

EU Executive Rule-Making and the Second Directive on Institutions for Occupational Retirement Provision

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1. Introduction

1.1. General

The Treaty of Lisbon has introduced a new system of legislation and executive rule-making in the European Union (EU).¹ Executive rule-making falls into two categories: delegation (Article 290 TFEU) and implementation (Article 291 TFEU). The new system attracted a fair degree of scholarly attention prior to and in the initial years after the entry into force of the Lisbon Treaty. This has included analyses of the problems that the new system brings about, as well as of issues that the new system has not resolved. These issues therefore continue to exist. Not much research has as yet been carried out on how the new legislative system is to be implemented in practice and how these issues play out. In this contribution the consequences of the new legislative system in a particular area of EU law will be addressed: pensions law. More specifically we will focus on the second Directive on Institutions for Occupational Retirement Provision (IORP II).² The role and competence of the EU in pension matters is highly politically sensitive³ and the revision of the initial IORP Directive has thus not only raised important matters of substance, but it also highlights various fundamental issues of the EU's legislative system. These include a) the competence of the EU to act in this area to begin with, b) the inclusion of powers for the Commission to adopt secondary legislation, but also c) the quasi-regulatory powers of the competent EU agency in the field: the European Insurance and Occupational Pensions Authority (EIOPA).

The structure of this contribution is as follows. First, a general analysis of the EU's legislative system is made, partly based on an analysis of the existing literature and the issues identified therein. Then, the revision of the IORP II Directive will be discussed in light of these issues.

In concrete policy areas such as pensions law, such issues cannot be viewed in isolation (for example, only the IORP Directive), but must be seen in light of the underlying substantive controversies. In the case of the

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1 The system is not entirely new: it is in part an explication of an existing situation.

2 Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (Institutions for Occupational Retirement Provision, IORP), OJ L 235, 23.9.2003, pp. 10-21. See for more background information on the IORP Directive, inter alia, H. van Meerten & B. Starink, 'Cross-border problems and solutions for IORPs', (2011) *EC Tax Review*, no. 1; A. van den Brink et al., *Regulating pensions; Why the EU matters*, Netspar design paper no. 5 (2011) and H. van Meerten, 'The scope of the IORP Directive', in U. Neergaard et al. (eds.), *Social Services of General Interest in the EU* (2013).

3 Not only the Netherlands, but also the United Kingdom, Ireland and Belgium are sceptical of a IORP II Directive. IPE, 3 September 2014: 'The UK government has said it will challenge all proposals in the IORP II Directive that do not "add value" to the local pension system, a minister has warned.' To be found at: <<http://www.ipe.com/home/uk-government-seeks-allies-in-challenging-brussels-on-iorp-ii/10002978.fullarticle>> (last visited 22 January 2016).

IORP II Directive, one of the main controversies is whether the EU (i.e. the EU legislature, the Commission as the main executive rule-making authority and EIOPA) should be able – for instance – to adopt capital requirements for pensions institutions. How this substantive controversy affects the general legislative issues identified in Section 2 will thus be the main focus of attention.

2. Executive rule-making after ‘Lisbon’

2.1. The Treaty system

The EU’s legislative system is based on two main distinctions: the first between legislative acts and non-legislative acts and the second between delegation (Article 290 TFEU) and implementation (Article 291 TFEU). Both delegation and implementation are qualified as ‘non-legislative acts’ in the terminology of the EU Treaty. According to Article 290 TFEU, a delegated act is an act of general application to supplement or amend certain non-essential elements of the legislative act. According to Article 291 TFEU, an implementing act is an act that ensures that legally binding Union acts are implemented subject to uniform conditions. Accordingly, both types of secondary legislation are primarily defined in institutional and procedural terms, rather than in substantive terms.⁴ Definitions of and prerequisites for the various legal acts are determined by procedural conditions and institutional relationships.⁵ As delegated acts (‘quasi-legislation’) are clothed in stronger democratic guarantees, they may be viewed as instruments that carry more weight than implementing acts.⁶ Yet, the Treaties have not established a formal hierarchy between delegated and implementing acts.⁷ Strikingly, the definitions of delegated acts and implementing acts are not related.⁸ Delegated acts are defined on the basis of their *scope of application* (supplementing or amending non-essential elements of legislative acts), whilst the definition of implementing acts is based on their *function and rationale* (implementing acts allow legislative acts to be applied according to uniform conditions).⁹ These definitions partly overlap.¹⁰

The result of this has been that the substantive distinction between legislation, delegation and implementation had to be fleshed out further by the institutional practice. Apart from the EU’s political institutions, also the role of the CJEU should be noted. Two decisions of the CJEU have shed more light on this issue. In the *Schengen Borders Code* case the CJEU ruled on the distinction between legislation and non-legislative acts¹¹ and the decision in the *Biocides* case concerned the distinction between delegation and implementation.¹²

2.2. The distinction between legislative and non-legislative acts

The distinction between legislative and non-legislative acts is not only for the EU legislature (Parliament, Council, Commission) to make. Indeed, with Article 290 TFEU the limitation of the EU legislature’s freedom to delegate rule-making powers has been awarded Treaty status.¹³ The status of legislative acts has thus

4 A. van den Brink, ‘Van rechtsinstrumenten naar rechtshandelingen: ‘Lissabon’ en de introductie van een Europees primaat van de wetgever’, (2008) *SEW. Tijdschrift voor Europees en economisch recht*, no. 5, pp. 166-170.

5 Important in this regard are the extensive ‘call-back’ rights under the concept of delegation that allow the Council and the European Parliament, individually, to raise an objection against a delegated act, or even to withdraw the delegation itself (this section will elaborate on this in more detail).

6 It should be noted that an argument for that conclusion can also be found in the fact that the concept of the delegated act had to replace the most far-reaching kind of comitology, i.e. the Regulatory procedure with scrutiny (known under its French acronym PRAC).

7 J. Bast, ‘New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law’, (2012) 49 *Common Market Law Review*, no. 3, pp. 885-927 at p. 919.

8 T. Christiansen & M. Dobbels, ‘Comitology and Delegated Acts after Lisbon: How the European Parliament lost the Implementation Game’, (2012) 16 *European Integration Online Papers (EIOP)*, article 13, p. 8, <<http://eiop.or.at/eiop/texte/2012-013a.htm>> (last visited 22 January 2016).

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

10 J. Bast, ‘Is There a Hierarchy of Legislative, Delegated and Implementing Acts?’, in C.F. Bergström & D. Ritleng, *Rulemaking by the European Commission. The New System for Delegation of Powers* (2016), pp. 157-172 at p. 167.

11 Case C-355/10, ECLI:EU:C:2012:516.

12 Case C-427/12, ECLI:EU:C:2014:170.

13 As it provides that delegation must be limited to non-essential elements and that the legal basis for delegation must explicitly define the objectives, content, scope and duration of the delegation of power.

acquired a constitutional dimension, which is reflected in the fact that political scrutiny has become a key characteristic thereof.¹⁴ The substantive criterion is that ‘essential elements’ of an issue need to be regulated by the legislature itself whereas ‘non-essential elements’ may be delegated to the executive.

In the *Schengen Borders Code* case the CJEU made clear that it has a substantial role in defining the distinction between legislative acts and non-legislative acts. Long before the Treaty of Lisbon, the basis for that conclusion had already been developed in the case law of the CJEU in which ‘essential’ elements were distinguished from ‘non-essential’ elements.¹⁵ Although the terminology is quite open-textured, the findings as to which elements are essential are ‘(...) [to be] based on objective factors amenable to judicial review’ (Paragraph 67).¹⁶ According to the CJEU, the decision of the Council supplementing the Schengen Borders Code (in the form of what we would now refer to as an implementing act) did indeed relate to essential elements. They should have been laid down in the basic act (i.e. a directive, secondary EU Law) and the decision of the Council therefore had to be annulled. The essential elements that had to be decided at the legislative level included the enforcement powers granted to border guards to take coercive measures. According to the CJEU, not only did the Council decision thus affect fundamental rights, but it also involved political choices: a balance had to be found between conflicting interests (protection of the migrant vs. the interest involved with checks at the EU’s external borders).¹⁷ Political choices as a criterion for defining essential elements is, however, problematic: if only since political decision-making can never be fully excluded in the context of executive rule-making.¹⁸

In any case, the discretion of the legislature has been effectively restricted by the CJEU.¹⁹ This is obviously manifested first of all by the outcome of the case. Moreover, the CJEU did not review whether or not the Council, as the executive institution, had remained within the margins set by the EU legislature (the delegation provision from the Schengen Borders Code) but rather whether the EU legislature had respected the general, constitutional distinction between essential and non-essential elements. In other words, the CJEU focused on the limits on the legislature rather than on the limits on the delegate.

The dividing line between legislative and non-legislative acts is also relevant from an inter-institutional perspective. In a recent case the CJEU had to rule on the Commission’s decision to withdraw a legislative proposal for a Regulation on macro-financial assistance to third countries.²⁰ The Commission opposed the Council’s and the European Parliament’s amendment of the proposal to remove an implementing power from the proposal according to which the Commission would have the power to decide on the actual conferral of assistance. The European Parliament and the Council had lodged an appeal against the withdrawal of the proposal by the Commission. The Commission disagreed with the decision of the European Parliament and the Council in that the European Parliament and the Council were of the opinion that such decisions should be made via the ordinary legislative procedure (and thus took the position that such decisions were part of the essential elements of the Regulation). The CJEU, however, found that the Commission’s withdrawal was justified. One of the main objectives of the proposal is to accelerate the decision-making on providing assistance and thus its effectiveness. In light of this, the implementing power was in fact an essential element of the proposal, according to the CJEU (Paragraph 91). Furthermore, the withdrawal was justified

14 Cf. J. Bast, ‘New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law’, (2012) 49 *Common Market Law Review*, no. 3, pp. 885-927, at pp. 893-894.

15 In particular, the decision in Cases 25/70, *Köster*, ECLI:EU:C:1970:115 and C-240/90, *Germany v Commission*, ECLI:EU:C:1992:408.

16 This wording shows traces of the wording developed by the CJEU in connection with the choice for the right legal basis (Case C-300/89, *Titanium Dioxide*, ECLI:EU:C:1991:244; Case C-376/98, *Tobacco Advertising*, ECLI:EU:C:2000:544). In practice, however, the judicial review of the choice of the Community legislature has remained restricted to a fairly marginal review, see: S. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a ‘Drafting Guide’’, (2011) *German Law Journal*, no. 3, pp. 827-864. As shown in what follows, the review of the CJEU is also more limited with regard to the choice to delegate regulatory powers than the level at which it appears to aim with this wording.

17 The type of political choices that is reserved to the legislature also depends on the legal basis: K. Bradley, ‘Delegation of Powers in the European Union. Political Problems, Legal Solutions?’, in C.F. Bergström & D. Ritleng, *Rulemaking by the European Commission. The New System for Delegation of Powers* (2016), pp. 55-85, Section 4.2.2.

18 D. Ritleng, ‘The Reserved Domain of the Legislature. The Notion of Essential Elements of an Area’, in C.F. Bergström & D. Ritleng, *Rulemaking by the European Commission. The New System for Delegation of Powers* (2016), pp. 133-155 at p. 152. See also M. Chamon, ‘How the concept of essential elements of a legislative act continues to elude the Court: *Parliament v. Council*’, (2013) 50 *Common Market Law Review*, no. 3, pp. 849-860.

19 Ritleng, *supra* note 18 analysed more CJEU decisions and concluded that the CJEU applies a rather case-by-case approach.

20 Case C-409/13, ECLI:EU:C:2015:217.

based on the Commission's position regarding the *trialogues*. In practice, these informal consultations between the three legislative institutions are of vital importance in order to reach consensus. The CJEU used the Commission's position during these dialogues as a justification for the subsequent withdrawal of the proposal. It did not answer the material question of whether this case involved essential or non-essential elements. The case should be seen as an answer to the question regarding the scope of application of the powers of legislative institutions to determine what elements of the regulation are essential.

2.3. The distinction between delegation and implementation

The Treaty of Lisbon has introduced another distinction that relates to the distinction between delegation and implementation.²¹ This distinction, although it may appear as quite technical, has indeed become extremely politicised. A lack of consensus on the choice between delegation and implementation frequently leads to considerable delays in the legislative process. This has been the case in major legislative dossiers such as the Multiannual Financial Framework, the reform of the Common Agricultural Policy and the series of measures relating to the Single Market Act I (April 2011) and II (October 2012).²²

The diverging and even opposing interests of EU institutions and the lack of clear substantive criteria and definitions in the Treaties are conducive thereto. Delegation is based for the most part on *ex post* control by the Council and the European Parliament.²³ Depending on the legal basis, these institutions may have the power to object to a specific delegated act (as a result of which it cannot enter into force) or they may even have the power to revoke the delegation altogether. Moreover, a legislative act may provide that both of these powers are connected to a specific delegation. The power to revoke the delegation is a radical one as it essentially means that the Council and the European Parliament can unilaterally amend a legislative act. However, as far as the authors are aware, this power has not yet been actually exercised. Both the Council and the European Parliament have, however, raised several objections to specific delegated acts.²⁴ Thus, delegated acts have certainly become included in processes of democratic oversight.²⁵

Not surprisingly, the European Parliament strongly prefers Article 290 TFEU because of these *ex post* control mechanisms²⁶ which it lacks under Article 291 TFEU.²⁷ By contrast, the Member States prefer implementation over delegation because of the *ex ante* control mechanism which applies to implementing acts via committees of national experts (comitology). The Member States value this mechanism of *ex ante* control mechanism highly and have tried to apply it to the adoption of delegated acts as well. Although the Commission already promised in 2009 to 'systematically consult experts from the national authorities of all

21 According to the European Parliament, the introduction of the concept of the delegated act is the most important change that the Treaty of Lisbon has made to the European legislative system: see for more details the AG's Opinion in Case C-427/12, ECLI:EU:C:2014:170. See for a discussion of the 'old' system: H. van Meerten, 'Naar een nieuw Europees wetsbegrip?', (2001) *Nederlands Tijdschrift voor Europees recht*, no. 6, pp. 166-169.

22 See for the details of this: <http://ec.europa.eu/growth/single-market/smact/index_nl.htm> (last visited 22 January 2016).

23 Schütze has argued that the powers of the European Parliament with regard to Art. 290 TFEU amount to nothing less than a constitutional revolution, since the basic treaties never previously acknowledged any formal role for the European Parliament over executive legislation: R. Schütze, "'Delegated" Legislation in the (new) European Union: A Constitutional Analysis', (2011) 74 *The Modern Law Review*, pp. 661-693 at p. 685.

24 A couple of examples: the Council has raised an objection against a delegated act of the Commission of 12 August 2014 regarding the format for submitting data on expenses for research and developments as referred to in Regulation (EU) 549/2013 on the European system of national and regional accounts in the European Union. In 2014, the European Parliament objected to a delegated regulation of the Commission regarding the definition of 'technically manufactured nanomaterials' that was based on Regulation (EU) 1169/2011 on the provision of food information to consumers.

25 The European Parliament has been looking to boost resources for the scrutiny of delegated acts, as well as to create greater uniformity between parliamentary committees in dealing with them. So far, the European Parliament's record has been poor in this regard: Th. Christiansen & M. Dobbels, 'Comitology and Delegated Acts after Lisbon: How the European Parliament lost the Implementation Game', (2012) 16 *European Integration Online Papers (EIOP)*, article 13, <<http://eiop.or.at/eiop/texte/2012-013a.htm>> (last visited 22 January 2016).

26 As had been predicted by Craig: P.P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review*, no. 5, pp. 671-687, at p. 675.

27 Art. 11 of the Comitology Regulation (Regulation 182/2011/EU) does provide for a mechanism to scrutinize implementing acts for the Council and the European Parliament: if either of these institutions indicates that a draft implementing act exceeds the implementing powers of the Commission provided for in the basic act, the Commission needs to review it. However, as Craig has noted, the limits of this mechanisms are notable, and do not extend to the Commission having to withdraw or amend an implementing act to which the Council or the European Parliament have objected: P.P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review*, no. 5, pp. 671-687, at pp. 684-685.

the Member States'²⁸ – and this commitment has indeed been incorporated into various legislative acts²⁹ – Member States view this as an insufficient guarantee.

These diverging subjective institutional views on delegation and implementation now make the legislative choice for either Article 290 TFEU or 291 TFEU necessarily easy to understand. Moreover, control by the CJEU is limited as the Court grants the legislature a wide margin of discretion. In its decision in the *Biocides* case, the CJEU concluded that judicial control is limited to whether the choice of the legislature falls within the conditions laid down in Articles 290 and 291 TFEU.³⁰ In a later case, the CJEU decided that whether the Commission has been granted a discretionary power or not (or, if so, the scope thereof) is not a relevant factor to determine whether Article 290 or 291 should apply.³¹

Despite the legislative discretion that determines the choice between Article 290 and 291 TFEU, Schütze has argued that delegation and implementation are fundamentally different in nature: in his view Article 290 TFEU concerns the delegation of legislative power (as it involves the power to amend primary legislation) whereas Article 291 TFEU concerns the delegation of executive powers (as it involves the implementation of primary legislation).³² The respective control mechanisms reflect this different status: control in the context of Article 290 TFEU focuses on democratic guarantees, whereas control by Member States is the key element in the context of Article 291 TFEU. The latter element can be explained by viewing implementing acts as a manifestation of executive federalism: Member States feel the need to be able to control the (supranational) Commission.

Such an idea of a fundamental difference between delegation and implementation is difficult to reconcile with the EU's legislative practice. Delegation is limited to acts of general application but this does not imply that implementation may not include measures of general application as well.³³ Moreover, whereas implementation is supposed to only give effect to existing provisions of primary legislation (and, thus, to refrain from adding new elements thereto), the reality is that it often inevitably involves value judgements and political choices.³⁴ Thus, implementing acts and delegated acts are not easy to distinguish on the basis of their content.³⁵

With the Interinstitutional Agreement on Better Law Making (IIA),³⁶ the EU institutions have tried to remove some of the controversy by bringing the procedure to adopt delegated acts closer to that of the committee procedures under Article 291 TFEU in that:

- it is now an obligation for the Commission to consult Member State experts;
- the Commission is obliged to react to the consultation of Member State experts and will state how it will take the experts' views into consideration; and
- Member State experts have the right to give a new opinion in case of a change in the material content of a draft delegated act.

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

29 For example, in the field of pensions in Directive 2013/14/EU (institutions for occupational retirement provision, undertakings for collective investment in transferable securities and managers of alternative investment funds). Recital 3 of the Directive provides: 'It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that it publish the results of such consultations.'

30 Case C-427/12, ECLI:EU:C:2014:170. More in detail on the decision and a critique thereof: D. Ritleng, 'The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)*', (2015) 52 *Common Market Law Review*, no. 1, pp. 243-258.

31 Case C-88/14, ECLI:EU:C:2015:499.

32 R. Schütze, "'Delegated' Legislation in the (new) European Union: A Constitutional Analysis', (2011) 74 *The Modern Law Review*, pp. 661-693 at p. 682.

33 Communication from the Commission to the European Parliament and the Council, Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, p. 4.

34 P.P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review*, no. 5, pp. 671-687, at p. 686.

35 See also Bast: 'In terms of phenomenology, they [i.e. delegated acts, TvdB/HvM] closely resemble earlier implementing acts.' J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', (2012) 49 *Common Market Law Review*, no. 3, pp. 885-927, at p. 916.

36 The three Institutions reached a political agreement on the text of the new Interinstitutional Agreement in December 2015. At the time of completing this contribution (January 2016) it still awaits formal approval. The provisional text is available at: <http://ec.europa.eu/smart-regulation/better_regulation/documents/20151215_ia_on_better_law_making_en.pdf> (last visited 12 January 2016).

Consequently, Member States' opposition to delegation may be expected to diminish and, thus, the choice between delegation and implementation may be expected to be depoliticized to a certain extent. But the Commission had wished for more – and, for that matter, the European Parliament as well – and tried to introduce a more substantive delineation of delegation and implementation. To that end, it identified a set of objective criteria that should guide the choice between the two forms of secondary legislation. In its proposal for a new IIA³⁷ the Commission identified a number of criteria that in fact directly flow from the Treaty system, such as the rule that measures designed to lay down additional substantive rules and criteria to be met can only be adopted by way of delegated acts as they supplement the basic act.³⁸ Other criteria would indeed have clarified and further elaborated the existing legal framework, such as the rule that 'the annual and multiannual work programmes implementing financial instruments should be adopted by means of implementing acts'. However, all of the Commission's criteria have been removed from the final version of the text of the IIA, including those that in fact add little to the existing legal framework. Even a vague commitment to negotiate substantive criteria between the three institutions following the entry into force of the IIA has not made it to the final text.³⁹

The legitimacy of EU secondary legislation is not only relevant from an interinstitutional perspective. The involvement of stakeholders and public consultation are increasingly seen as valuable elements of the decision-making on delegated acts in particular.⁴⁰ The IIA, however, brings little new in this regard, focused as it is on Member State expert participation. It only provides that decision-making on delegated acts 'may include' consultations with stakeholders.⁴¹ Experiences with obligations to that effect that already exist with regard to the powers of financial agencies of the EU have thus not found their way to the IIA.

More in general, the IIA completely ignores the position of EU agencies in EU law making. The EU financial agencies that were set up in 2011 have been given quasi-regulatory powers and are authorized to propose draft delegated and implementing acts. The status of such draft acts is strengthened by legislative constraints on the discretion of the Commission. The Commission may not simply ignore such draft acts. Thus, the existence of such quasi-regulatory powers raises questions as to their exact status and scope, their legitimacy and the implications for the EU institutions. These questions have remained unaddressed by the IIA. This is all the more surprising since the basic Treaties have failed to recognize the status of EU agencies as well.⁴² Thus, no constitutional framework exists to regulate the position of agencies as recipients of (quasi-)delegated or (quasi-)implementing powers. The gap between the constitutional provisions and the actual institutional practice is only widening.⁴³

We will analyse the effects of this gap on the position of the EU agency in the field of pensions: the European supervisory agency EIOPA (European Insurance and Occupational Pensions Authority).⁴⁴

37 COM(2015) 216 final.

38 Annex I to the Commission's proposal COM(2015) 216 final, *Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts*, consideration 8.

39 IIA, Common Understanding on Delegated Acts.

40 This could be viewed as a result of Art. 11 of the Treaty on European Union in which the principle of representative democracy is elaborated and supplemented by consultation and dialogue obligations (among other obligations). See for more details on this the proposal of the Research Network on EU Administrative Law (RENEUAL) to develop a general framework for the EU administrative procedure: the RENEUAL Model Rules 2014 (specifically: D. Curtin et al., 'ReNEUAL Model Rules on EU Administrative Procedure: Book II – Administrative Rulemaking'), available at: <<http://www.reneual.eu/>> (last visited 22 January 2016).

41 Consideration 17 of the IIA.

42 H.C.H. Hofmann, 'Legislation, Delegation and Implementation Under the Treaty of Lisbon: Typology Meets Reality', (2009) 15 *European Law Journal*, no. 4, pp. 482-505, at p. 501.

43 Cf. Hoffmann, *ibid.*, who signalled this development in relation to EU primary law, but six years later and with a new Inter Institutional Agreement that ignores the issue, the gap has only widened.

44 EIOPA has received little scholarly attention so far regarding its rule-making powers. This is different for ESMA (the European Markets and Securities Authority). See inter alia: M.P.M. van Rijsbergen (2014), 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', (2014) 10 *Utrecht Law Review*, no. 5, <http://doi.org/10.18352/ulr.304>, pp. 116-131.

3. Executive rule-making in EU pensions law

3.1. Resistance to executive rule-making

Article 30 of the Commission's proposal to revise the IORP II Directive contains a legal basis for delegation for the Commission. Under this provision, the Commission may adopt a delegated act specifying, inter alia, the remuneration policy, the risk assessment for pensions and the pension benefit statement.

Moloney⁴⁵ concludes that delegation provisions are usually drawn up in very general terms and that it is therefore difficult to see how they relate to the requirements of Article 290 TFEU. Moloney's view is inter alia supported by the European Economic and Social Committee (EESC). In connection with the MiFid II proposal⁴⁶ the EESC objected to the 'extreme and disproportionate use of delegated acts', as provided by Article 94 of the proposal.⁴⁷ According to the EESC, delegated acts should relate to specific and well-defined affairs and should be exercised within a certain period of time.

In the proposal for the MiFIR Regulation⁴⁸ the EESC⁴⁹ notes that there is a compatibility problem between Article 40 of the draft Regulation (the legal basis for delegation) and Article 290 TFEU.⁵⁰ The number, content and provisions of the delegated acts are not consistent with the provisions of the Treaty and place too many fundamental aspects of the Regulation outside the scope of the normal legislative process, according to the EESC. The EESC therefore recommends examining how Article 40 of the proposal can be aligned with the requirements of Article 290 TFEU.

The EESC was also critical of the proposed legal bases for delegation in the IORP II proposal.⁵¹ The EESC urged the Commission to be particularly cautious when drawing up the delegated act mentioned in Article 54 of the proposal (regarding requirements for the pension benefit statement), 'given the potential costs of such a solution'. The Committee therefore suggested that when listing information requirements for scheme members, the Commission should take into account the nature of the schemes which they belong to.⁵² By doing so, the EESC essentially said that the Commission should be careful not to affect the essential elements of the rules. As to making information available to members and beneficiaries of pension funds, the EESC expressed concerns about the suitability of a statement of standardised information, and proposed that more experience should be gathered before the delegated act could be carried out.⁵³

3.2. EIOPA and executive pension regulation

As stated in Section 2, the EU financial agencies have powers to draw up draft rules in preparation of delegated acts and implementing acts.⁵⁴ EIOPA⁵⁵ has such powers too. They are somewhat controversial, mostly due to the fact that EIOPA deals with rather sensitive issues and seems to act, sometimes, on its own initiative.

On its own initiative, EIOPA is currently working (in connection with the implementation of the current IORP Directive) on tightening the requirements for the solvency of pension institutions.⁵⁶ These solvency

45 N. Moloney, *EU Securities and Financial Markets Regulation* (2014), p. 904.

46 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Council Directive 2004/39/EC of the European Parliament and of the Council (recast), OJ C 191, 29.6.2012, pp. 80-83.

47 Ibid.

48 Markets in Financial Instruments Regulation, this Regulation 'comes' under MiFid.

49 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EMIR) on OTC derivatives, central counterparties and trade repositories, OJ C 143, 22.5.2012, pp. 74-77.

50 Ibid., no. 1.7.

51 Ibid., no. 4.3.5.

52 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision, OJ C 451, 16.12.2014, pp. 109-115.

53 Ibid., no. 4.3.2.

54 See extensively: E.M. Busuic, *European Agencies: Law and Practices of Accountability* (2013).

55 See note 3, supra.

56 This 'own initiative' is already controversial in some Member States. See: H. van Meerten & F. Valkenburg, 'Naar een Europese pensioenrichtlijn', (2015) *Pensioenmagazine*, no. 4.

requirements, set out in the ‘Holistic Balance Sheet (HBS)’, entail a mechanism that should facilitate a clearer comparison between European pension funds.⁵⁷

In the course of its consultations EIOPA reiterated the Commission’s statement that more technical information on the solvency of pension funds was required.⁵⁸ EIOPA acted on this by starting these consultations on its own initiative, and emphasized that there was no connection with the Commission’s proposal for IORP II. PensionsEurope, a representative body of national pension funds, has been critical of the EIOPA’s plans for the HBS, and has even referred to the plan as being ‘conceptually wrong.’ It claims that the HBS is not an adequate regulatory instrument and moreover entails an ‘unacceptable burden’ for IORPs.⁵⁹

Aside from the HBS, EIOPA issues several reports and guidelines, including ones on the costs of IORPs⁶⁰ and individual value transfers between Member States.⁶¹ This last report⁶² identifies eight bottlenecks for cross-border individual value transfer for which EIOPA offers ‘good practices’. These should be observed by the Member States.

These EIOPA activities do not automatically lead to acts with legally binding effect. This could however be the end result, either through the mechanism of Article 290/291 TFEU, or otherwise (see the next section). This could give EIOPA a greater role than is perhaps assumed. This will be explained in what follows.

4. Further capital requirements for IORPs?

As said, under the current measures of the European Commission and EIOPA, and based on the current draft text of the IORP II Directive, no new capital requirements seem to be imposed on IORPs.⁶³ Nevertheless, as stated at the end of the preceding section, it cannot be ruled out that such requirements will eventually come into the picture. Three developments can be mentioned.

First of all, Article 30 of the draft IORP II Directive empowers the European Commission to adopt implementing acts ‘in cases not foreseen by this Directive’.⁶⁴ In practice, the *differences* between the national capital requirements are a complicating factor when it comes to the cross-border provision of pension schemes. Precisely these differences could be a reason for applying Article 30 and imposing capital requirements. This is affirmed by the wording of the recitals of the IORP proposal that state that it is principally the sponsoring undertaking rather than the pension institution that either covers the longevity risk (for example) or guarantees certain benefits or certain investment performance. According to the this recital, however, in some cases it is the pension institution itself which provides such cover or guarantees and the sponsor’s obligations are generally exhausted by paying the necessary contributions. In these circumstances, the recital continues, the products offered are similar to those of life-assurance companies and the institutions concerned should hold at least the same additional own funds as life-assurance companies.⁶⁵ Accordingly, although the scope of application of the legal basis for delegation is fairly broad, no essential elements of the regulation are in dispute in this sense. Partly in light of the recitals, the separation between legislation and executive rule-making would thus not be jeopardized.

In this light it is – *in se* – at least doubtful whether removing the delegation provision of Article 30 IORP II Directive would result in a situation in which no capital requirements can be imposed on IORPs.

57 Ibid.

58 Outcome of the consultations, EIOPA, ‘Consultation Paper on Further Work on Solvency of IORPs’, 13 October 2014, EIOPA-CP-14/040, No. 3.4.

59 Press release by PensionsEurope, ‘PensionsEurope publishes Position Paper on EIOPA plans for further work on solvency of IORPs’, 17 February 2015.

60 EIOPA, ‘EIOPA Report on Costs and charges of IORPs’, 7 January 2015, EIOPA-BoS-14/266.

61 Outcome of the consultations, EIOPA, ‘Consultation Paper on a Report on Good Practices on individual transfers of supplementary occupational pension rights’, 29 January 2015, EIOPA-CP-15/001.

62 Ibid.

63 P. Borsjé & H. van Meerten, ‘Voorstel IORP II-richtlijn: aanzet tot hervorming van het Nederlands pensioenstelsel’, (2014) *Nederlands tijdschrift voor Europees Recht*, no. 8, pp. 264-274.

64 See Para. 3.4 of the explanatory notes to the IORP II proposal (COM(2014) 167 final), ‘Further explanation of the proposal, per chapter or per article’, to Article 30 in Chapter 1 – Governance System.

65 Recital 30 in the Commission Proposal for the IORP Directive and included in the recitals, even after the Council’s comprise, in no. 29 in the IORP II proposal (COM(2014) 167 final).

Moreover, secondly, the Green Paper on the 'Capital Markets Union' is also relevant in this context.⁶⁶ Pensions (albeit – so it seems, 3rd pillar, individual pensions) form a prominent position in the Green Paper.⁶⁷ The European Commission views national pension measures as an important obstacle to the development of a capital market. In our view this also holds true for occupational pensions. An essential obstacle in this regard seems to be, for example, mandatory membership of a Dutch (!) pension fund for employees in the Netherlands (albeit 2nd pillar). It seems – regardless of whether it concerns 2nd or 3rd pillar – only a matter of time before the Commission deals with this discrimination in terms of nationality in light of the Capital Markets Union.⁶⁸

Thirdly, account should also be taken of the possibility that another EU legislative instrument or mechanism is used to impose further capital requirements on IORPs. In that regard it should be noted, first of all, that it is possible to 'convert' the soft law instruments of EIOPA (such as the HBS) into executive rules,⁶⁹ or that the CJEU adopts such soft law instruments, for example, by referring to them in the case law. This has happened before, e.g. in the fields of competition and state aid.⁷⁰ The fact that this might also happen to, for example, the EIOPA reports seems all the more likely, as Article 16 of the EIOPA Regulation includes a 'comply or explain' mechanism. The first paragraph of this article provides that with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, EIOPA issues guidelines and recommendations addressed to competent authorities or financial institutions. The same therefore applies to IORPs.⁷¹ Article 16(4) of the EIOPA Regulation then provides that the European Parliament, the Council and the Commission will be informed of the guidelines and recommendations that have been issued. EIOPA will state which competent authority has not complied with them, and outline how it intends to ensure that the competent authority concerned follows its recommendations and guidelines in the future (hence: comply or explain).

An example of how the comply or explain system can work out is found in the sphere of the Solvency II Regulation. Part of the adopted delegated act under the Solvency II Directive⁷² is a detailed description of the calculation of the solvency capital requirement and the minimum solvency requirement of insurers.⁷³ The fact is that, pursuant to Article 4 of the current IORP Directive, certain pension insurers can operate in another EU Member State under a more favourable solvency regime than insurance companies from a Member State that does not apply Article 4 IORP.⁷⁴ It cannot be ruled out in advance that EIOPA will use the power to adopt delegated acts under the Solvency II Regulation to deal with this uneven playing field between pension insurers. It should be noted, however, that in this regard it is relevant that this power of EIOPA must not concern the essential elements of the Solvency II Regulation.

66 Green Paper, 'Building a Capital Markets Union', COM(2015) 63 final.

67 Ibid. 'This raises the question of whether the introduction of a standardised product, for example through a pan-European or "29th" regime, removing obstacles to cross-border access could potentially strengthen the single market in personal pension provision.'

68 That the Dutch mandatory membership is at odds with the EU law was discussed in: H. van Meerten, 'Vrij Verkeer Van Diensten: Solvency II Basic en de Verplichtstelling', (2012) *Tijdschrift voor Financieel Recht*, no 7/8, pp. 290-296.

69 Van den Brink and Senden have argued that a better system of checks & balances for the adoption and functioning of such soft law should be adopted: A. van den Brink & L. Senden, *Checks and balances of soft rule-making in the EU*, Study for the European Parliament, PE 462.433, March 2012, available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462433/IPOL-JURI_ET\(2012\)462433_EN.pdf?>](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462433/IPOL-JURI_ET(2012)462433_EN.pdf?>) (last visited 22 January 2016).

70 O. Stefan, 'Hybridity before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law', 2012 (37) *European Law Review*, no. 1, pp. 49-69.

71 We therefore agree with the view of the Dutch Council of State (*Raad van State*): IORPs are financial undertakings (*Kamerstukken II* 2011/12, 32182, 4). IORPs are also service providers within the meaning of Art. 56 TFEU. The fact is that according to the CJEU the IORP Directive aims at establishing an internal market for occupational retirement provisions within the scope of which the institutions for occupational retirement provisions must be able to freely carry out services and investments, see: Case C-343/08, *Commission v Czech Republic*, ECLI:EU:C:2010:14, Para. 43.

72 Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 12, 17.1.2015.

73 *Kamerstukken II* 2014/15, 34100, 6.

74 How this works is elaborated in: H. van Meerten & B. Starink, 'Cross-border problems and solutions for IORPs', (2011) *EC Tax Review*, no. 1, pp. 30-40. Whether or not this leads to unfair competition was recently discussed (once more) in the Dutch Lower House (*Tweede Kamer*). The government concluded that this was not the case. Wrongly in our opinion.

EIOPA also has at its disposal the powers set out in Article 8 of Regulation 1094/2010 (the EIOPA Regulation).⁷⁵ They are fairly broad, especially in relation to insurers and include a) advisory and coordinating powers, b) the development of drafting standards and c) independent supervisory powers. Article 1(2) of this Regulation moreover provides that EIOPA will act within the powers conferred by this Regulation and within the scope of secondary EU legislation (including the Solvency II Regulation and the IORP Directive), but also ‘including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority’.

The EIOPA Regulation moreover provides for a mechanism to resolve differences of opinion between national supervisory authorities.⁷⁶ Where a national supervisory authority takes issue with the procedural or substantive terms of a measure taken (or not taken) by another national supervisory authority, EIOPA must assist the authorities at their request in reaching agreement within the timeframe determined by EIOPA.⁷⁷ If the dispute continues, EIOPA must be able to settle the matter.⁷⁸ These dispute resolution powers are broad and can therefore also extend to the interpretation of delegated acts. Via these powers too, the capital requirement can therefore fall within the scope of EIOPA’s powers.

5. Conclusion and closing remarks

The distinction between legislative and non-legislative acts is not only relevant from a constitutional perspective, but defines concrete legislative dossiers as well. In EU pensions law a key issue is whether capital requirements for pensions institutions may be adopted by executive regulation. As we have contended, various legal bases and options exist that may allow for this. At least, they would not *a priori* prohibit such rules. Yet, given the political controversy it would be likely that setting such requirements would amount to regulating essential elements of the area. Indeed, the making of political decisions would be involved which is, according to CJEU, reserved for the legislature, albeit that the CJEU would look at the actual substantive political interests at stake, rather than at the existence of political controversy.

The case of pensions law illustrates, moreover, that the demarcation between legislative and executive power is not only a matter of institutional powers, but affects the vertical power balance between the Member States and the European Union. This is a strong argument in favour of CJEU control over the issue at a level that is higher than the one we find in some domestic legal systems.

The distinction between delegated and implementing acts plays a role as well in the national opposition against delegated acts. Some governments have issued a critique on the proposed Article 30 of the draft IORP Directive, which provides for the power to adopt delegated acts.⁷⁹ Arguably, the possibility that the Commission may invoke this provision to impose capital requirements on pension institutions is especially worrying for Member States in light of the lack of *ex ante* control via committee procedures (comitology) that does exist under implementing acts. Here, the new Interinstitutional Agreement on Better Law-Making may make a difference on the point of the consultation of Member State experts. In any case, the key element here is Member State control. The constitutional discourse on the nature of the difference between delegated and implementing acts seems to be playing no role whatsoever in the decision-making process on the Directive.

75 Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC.

76 Art. 21 Regulation (EU) No. 1094/2010 (the EIOPA Regulation).

77 That thereby takes account of any relevant time-limits from the relevant legislation and the urgency and complexity of the dispute: Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulation (EC) No. 1060/2009, and (EU) Nos 1094/2010 and 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority ('Omnibus II')).

78 Ibid.

79 P. Borsjé & H. van Meerten, ‘A European Pensions Union: towards a strengthening of the European pension systems’, in F. Pennings & G. Vonk (eds.), *Research Handbook on Social Security Law* (2015), pp. 385-412.

The political controversy over Article 30 of the Directive is relevant from another perspective as well. The legal basis for the adoption of delegated acts has become the focus of attention with the opposition to capital requirements. As we have argued, however, such capital requirements may, however, acquire an EU dimension in other ways than Article 30 alone. This seems to remain ignored. Thus, we may expect that the political salience of Article 290 TFEU will remain to be higher than Article 290 TFEU despite the horizontal rather than vertical divide between them.

Finally, the role of EU agencies: this article has argued that EIOPA could have an important influence on the solvency requirements that may be imposed on pension institutions. This is not only due to the extensive quasi-regulatory powers that EIOPA possesses on the basis of numerous legislative acts, but is also due to its other powers (such as dispute resolution powers). In fact, this scenario is quite likely in view of EIOPA's actual activities in recent years. The lacuna in regulating EU agencies' position in rule-making in a more general way is thus manifested as an ever increasing problem.⁸⁰ The role of the EIOPA is now being developed in an *ad hoc* way. The new Inter-Institutional Agreement on Better Law-Making fails to address the issue, however.

In light of the controversy over executive rule-making powers, it would make sense if capital requirements for IORPs were directly and effectively regulated by the legislature itself. This would strengthen their legitimacy and be in line with the case law of the CJEU. As an essential element of the IORPs, capital requirements can also be regarded as an essential element of the regulation itself and as such they belong to the legislative domain. ■

⁸⁰ See, inter alia, Hofmann, *supra* note 42, who had identified this as one of the major challenges in EU administrative law and the RENEUAL proposals, *supra* note 40, in which the issue features prominently as well.