers to “mechanisms for control by Member States of the Commission’s exercise of implementing powers” is Article 291(3) TFEU, which deals solely with implementing acts. No similar reference can be found in Article 290 TFEU dealing with delegated powers. On the other hand, instead of the Member States, Article 290 TFEU grants rights of supervision to the Council and the European Parliament insofar as they may reject the delegated act adopted by the Commission or may revoke the delegation as a whole. Commentators highlight that the involvement of the Parliament in the supervision of delegated acts (which equals that of the Council) is more than justified in view of the fact that while acting within its delegated powers the Commission is entitled to amend or supplement the basic legislative act.\(^{273}\) Most of the basic acts are adopted jointly by the Council and Parliament via the ordinary legislative procedures, thus, the Parliament should indeed have a say in the amendment of that basic act resulting from the delegation of powers to the Commission. Finally, under the former

\(^{271}\) Supra note 250.

\(^{272}\) Hofmann, supra note 45, p. 500, see also Adriaansen, supra note 243, p. 132.

\(^{273}\) Ponzano, supra note 247, p. 141.
Comitology Decision, the Parliament had already enjoyed certain rights of supervision with regard to implementing acts which were subject to the ‘regulatory procedure with scrutiny’, i.e. acts of general scope designed to amend non-essential elements of the basic legislative act. These acts are now adopted by the Commission in the exercise of delegated powers and are called ‘delegated acts’. Hence, the Parliament’s rights of control with regard to delegated acts can also be seen as the preservation of its rights that had gradually evolved under the previously applicable comitology procedures.\(^{274}\)

In this perspective, the distinction between ‘delegated acts’ and ‘implementing acts’ can be explained, as Hofmann mentions, by reasons related to horizontal separation of powers between the EU institutions.\(^{275}\)

Despite the absence of a formal legal basis for comitology in the Treaty with regard to delegated acts, many authors argue that the Commission ought to continue consulting the committees even when exercising delegated powers, as such practice would guarantee the required level of expertise in this area of executive rule-making.\(^{276}\) The Commission has, in fact, indicated that it intends to do so; nonetheless, it emphasised that the national experts would have a “consultative rather than an institutional role” in the decision-making procedure under Article 290 TFEU.\(^{277}\)

Another change under the new Lisbon regime is the introduction of new comitology rules with respect to implementing acts. The Lisbon Treaty prescribed the adoption of a regulation for laying down the rules of control to be exercised by the Member States over the Commission’s implementing powers. In particular, Article 291(3) TFEU provides that:

“[...] the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.”

\(^{274}\) Differently, Craig who points to the risk that the Parliament’s power of supervision over delegated acts can be rather formal than substantive, see supra note 89, pp. 110-113.

\(^{275}\) Hofmann also points out that from the perspective of vertical separation of powers between the EU and the Member States, the introduction of the two categories of executive acts (delegated – implementing) can be seen as an attempt to shift the Union’s administrative system to executive federalism instead of the unique integrated structures and networks of administration that comitology represents, see supra note 45, pp. 497-500.

\(^{276}\) Ponzano, supra note 247, pp. 136-138; Hofmann, supra note 45, p. 500. These authors also point to Declaration No. 39 annexed to the Final Act of the Treaty of Lisbon which states that the Commission has the “intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area”.

\(^{277}\) Commission’s Communication, supra note 248.
Pursuant to this provision, the previous Comitology Decision\textsuperscript{278} was replaced by Regulation 182/2011 of the Council and the Parliament.\textsuperscript{279} This was necessary also for the reason that one of the comitology procedures set out under the Comitology Decision, namely the ‘regulatory procedure with scrutiny’, has become obsolete. This procedure applied to acts which amended the basic legislative act. As we have seen above, under the Lisbon regime, the Commission can only amend or supplement the basic legislative act when it exercises delegated powers\textsuperscript{280} and the outcome of the exercise of delegated powers is no longer subject to comitology. Thus, the comitology system also had to be amended in substance. Regulation 182/2011 establishes two procedures for controlling the Commission’s exercise of implementing powers; the advisory and the examination procedure. The examination procedure, in which the committee of the Member States’ representatives has a more influential role, applies to the adoption of general implementing acts, as well as to specific ones if they concern particularly sensitive sectors, such as taxation.\textsuperscript{281} Under this procedure, the Commission’s implementing act can be adopted if supported by a qualified majority of the committee. The rejection of the act also requires a qualified majority. If neither a positive nor a negative opinion can be delivered in the absence of the required majority in the committee, the Commission, eventually, still has the right to adopt the act – even if it relates to taxation – unless it is opposed by a qualified majority in the appeal committee, which is a second-instance committee. Thus, the outcome may well be that the implementing act is adopted despite it being opposed by the majority of the Member States’ representatives.\textsuperscript{282} This demonstrates that the Commission’s discretion is rather broad.

\textsuperscript{278} Supra note 250.
\textsuperscript{280} Hofmann, supra note 45, p. 500.
\textsuperscript{281} Article 2 of Regulation 182/2011.
\textsuperscript{282} As to the details, Article 5 of Reg. 182/2011 prescribes that both the adoption of a positive and a negative opinion in the committee requires a qualified majority. If the committee delivers no opinion, the Commission can still adopt the act except where the act concerns certain sensitive areas, one of those being taxation. In the latter case, the Commission may submit the act to an appeal committee (or, within two months, an amended draft to the original committee). The appeal committee again has to deliver its opinion by qualified majority. If no opinion can be reached, the Commission may adopt the draft act. Regulation 182/2011 also provides for certain rights of information (see Article 10(3)) and scrutiny (see Article 11) for the Parliament as well as, the Council. These rights are rather weak, however, as even if the latter take the view that the Commission has exceeded its implementing powers accorded to it in the basic act, the Commission may maintain the implementing act at issue.
in the field of implementing acts, contrary to the sphere of ‘delegated acts’ where the Council and the Parliament may exercise strict supervision over the Commission’s use of delegated powers.

As a point of criticism, it should be mentioned that it is rather dubious whether the two categories of executive acts can, in fact, be distinguished. The difference between ‘supplementing’ a basic act which can only be done on the basis of a delegation and ‘implementing’ the latter by way of an implementing act is quite subtle, especially, for example, in the case of the implementation of broadly formulated framework directives. In such case, the choice of what issues fall under delegation of powers and what other issues will be subject to implementing powers may be rather arbitrary.

As an illustration, we can look at the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), which authorises the Commission to regulate the following issues by way of delegated acts: (i) changes to Annex I and II of the Proposal setting out the company forms and corporate taxes which designate the personal scope of the proposed Directive (Article 2); (ii) amendments to Annex III setting out the taxes which are non-deductible from the base of the CCCTB (Article 14); (iii) laying down more detailed rules on the (a) definition of legal and economic ownership, in relation in particular to leased assets, (b) the calculation of the capital and interest elements of the lease payments, (c) the calculation of the depreciation base of a leased asset (Article 34); and (iv) laying down more precise rules on the definition of the categories of fixed assets subject to Chapter VI (Article 42). On the other hand, the Proposal assigns the following issues to the Commission’s exercise of implementing powers: (i) drawing up annually a list of third-country company forms which are to be considered to meet the conditions for the application of the proposed Directive (Article 3); (ii) laying down detailed rules on the calculation of the labour, asset and sales factors, the allocation of employees and payroll, assets and sales to the respective factor and the valuation of assets for the purposes of the apportionment formula (Article 97); (iii) establishing a standard form of the notice to opt (Article 106); and (iv) laying down rules on electronic filing, on the form of the tax return, on the form of the consolidated tax return, and on the supporting documentation required (Article 113). Looking at the two lists above we may wonder why the adoption of the list

283 De Witte, supra note 33, p. 93; Chalmers, Davies and Monti, supra note 17, p. 100. For the Commission’s views on the differences between ‘delegated acts’ and ‘implementing acts’, see the Commission’s Communication, supra note 248.

of eligible third-country companies falls under ‘implementation’ whilst the changes to the list of eligible Member States’ companies is within the scope of ‘delegation’. In our view, the decision on eligible third-country companies qualifies as “supplementing non-essential elements of the legislative act” just as adding new company forms to the list of eligible Member States’ companies. Similarly, it is not clear what renders the laying down of detailed rules concerning the factors of apportionment ‘implementation’, whereas the establishment of detailed rules on leasing of assets belongs to ‘delegation’. This demonstrates how elastic the categories of ‘delegated acts’ and ‘implementing acts’ are.

The unclear borderline between delegated and implementing acts is problematic, as from the point of view of the control mechanism it is not at all indifferent under which category a certain issue falls. The adoption of delegated acts is controlled by the Council (and the Parliament), whereas the enactment of implementing acts is monitored by the Member States’ committees in the framework of the comitology. Having regard to this important difference, a much clearer dividing line should be drawn between delegated and implementing acts. This is all the more so, because – as we have pointed out above – the Commission seems to enjoy a broader scope of discretion in the field of implementation where the role of the Member States’ committees is rather restricted than in the field of delegation where the Council (and the Parliament) can control the exercise of delegated powers more closely.

4.3. International agreements

In this Section, we deal with the question of where international agreements can be placed in the hierarchy made up of primary and secondary sources of EU law. International agreements concluded by the Union can formally qualify as a form of secondary law having regard to the fact that they are enacted by the Union institutions. It needs to be seen, however, whether they indeed rank at the same level as other acts of secondary law.

International agreements are binding upon the EU institutions and the Member States pursuant to Article 216(2) TFEU. The Union is also bound by international agreements which it had not concluded itself but where

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285. In the case of the Proposal for the CCCTB the control of delegated acts adopted by the Commission is exercised solely by the Council, as the proposed Directive is based on Article 115 TFEU, which prescribes a special legislative procedure in which the sole legislator is the Council while the Parliament has to be merely consulted.
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it has substituted for the Member States in the exercise of the powers in the areas governed by the agreement.\(^{286}\) The Court held that these international agreements form an integral part of the Union’s legal system.\(^{287}\) The integration of international agreements into the internal legal order of the Union means that those international agreements are, in principle, capable of having the same authority, nature and effects as other sources of EU law have. In particular, as regards their effect in the national legal systems of the Member States the Court held that, under certain conditions, international agreements concluded by the Union enjoy primacy over national laws and can be directly invoked by individuals before their national courts irrespective of whether or not such effects would be assigned to them according to the domestic laws of the Member State concerned.\(^{288}\) The conditions for a provision of an international agreement to have direct effect are the same as those for measures of a purely Union origin; namely, the provision has to be sufficiently clear, precise and unconditional. In addition, an international agreement can only confer directly effective rights on individuals where this is compatible with the “spirit, general scheme and terms”\(^{289}\) or, in another formulation, the “purpose and nature”\(^{290}\) of the agreement in question. In light of this, the Court held that various international agreements, most importantly, the GATT and its successor, the WTO Agreements, are not capable of having direct effect due to the fact that they are based on the principles of negotiation, reciprocity and mutuality and their provisions show a high degree of flexibility with several possibilities for derogations.\(^{291}\) However, the courts of the Member States must apply their national law in the light of the wording and purpose of international agreements even

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where those agreements do not have direct effect (principle of consistent interpretation) provided that the application of national law concerns fields in respect of which the Union has already legislated.\textsuperscript{292}

To the extent that international agreements concluded by the EU form part of the Union’s legal system, they need to be integrated in the normative hierarchy of EU law. Based on Article 216(2) TFEU (formerly Article 300(7) EC), the Court held that the Union institutions are bound by agreements concluded by the Union and, consequently, those agreements have primacy over secondary EU legislation.\textsuperscript{293} It follows from the ranking of international agreements in the hierarchy of EU norms that other measures of secondary EU law, such as the acts of the institutions, have to comply with international agreements binding on the Union. The Court had already declared in its early case law that it considered itself bound to “examine whether [the] validity [of acts of the institutions] may be affected by reason of the fact that they are contrary to a rule of international law”\textsuperscript{294}. Therefore, the validity of acts of secondary EU law is subject to review by the Court for their compatibility with higher ranking international agreements.\textsuperscript{295} However, such review of validity is conditional upon the international agreement meeting the same criteria that are required for its being directly effective, i.e. clear, precise and unconditional provision and the agreement’s purpose and nature permit it to be directly effective. Hence, acts of the EU institutions cannot be tested for compatibility with the GATT and WTO Agreements due to the nature and structure of the latter.\textsuperscript{296} The only exceptions to this rule are situations where the Union intended to implement, via the Union act under review, a


\textsuperscript{293} ECJ, 10 September 1996, Case C-61/94 Commission v Germany, para. 52; ECJ, 12 January 2006, Case C-311/04 Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst – Douanedistrict Rotterdam, para. 25; ECJ, 10 January 2006, Case C-344/04 International Air Transport Association, European Low Fares Airline Association v Department for Transport, para. 35; ECJ, 3 June 2008, Case C-308/06 International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport, para. 42; Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, para. 307, see also Leanarts and Desomer, supra note 45, p. 740-741.

\textsuperscript{294} Joined Cases 21-24/72 International Fruit Company, para. 6.

\textsuperscript{295} Case C-308/06 Intertanko, para. 43.

\textsuperscript{296} Case C-280/93 Germany v Council, para. 109; Case C-149/96 Portugal v Council, para. 47. Similarly to the GATT/WTO Agreements, the Court held that the validity of a Union measure cannot be assessed in the light of the United Nations Convention on the Law of the Sea due to the nature and broad logic of the latter, see Case C-308/06 Intertanko, para. 65.
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particular obligation entered into within the framework of GATT/WTO, or if the Union act expressly refers to specific provisions of the GATT/WTO Agreements.297

In addition, due to the primacy of international agreements over other measures of secondary legislation the latter must be interpreted in conformity with the former in accordance with the principle of consistent interpretation.298

On the other hand, international agreements concluded by the Union rank lower in the hierarchy of sources of EU law than primary law, the latter including the founding Treaties as well as the general principles of EU law.299 The Court reinforced this principle most powerfully in its Kadi judgment300 in which it annulled an EU Regulation implementing a United Nations (UN) Security Council Resolution brought under Chapter VII of the UN Charter ordering the freezing of assets of individuals associated with terrorist activities on the ground that the Regulation violated fundamental rights protected by the Union’s legal order.301 In particular, the Court stated that

“[…] the Charter of the United Nations […] would have primacy over acts of secondary Community law (see to that effect, Case C-308/06 Intertanko and Others [2008] ECR I-0000, paragraph 42 and case-law cited).

That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.”302

The conclusion that primary law prevails over international agreements was derived by the Court from the wording of Article 218(11) TFEU (formerly Article 300(6) EC Treaty). This provision gives jurisdiction to the Court to render an opinion on the compatibility of an international agreement with the Treaties prior to the conclusion of that agreement and expressly states that an international agreement which, in the Court’s opinion, is in conflict

297. ECJ, 22 June 1989, Case 70/87 Fédération de l’industrie de l’huilerie de la CEE (Fediol) v Commission, para. 19; ECJ, 7 May 1991, Case C-69/89 Nakajima All Precision Co. Ltd v Council, paras. 30-31; Case C-280/93 Germany v Council, para. 111.
298. Case C-61/94 Commission v Germany, para. 52; ECJ, 1 April 2004, Case C-286/02 Bellio Flli Srl v Prefettura di Treviso, para. 33; Case C-311/04 Algemene Scheeps Agentuur, para. 25.
299. De Witte, supra note 33, p. 80.
300. Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat.
301. For an extensive analysis of the judgment see G. De Búrca, The European Court of Justice and the International Legal Order After Kadi, 51 Harvard International Law Journal 1 (2010), pp. 1-49 and the literature referred to by De Búrca in FN 2 and 3.
302. Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, paras. 307-308.
with the Treaties may not enter into force.\textsuperscript{303} It is worth noting in this context that the Court’s remark on the place of international agreements in the normative hierarchy of the Union’s legal order was no more than an \textit{obiter dictum}. The actual reasoning through which the Court arrived at the conclusion that it does have jurisdiction to review the validity of, and eventually annul, a Union act implementing a UN Security Council resolution was based on a strong pluralist view of the international legal order and the relationship of international law and EU law.\textsuperscript{304} According to this stance, EU law is an independent, separate and autonomous legal system within the global arena existing alongside other normative systems, international law being one of them.\textsuperscript{305} The distinctness of the various legal systems means that their normative authority, as well as the effect of their rules, is confined to their own ambit. With regard to the Union’s legal order, its autonomy entails that the observance of basic constitutional principles within its internal system has priority over any possible obligations stemming from other legal systems, in particular international law. As the Court bluntly put it:

“[...] the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

The question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.”\textsuperscript{306}

The Court’s view that the Union’s legal system and the international legal system are parallel and juxtaposed orders with distinct jurisdictions and distinct authorities that produce effects only within their own respective spheres culminates in the statement that,

“[...] the review of lawfulness [...] to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

[...]”

\textsuperscript{303} For a more recent example of the exercise of such jurisdiction by the Court see Opinion 1/09 rendered on 8 March 2011 in which the Court found that the Draft Agreement on the European and Community Patents Courts is not compatible with the EU Treaty and the TFEU (OJ C211, 16.7.2011).

\textsuperscript{304} De Búrca, supra note 301, pp. 4, 7, 12, 23, 29.

\textsuperscript{305} Ibid. For a description of the pluralist approaches to the international legal order see De Búrca, supra note 301, pp. 31-34.

\textsuperscript{306} Joined Cases C-402/05 P and C-415/05 P \textit{Kadi and Al Barakaat}, paras. 316-317.
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[...] any judgment given by the Community judicature deciding that a Community measure intended to give effect to [a UN Security Council] resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.307

In other words, the Court emphasises that the annulment concerns only the EU Regulation without the validity of the UN Resolution – which the former was supposed to implement – being affected. The UN Resolution would maintain its status, validity and primary ranking within the separate legal system of international law. However, it is hard to deny that the annulment of the EU implementation measure, in fact, entails an indirect challenge to the underlying UN Resolution itself with the consequence that the obligation resulting from such resolution, i.e. an international law obligation, remains unfulfilled in the Union.308

The alternative approach that the Court could have taken is the constitutional approach to the international legal order.309 This presupposes the existence of a common international system and an international community of which all sub-systems (global, regional, local) form part and which is governed by an agreed set of basic rules and principles. The strong constitutional approach proposes a hierarchical order of these rules in order to resolve conflicts between the various levels of authority. The soft constitutional approach advocates for common rules and principles in a system where the relationships of the former are governed by negotiation and consensus instead of a strict hierarchy.310 Actually, when the Court depicts the hierarchy of norms in the Union’s legal system and places international agreements in between primary and secondary EU law it projects a ranking that it would put forward if it were to follow a unitary, i.e. constitutional, approach to the international legal order.311 Instead, the Court followed a strong pluralist approach under which no single hierarchy of norms originating from different authorities can be established. Although for this reason the description that the Court gives of the hierarchy of sources of EU law remains an obiter dictum, it is the most important premise for our purposes, that is, for defining the place of international agreements in the Union’s normative order.

308. Nergelius, supra note 124, p. 41.
309. De Búrca, supra note 301, pp. 12, 29.
310. For a description of the various forms of constitutional approaches see De Búrca, supra note 301, pp. 34-41.
311. Nergelius, supra note 124, p. 41; De Búrca, supra note 301, p. 29.
In summary, international agreements concluded by the Union (alone or together with the Member States) are located between primary law and secondary law in the normative hierarchy of EU law. Consequently, acts of the Union institutions must comply with international agreements and they are subject to legality review for their compatibility with the latter provided, however, that the relevant provisions of the international agreement are sufficiently clear, precise and unconditional and the purpose and nature of the international agreement would allow those provisions to have direct effect. On the other hand, international agreements are subordinated to primary law and therefore, they cannot contravene the founding Treaties and the general principles of EU law, including fundamental rights. The jurisdiction of the Court to monitor international agreements prior to their conclusion is designed to preclude situations from arising whereby a validly concluded, enforceable international agreement would conflict with a norm of primary law. If such conflicts were still to arise it is not unequivocal how the Court would resolve them having regard to its pluralist approach to the relationship of EU law and international law, which in *Kadi* led only to the invalidation of the implementing EU Regulation but not that of the underlying international law instrument.

4.4. Overview

From the above it can be inferred that a hierarchy does not exist between the various instruments belonging to the ambit of secondary EU law. This is due predominantly to the fact that in the Union’s constitutional order, the separation of powers between the institutions does not correspond precisely to what we find in a state structure. The author of an act of secondary law and his democratic legitimisation does not directly determine the place of that act in the normative order. Both the legislative and the executive organs may adopt regulations, directives or decisions which are of equal rank. In principle, a Commission regulation has the same force and authority in the legal order as a regulation adopted by the Council and the Parliament. Nevertheless, a Commission regulation has to comply with a regulation of the Council and Parliament where the former is adopted on the basis of a specific delegation of powers or conferral of implementing powers included in the latter.

Consequently, as far as the relationship between the various forms of secondary EU law is concerned, a hierarchy of norms akin to the one that exists

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312. Bieber and Salomé, supra note 194, p. 911.
in national legal systems cannot be identified apart from the relationship between basic acts and delegated/implementing acts. However, organising principles that are normally used to ensure systemic coherence in a legal system, be it a national system or the international legal order, do play a role in governing the relationship of different forms of secondary law. Principles, such as the later law prevails over previously adopted rules (lex posterior) and specific rules have priority over rules of a general nature (lex specialis) are recognized under EU law. The binding/non binding character and the general/individual scope of an act, which is consonant to the principle of lex specialis, are additional parameters that play a role in structuring the relations of secondary EU law.

Finally, as far as international agreements concluded by the Union (alone or together with the Member States) are concerned, they are placed between primary law and secondary law in the hierarchy of sources of EU law.

313. De Búrca, supra note 301, p. 5, FN 16
314. ECJ, 13 December 2001, Case-481/99 Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG, paras. 36-39; ECJ, 19 June 2003, Case C-444/00 The Queen on the application of Mayer Parry Recycling Ltd v Environment Agency, Secretary of State for the Environment, Transport and the Region, paras. 49-57. See Lenaerts and Van Nuffel, supra note 16, p. 704, FN 190 adding that in order for the more specific rule to prevail, it must intend to limit or replace the general provision.
315. Leanarts and Desomer, supra note 45, p. 746.