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ARTICLE

Rethinking the Constitutional Architecture of EU Executive Rulemaking: Treaty Change and Enhanced Democracy

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Abstract

Fifteen years following the entry into force of the Lisbon Treaty, this article seeks to analyse its impact on EU executive rulemaking. It delves into the constitutional concerns arising from the architecture of Articles 290 and 291 Treaty on the Functioning of the European Union (TFEU), in particular relating to the institutional balance, the concept of implementation, the distinction between delegated and implementing acts and the legitimacy of the control mechanisms envisaged in the TFEU. The article argues that there is a need for reform and integration of Articles 290 and 291 TFEU in one Article dedicated to EU executive rulemaking, going beyond mere considerations of institutional balance. Such a reform entails a return to the essence of comitology as a general mechanism for consultation in and control of rulemaking, allowing Member States to deliberate with the Commission with a veto right for both the Parliament and the Council, embracing the idea of executive subsidiarity. It requires also to go beyond the old comitology mechanisms based on a pure interinstitutional perspective by connecting to Article 11 TEU (Treaty on European Union) and recognising the need for participatory engagement so as to enhance the legitimacy of EU executive rulemaking.

Keywords: delegated and implementing acts; democracy; institutional balance; Treaty change

I. Introduction

The constitutional shift in executive rulemaking introduced by the Lisbon Treaty has brought about much academic debate[1] and case-law.[2] Comitology-based decision-making by the European Commission (hereinafter referred to as "Commission") had until then been based on the mechanism where the EU legislature delegated seemingly technical implementing powers, keeping control over the Commission via comitology in particular on matters that turn out to be politically sensitive and highly controversial. Whilst its

[1] See, for instance, H Hofmann, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality" (2009) 15 European Law Journal 482; R Schütze, "From Rome to Lisbon: "Executive Federalism" in the (New) European Union" (2010) 47 Common Market Law Review 1385; M Chamon, "Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty" (2016) 53 Common Market Law Review 1501; CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016).

[2] See, for instance, Case C-355/10 *Parliament v Council* [2012] ECLI:EU:C:2012:516; Case C-270/12 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:18; Case C-427/12 *Commission v Parliament and Council* [2014] ECLI:EU:C:2014:170; Case C-65/13 *Parliament v Commission* [2014] ECLI:EU:C:2014:2289.

rationale was therefore one of *ex ante* control and monitoring, comitology developed over the years in a forum of cooperation and deliberation between national representatives and the Commission.[3] In that respect, comitology has been argued to give form to a model of "integrated"[4] or "mixed"[5] administration. Delegation of executive rulemaking powers to the Commission under comitology hence predates the institutional democratisation of the EU and does not find its original *raison d'être* in democratic legitimacy concerns.[6] Over the years, nevertheless, the European Parliament (hereinafter referred to as "Parliament") struggled for more influence over and transparency of comitology-based decision-making,[7] that resulted in the adoption of the 1999 Comitology decision and in particular its 2006 amendment.[8]

The Parliament's drive for greater influence over executive rulemaking and the Commission's quest for recognition as the sole EU executive power without interference of comitology pushed for constitutional change, that was embedded in the Lisbon Treaty.[9] The latter revolutionises the constitutional principles governing executive rulemaking.[10] It codifies the changed role of the Parliament in the EU's constitutional setting, anchored in its *ex post* control of delegated acts laid down in Article 290 TFEU. It accords, under that same Article, the power to the Commission to adopt delegated acts without comitology. Lisbon thus formally recognises that both branches of the EU legislature can supervise the exercise of normative powers by the Commission.[11] At the same time, it recognises in Article 291(1) TFEU the power of Member States to implement EU legislation and herewith arguably conforms an "own species of executive federalism."[12] Conversely, where uniform conditions for implementing legally binding Union acts are needed, it states that the EU legislature has to confer implementing powers on the Commission,[13] or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 TEU, on the Council (Article 291(2) TFEU).[14] From the specific wording used in Article 291(3) TFEU, it can be inferred that both the Parliament and Council would no longer have a role to play in comitology. In fact, the latter would be considered as a mechanism of control by Member

[3] See C Joerges and J Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" (1997) 3 European Law Journal 273; CF Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (Oxford University Press 2005); E Vos, "Fifty Years of European Integration, Forty-Five Years of Comitology" in A Ott and E Vos (eds), *Fifty years of European integration: foundations and perspectives* (TMC Asser Press 2009); A Volpato, *Delegation of Powers in the EU Legal System* (Routledge 2022); Z Xhaferri, *Law and Practices of Delegated Rulemaking by the European Commission* (Brill Nijhoff 2023).

[4] See H Hofmann and A Türk, "The Development of Integrated Administration in the EU and Its Consequences" (2007) 15 European Law Journal 482.

[5] Schütze, supra, note 1, 1420–23.

[6] D Ritleng, "The Reserved Domain of the Legislature: The Notion of 'Essential Elements of an Area'" in CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 139.

[7] See Bergström, supra, note 3; Vos, supra, note 3; GJ Brandsma, *Controlling Comitology: Accountability in a Multi-Level System* (Palgrave Macmillan 2013) 64–92.

[8] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, as amended by Council Decision of 17 July 2006, OJ L 200.

[9] European Commission, "European Governance: A White Paper" (2001) DOC/01/10.

[10] R Schütze, "'Delegated' Legislation in the (New) European Union: A Constitutional Analysis" (2011) 74 The Modern Law Review 661, 681.

[11] K Bradley, "Delegation of Powers in the European Union: Political Problems, Legal Solutions?" in CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 57.

[12] Schütze, supra, note 1, 1398–400.

[13] The use of word "confer" in Art 291(2) TFEU is misleading since the mechanism in question is one of delegation and not conferral. The wording of this provision has however led some scholars to understand the exercise of implementing powers by the Commission in terms of conferral rather than delegation of powers. These two contrasting views are addressed in detail by Volpato, supra, note 3, 58–59.

[14] Whilst the exercise of implementing powers by the Council falls outside the scope of this contribution, an overview of that topic is provided by Volpato, supra, note 3, 65–70.

States, now that according to the text of Article 291(3) TFEU "[the co-legislators] 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" (emphasis added). Accordingly, the 2011 Comitology Regulation[15] lays down a very limited role for these institutions.

Today, fifteen years after the entry into force of the Lisbon Treaty, we may observe three, closely related, constitutional concerns relating to the EU's system of executive rulemaking. This contribution aims to discuss these issues. First, we will examine the change in institutional balance and nature of executive powers brought about by the Lisbon Treaty and the concerns as to the limits of the executive powers of the Member States and the Commission (Section II). Second, we will consider how the numerous litigation procedures between the institutions about the demarcation line between Articles 290 and 291 TFEU have not been able to solve the existing tensions underlying the division between delegated and implementing acts (Section III). Third, we will analyse the various shortcomings that exist in the mechanisms of control envisaged by Articles 290 and 291 TFEU from a perspective of legitimacy. This is particularly relevant in the debate surrounding comitology-based decision-making on GMOs and glyphosate as underlined by the Commission's proposal for a revision of the 2011 Comitology Regulation (Section IV). In conclusion, we will discuss the need to go back to one integrated system for executive rulemaking that goes beyond the old comitology-based system and takes account of the need to enhance the legitimacy of EU executive rulemaking (Section V).

II. Lisbon's impact on executive rulemaking and comitology

1. Constitutional shift in executive rulemaking

Before Lisbon, the Commission's executive powers were embedded in Article 202, third indent and Article 211, fourth indent of the EC Treaty. Under the former, the Council was obliged to "confer on the Commission, in the acts which the Council adopt[ed], powers for the implementation of the rules which the Council lays down." In specific cases, it could reserve the right "to exercise directly implementing powers itself." Article 202 EC also stipulated that the Council could impose certain requirements in respect of the exercise of these powers and provided that the relevant procedures must be consonant with principles and rules to be laid down in advance by the Council, viz. the comitology procedures. This meant that implementation of EU legislation at EU level was entirely carried out through comitology.[16] In its White paper on European Governance the Commission, however, called for a revitalisation of the Community method, in particular to lay on the Commission the responsibility to initiate and execute policy and legislation. The Commission saw itself as the only holder of executive powers and emphasised the need to review executive rulemaking. It thus called for a simple mechanism that recognised its responsibility to adopt executive measures under the direct control of Parliament and Council, and for a rethinking of comitology decision-making.[17] At the same time, the Parliament, harnessed with co-decision powers, demanded more control over the exercise of the Commission's executive powers and to be placed on equal footing as the Council in comitology. Lisbon took on these views by introducing in Article 290 TFEU the Commission's power, put under direct control of both branches of the legislature, to adopt

[15] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55.

[16] See Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184.

[17] European Commission, "European Governance: A White Paper", supra, note 9, 25–26.

non-legislative acts without comitology, thus recalibrating the institutional balance. This has led authors to describe the Parliament[18] and the Commission[19] coming out as the "winners" from the Lisbon reforms.

2. *Limits of executive powers of the Member States and the Commission*

A more disputed issue concerns Lisbon's explicit mention of Member States in Article 291 TFEU. Article 291(1) TFEU states that "Member States shall adopt all measures of national law necessary to implement legally binding Union acts." This has led some authors to conclude that Article 291(1) TFEU lays down "the basic rule in the EU's executive federalism"[20] and that Lisbon consolidated the European legal order's "own species of executive federalism."[21] Does Article 291(1) TFEU enshrine a prerogative or a duty for the Member States?[22] Chamon[23] and Jacqué[24] favour the first view. Bradley defends the latter position and convincingly argues that Article 291(1) TFEU affirms Member States' obligation to implement legally binding Union acts and is a clear manifestation of the more general duty of sincere cooperation laid down in Article 4(3) TEU.[25] He rightly underlines that the implementation of Union acts by Member States under Article 291(1) TFEU is quite different in character from the implementation by the Commission (or Council) under Article 291(2) and (3) TFEU. Under paragraph (1), Member States are obliged to give effect to EU legal acts in their own national legal and administrative orders. This may be referred to as "national implementation." Paragraphs (2) and (3) concern instead activities that take place at EU level and may be referred to as "Union implementation."

Problematic in this respect is, nevertheless, the "palace revolution"[26] that took place in the wording of Article 291(3) TFEU. The latter assigns the responsibility to control the Commission in the exercise of its implementing powers to the Member States alone, to the exclusion of the Parliament and the Council. Bradley talks in this respect about a "*coup de force*"[27] by the Treaty drafters since this infringes the rationale underlying the constitutional and institutional structures of the EU. Following the latter, implementing acts adopted by the Commission should indeed fall under the political supervision of EU institutions. Yet, by conflating two distinct concepts of implementation in Article 291 TFEU, this supervision now falls only to the Member States. What is positive about the explicit mention of Member States in Article 291(3) TFEU is that it is a constitutional recognition of the idea of "executive subsidiarity," embraced long ago by the Court of Justice of the European Union (hereinafter referred to as "Court")[28] and the Commission,[29] and gives expression to a Member State-oriented understanding of the principle of

[18] See T Christiansen and M Dobbels, "Comitology and Delegated Acts after Lisbon: How the European Parliament Lost the Implementation Game" (2012) 16 European Integration online Papers 13; J Mayoral, "Democratic Improvements in the European Union under the Lisbon Treaty: Institutional Changes Regarding Democratic Government in the EU" (2011) RSC Research Report, EUDO Institutions, available at <https://cadmus.eui.eu/bitstream/handle/1814/19902/EUDOreport922011.pdf?sequence=1&isAllowed=y>.

[19] See Vos, supra, note 3.

[20] M Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Hart 2022) 21.

[21] Schütze, supra, note 1, 1400.

[22] Chamon, supra, note 20, 22.

[23] ibid, 23.

[24] JP Jacqué, "The Evolution of the Approach to Executive Rulemaking in the EU" in CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 22.

[25] Bradley, supra, note 11, 71.

[26] ibid.

[27] ibid.

[28] See Case C-205/82 *Deutsche Milchkontor GmbH* [1983] ECLI:EU:C:1983:233, para 17.

[29] European Commission, "The Principle of Subsidiarity: Communication of the Commission to the Council and the European Parliament" (1992) SEC (92) 1990 final.

institutional balance by including its vertical dimension.[30] It, however, gives the false impression that the EU derives its executive competence only from Article 291(2) TFEU. For it is clear that the EU has two general competences under Articles 114 and 352 TFEU, that include also executive powers.[31] We therefore view that the executive powers of the Commission to implement EU legislative acts are conferred upon the Commission by the EU legislature and should fall under the political supervision of EU institutions, also in view of Article 10 TEU. To some extent this is also recognised by the Comitology Regulation, that gives a right of scrutiny in relation to the Commission's exercise of implementing powers to both the Parliament and the Council.[32]

Taking account of the vertical dimension of the institutional balance, it is only logical that comitology evolved as a mechanism of control and participation, allowing Member States to actively take part in decision-making where the Commission was entrusted with the implementation of EU law.[33] This kind of deliberative decision-making between the Commission and national representatives in comitology, conceptualised by some as a forum of "deliberative supranationalism,"[34] has worked and still works effectively in most comitology-based decisions, in the sense that measures are adopted without heated controversies during the decision-making procedures.[35]

3. Constitutional neglect: Executive powers of EU agencies

Another concern raised by Lisbon relates to the neglect of EU agencies as holders of executive power in the EU. Whilst Lisbon made EU agencies prominently visible in various Treaty provisions, relating for example to judicial review,[36] transparency[37] and complaints on instances of maladministration submitted to the Ombudsman,[38] any sign of agencies is lacking in the Treaty Article where they probably would fit best: Article 291 TFEU. Where the drafters of the Working Group IX on Simplification to the Convention were determined "to make comprehensible"[39] the EU's system of instruments and procedures, the disregard of agencies in Article 291 TFEU is quite incomprehensible as they since long, in accordance with the *Meroni* doctrine,[40] have been allowed to adopt individual executive measures. This constitutional neglect should most likely be explained in terms of the Commission's own unitary view on the EU executive.[41] The view was explicitly stated in the Commission's White Paper on European Governance, where the Commission presented itself "as the lone hero of European policy-making and implementation."[42] This was in a time where the Commission had just rejected the proposal by some Member States to insert in the Treaties

[30] E Vos, "The Rise of Committees" (1997) 3 European Law Journal 210, 223–24. See also the contribution by Z Xhaferri and F Coman-Kund in this Special Issue.

[31] Schütze, supra, note 1, 1398.

[32] Art 11 of the Comitology Regulation.

[33] Jacqué, supra, note 24, 24–27.

[34] Joerges and Neyer, supra, note 3.

[35] See, for instance, European Commission, "Report from the Commission to the European Parliament and the Council on the Working of Committees in 2022" (2023) COM/2023/664 final.

[36] Arts 263, 265 and 267 TFEU.

[37] Art 15(1) and (3) TFEU.

[38] Art 228(1) TFEU.

[39] Working Group IX on Simplification, "Final Report of Working Group IX on Simplification" (2002) CONV 424/02 2.

[40] Case 9/56 *Meroni v High Authority* [1958] ECLI:EU:C:1958:7.

[41] E Vos, "EU Agencies, Common Approach and Parliamentary Scrutiny" (European Parliamentary Research Service 2018) PE 627.131 40.

[42] FW Scharpf, "European Governance: Common Concerns vs. The Challenge of Diversity" (2001) Jean Monnet Working Paper No. 6/01 8.

a separate legal basis for the creation of agencies,[43] as it feared this would risk creating conflicting centres of power.[44] The Court in *ESMA* or *Short Selling* was, nevertheless, ready to save the system by declaring that the conferral of certain decision-making powers on ESMA in "an area which requires the deployment of specific technical and professional expertise"[45] does not "correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU".[46] Yet, this reasoning does not hold true where we look at the legislative practice that confers binding executive decision-making powers on agencies to adopt, for example, a binding decision of the European Union Intellectual Property Office (EUIPO) on the approval or rejection of a European trademark which is comparable to a Commission decision on the EU-wide approval or refusal of medicinal products. However, while the latter act is a Commission implementing decision under Article 291 TFEU, the act by the agency would not fall under this category. This highlights the uncomfortable position of agencies as actors operating in the shadow of hierarchy which can adopt binding executive acts, and calls for Treaty change.

III. The problematic demarcation between delegated and implementing acts

Not only has the introduction of the distinction between delegated and implementing acts by Lisbon raised constitutional queries as to the nature of executive powers, but it has also advanced questions about the precise definition of, and demarcation between, these two types of acts. This *problématique* has thus been added to the already existing issue of disentangling, within a legislative act, the essential elements from the non-essential ones.[47] Indeed, defining the essential elements,[48] which "must be based on objective factors amenable to judicial review"[49] and cannot be delegated, requires drawing an ambiguous line between "what is political and what is technical."[50]

1. Demarcation between delegated and implementing acts: Analytical and constitutional concerns

To this ambiguity in distinguishing between essential and non-essential elements, the Lisbon Treaty added yet another unclarity by abandoning the general umbrella definition of implementation in favour of the bifurcation between delegated and implementing acts.

[43] E Vos, "European Agencies and the Composite EU Executive" in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014) 44.

[44] Speech by R Prodi before the European Parliament, 3 October 2002, SPEECH/00/352.

[45] *United Kingdom v Parliament and Council*, supra, note 2, para 82.

[46] ibid, para 83.

[47] A further problematic issue, which cannot be addressed in this article, is the unclear relationship between legislative acts, non-legislative acts adopted on the basis of those legislative acts and non-legislative acts based directly on the Treaties. See, for instance, Case C-259/21 *Parliament v Council* [2022] ECLI:EU:C:2022:917, concerning measures adopted by the Council on the basis of Art 43(3) TFEU. For an early comment on the Court's judgement in that case, see A Volpato, "Fishing for a Hierarchy of Sources in EU Executive Rule-making: Case C-259/21, *European Parliament v Council of the EU*" (*EU Law Live*, 13 December 2022) <https://eulawlive.com/analysis-fishing-for-a-hierarchy-of-sources-in-eu-executive-rule-making-case-c-259-21-european-parliament-v-council-of-the-eu-by-annalisa-volpato/>.

[48] On the problematic distinction between essential and non-essential elements, see Volpato, supra, note 3, 135; A Türk, "Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law: Configuring EU Normative Spaces" (2020) 26 European Law Journal 415, 419; Ritleng, supra, note 6, 138.

[49] *Parliament v Council*, supra, note 2, para 67.

[50] See K Lenaerts and A Verhoeven, "Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision" (2000) 37 Common Market Law Review 645, 662.

Although welcomed by some authors as "theoretically sound,"[51] such a distinction is in fact confusing.[52] Whilst Advocate General Jääskinen had acknowledged in his opinion to the *Short Selling* case that the borderline between amending or supplementing and implementing a legislative act is not always easy to draw, he still insisted in that same opinion that the Lisbon Treaty had introduced "a sharp conceptual distinction"[53] between the two types of acts. In the same vein, the Commission held that it had been the clear intention of the drafters of the Treaty to design Articles 290 and 291 TFEU as "mutually exclusive."[54] Yet, these allegedly sharp conceptual distinction and mutual exclusivity had to confront the reality of the overlap between Articles 290 and 291 TFEU,[55] as both types of acts permeate the normative content of the legislative act with greater specificity.[56]

The Court settled the question of demarcation in the *Biocides* case.[57] However, rather than providing clear guidance on the dichotomy between the two types of acts, the judges "preferred to resort to elusive formulas so as to demarcate each of them",[58] placing in the hands of the EU legislature the responsibility for the choice between delegated and implementing acts.[59] It is therefore today clear that the EU legislature has broad discretion in its decision to confer a delegated or implementing power on the Commission. This results in a grey zone instead of a neat distinction and confirms the overlap between the two types of acts.[60]

Not only is the analytical divide between delegated and implementing acts rendered "fragile and difficult"[61] by the convoluted juxtaposition of "amending and supplementing" and "implementing,"[62] but its constitutional logic has been even further weakened by the reintroduction of a sort of light version of comitology also for the adoption of delegated acts.[63] With the 2016 Interinstitutional Agreement on Better Law-Making, the Commission formally agreed to consult experts designated by each Member State in the preparation of draft delegated acts.[64] This has so restored the *ex ante* control on delegated acts through

[51] M Chamon, "Dealing with a Zombie in EU Law: The Regulatory Comitology Procedure with Scrutiny" (2016) 23 Maastricht Journal of European and Comparative Law 714, 717.

[52] Z Xhaferri, "Delegated Acts, Implementing Acts, and Institutional Balance Implications Post-Lisbon" (2013) 20 Maastricht Journal of European and Comparative Law 557, 562; T Christiansen and M Dobbels, "Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts"(2013) European Law Journal 42, 44; J Mendes, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design" (2013) 19 European Law Journal 22, 38; Volpato, supra, note 3, 58–59.

[53] Case C-270/12 *United Kingdom v Parliament and Council* [2013] ECLI:EU:C:2013:562, Opinion of AG Jääskinen, para 81.

[54] European Commission, "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" (2009) COM(2009) 673 final 3.

[55] J Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 Common Market Law Review 885, 920.

[56] P Craig, "Comitology, Rulemaking, and the Lisbon Settlement" in CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 178.

[57] *Commission v Parliament and Council*, supra, note 2.

[58] 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 252.

[59] *Commission v Parliament and Council*, supra, note 2, para 40.

[60] Moreover, see M Chamon, "Only Fans of the Council's Implementing Powers in Luxembourg: *Fenix International*" (2023) 60 Common Market Law Review 1683, 1702, where the author notes that, after Lisbon, the Court has applied the same test to define "implementation" that it used before Lisbon Treaty, ignoring that the latter "carved out the supplementation of legislative acts from the broad pre-Lisbon notion of implementation."

[61] Craig, supra, note 56, 181.

[62] This is extensively addressed in Chamon, supra, note 1, 1520–30.

[63] See the contribution by Xhaferri and Coman-Kund in this Special Issue.

[64] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12 May 2016, para 28. Already before the Agreement the Commission had committed to carry out appropriate and transparent consultations well in advance, including at expert level, in the preparation and drawing-up of delegated acts. See Council of the European Union, "Common Understanding on Delegated Acts" (2011) 8753/11 2.

the backdoor and herewith has informally modified the constitutional architecture of the Treaty,[65] leading the Commission back to the future with the *ex ante* consultation of comitology committees fulfilling the role of Member States' experts. Such an arrangement therefore openly contradicts the idea of a material and/or functional separation between Articles 290 and 291 TFEU.[66]

Finally, to supplement the Interinstitutional Agreement on Better Law-Making, the Parliament, the Council and the Commission adopted non-binding criteria concerning the application of Articles 290 and 291 TFEU.[67] These non-binding criteria reflect the Court's (limited) case-law and largely confirm the legislature's broad discretion. They also attempt at defining some, albeit broad and non-exhaustive, guidelines on the type of instrument to choose for the adoption of acts relating to procedures, methods, methodologies, obligations to provide information and authorisations.[68]

2. *Blurring dividing lines between delegated and implementing acts in practice*

Precisely due to the inherently problematic division between the two types of acts, it is often difficult to establish in how far measures have been correctly adopted as delegated or implementing acts. It is, nevertheless, possible to identify at least three problematic practices.

The first emblematic example of the absence of a principled approach in the choice between delegated and implementing acts is offered by the strikingly diverse use of measures for the adoption of lists of authorised products or substances. In the food sector, for instance, we can distinguish between, on the one hand, the common framework for authorisation of food additives, food enzymes and food flavourings[69] and, on the other hand, other sectoral food legislation, such as the Novel Food Regulation[70] and the Regulation on smoke flavourings.[71] Even within the common framework, some inconsistencies exist. So the Union list of food additives was inserted in the annex of the original basic act.[72] The Union list of enzymes has not yet been established,[73] whilst the Union list of flavourings was included as an annex to Regulation 1334/2008 by an implementing regulation of the Commission.[74] The latter practice seems at odds with the subsequent case-law of the Court in *EURES*[75] and *Visa Reciprocity*,[76] where the judges

[65] See P Craig, "Delegated and Implementing Acts" in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, vol I (Oxford University Press 2018) 734–39.

[66] Mendes, supra, note 52, 31.

[67] Non-Binding Criteria for the Application of Articles 290 and 291 of the Treaty on the Functioning of the European Union, 18 June 2019, ST/8559/2019/REV/1, OJ C 223.

[68] ibid, paras II.E-II.G.

[69] Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings, OJ L 354.

[70] Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, OJ L 327.

[71] Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods, OJ L 309.

[72] Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives, OJ L 354.

[73] On food enzymes, see Regulation (EC) No 1332/2008 of the European Parliament and of the Council of 16 December 2008 on food enzymes, OJ L 354. At the time of writing, the process of assessment by EFSA of the submitted applications is still ongoing. Therefore, the Union list of authorised enzymes will only be adopted once EFSA finalises its assessment.

[74] Commission Implementing Regulation (EU) No 872/2012 of 1 October 2012 adopting the list of flavouring substances, OJ L 267.

[75] *Parliament v Commission*, supra, note 2.

[76] Case C-88/14 *Commission v Parliament and Council* [2015] ECLI:EU:C:2015:499. See AP van der Mei, "Delegation of Rulemaking Powers to the European Commission Post-Lisbon" (2016) 12 European Constitutional Law Review 538.

clarified that legislative acts can be amended or supplemented only by delegated acts and not by implementing acts.[77]

All three lists for additives, enzymes and flavourings can be amended by means of an executive act adopted under the regulatory procedure with scrutiny (PRAC).[78] As we know the latter procedure will in all likelihood be replaced by a delegated act.[79] In contrast, the Union lists of novel foods and smoke flavourings are established separately from the relevant legislative act and adopted by a Commission implementing regulation[80] and can be amended by means of implementing acts.[81] Where it has been suggested in the literature that acts of general scope should be adopted as delegated acts rather than implementing acts,[82] one could try to understand the different approaches underlying the Union lists in relation to the different nature of the authorisations granted therein. Yet, this would not explain why the EU lists on both novel foods and smoke flavourings are adopted as implementing acts. The list of authorised smoke flavourings is for example updated through implementing acts, which, unlike delegated acts, can also be of individual nature. Smoke flavourings are indeed always authorised in connection with a specific authorisation holder. However, authorisations of novel foods are acts of general scope, whereby only upon specific and duly motivated request of the applicant proprietary rights relating to novel foods may be recognised for five years. It is therefore difficult to see why authorisations and subsequent amendments of the EU list of novel foods are both adopted through implementing acts.

An attempt to clarify the rationale behind the choice between delegated and implementing acts comes from the above-mentioned non-binding criteria. Accordingly, acts relating to authorisations should be adopted by means of implementing acts when they concern authorisations of individual application or authorisation of general application "for which the Commission decision is based on criteria defined in the basic act in a sufficiently precise manner." Conversely, delegated acts should be chosen when the authorisation supplements, within the limits of the delegation, the basic act, in that it does not merely apply the criteria laid down in the basic act but also builds on its content.[83] Arguably, however, this clarification may only serve, if ever, *pro futuro*, as it is difficult to maintain that, for instance, the authorisations of food additives supplement the basic act whereas the general authorisations of novel foods merely implement it.[84]

While in 2014 the Parliament called for Union lists to be established, if appropriate, in the annexes of legislative acts,[85] the Parliament has in fact been willing, as Xhaferri puts it, "to compromise its position in confidential trialogues, resulting in both the Commission and Parliament including the Union lists in the enacting terms of a legislative act or adopting it using an implementing act".[86] As exemplified by the case of Union lists of

[77] *Parliament v Commission*, supra, note 2, para 45; *Commission v Parliament and Council*, supra, note 76, paras 29–31.

[78] Art 7 of Regulation (EC) No 1331/2008.

[79] See Chamon, supra, note 51.

[80] Commission Implementing Regulation (EU) 2017/2470 of 20 December 2017 establishing the Union list of novel foods, OJ L 351; Commission Implementing Regulation (EU) No 1321/2013 of 10 December 2013 establishing the Union list of authorised smoke flavouring primary products for use as such in or on foods and/or for the production of derived smoke flavourings, OJ L 333.

[81] Art 6 of Regulation (EC) No 2065/2003.

[82] For reasons of transparency and democratic control. See Xhaferri, supra, note 3, 281.

[83] Non-Binding Criteria, supra, note 67, para II.G.

[84] Chamon, supra, note 20, 74 notes that "the non-binding criteria [. . .] are at times so vague that is not even possible to know whether the legislator is deviating from them".

[85] European Parliament, "Resolution of 25 February 2014 on Follow-up on the Delegation of Legislative Powers and Control by Member States of the Commission's Exercise of Implementing Powers" (2014) 2012/2323(INI) para 1.

[86] Xhaferri, supra, note 3, 272.

authorised products and substances, this has resulted in an inconsistent practice "flawed in terms of transparency, legal clarity, and political accountability."[87]

The second example of the lack of a principled approach by EU institutions in the choice between delegated and implementing acts is offered by Craig.[88] While only delegated acts, but not implementing acts, can supplement legislative acts, that author shows at least one example of an implementing regulation which supplemented a legislative act in the field of aviation safety.[89] This appears to contradict the wording of the TFEU and the abovementioned case-law.

The third example of a complexity arising from institutional practice lies within the Commission's rather surprising preference for implementing acts over delegated acts "for reasons of efficiency."[90] This is highly remarkable as the Commission has claimed since its White paper on European Governance that a direct mechanism of control over the Commission's acts, as we now find in relation to delegated acts, instead of comitology, would "make decision-making simpler, faster and easier to understand."[91] This practice confirms that, in most fields, the collaboration between the Commission and the committees within the comitology framework has proved overall efficient. At the same time, as we argued above, the Council has imposed on the Commission the obligation to consult national experts in the procedure for the adoption of delegated acts, which in practice are the comitology committees.[92] Hence, the rationale behind the constitutional design of Article 290 TFEU has been practically neglected by the evolving institutional dynamics.

In conclusion, the inconsistent practice exemplified above allows us to draw some general observations. First, delegated and implementing acts can serve the same purpose. In the case of Union lists, the same result can arguably be achieved by including the list either in the annex of a legislative act and then amend it through delegated acts or in an implementing act and then amend it through further implementing acts. This functional overlap blurs the dividing line between the two types of act, and in light of the different forms of democratic control attached to them, it problematises the legislature's arbitrariness recognised in *Biocides*. It is simply impossible to ignore the stark contrast between splitting an umbrella definition such as "implementation" into two supposedly different constitutional categories and recognising, afterwards, the overlapping nature of such categories, coupled with the absence of intelligible criteria to support the choice for one rather than the other. Second, the lack of a principled approach may result in institutional practices of dubious legality. The somewhat artificial boundaries between Articles 290 and 291 TFEU have, at times, arguably contributed to the improper use of implementing acts for the purpose of amending or supplementing legislation. Finally, the diffuse use of the PRAC shows that Member States in the Council have been reluctant to complete the transition from the PRAC, where they hold a more prominent role,[93] to delegated acts. In this way, the PRAC, a regime that was originally meant to be provisional, remains today, fifteen years after the entry into force of the Lisbon Treaty, an "anomalous absurdity"[94] within the legal framework of EU executive rulemaking.

[87] ibid, 273.

[88] Craig, supra, note 56, 185.

[89] Commission Implementing Regulation (EU) No 390/2013 of 3 May 2013 laying down a performance scheme for air navigation services and network functions, OJ L 128, now repealed by Commission Implementing Regulation (EU) 2019/317 of 11 February 2019 laying down a performance and charging scheme in the single European sky, OJ L 56. Arguably, also the new regulation, like the repealed one, supplements the basic act.

[90] Xhaferri, supra, note 3, 282.

[91] European Commission, "European Governance: A White Paper", supra, note 9, 26.

[92] Xhaferri, supra, note 3, 92.

[93] See Chamon, supra, note 51, 722.

[94] Chamon, supra, note 20, 65.

IV. Legitimacy of the EU's politicised administration

1. Problematic legitimacy of EU executive rulemaking

Whilst the first reactions to the novelties introduced by Lisbon still hailed the Parliament as a winner in view of its enhanced supervision over the Commission after the adoption of delegated acts, this picture was probably too optimistic. Indeed, the role of the Parliament is now marginalised in relation to implementing acts, and at the same time shortcomings of the role of the Parliament in delegated acts may appear. In view of the problematic demarcation between delegated and implementing acts and the fact that comitology is still the prevailing mode of decision-making, the lack of a substantial role of the Parliament may be problematic. This is particularly true when considering that, as Mendes rightly observes,[95] the constitutional framing of delegated and implementing acts should be read in light of the principle of democracy as set forth in Articles 9 to 12 TEU.[96] Recognising that the functioning of the Union is founded on both representative and participatory democracy, these horizontal Treaty provisions design the normative framework that should shape the relationship between, on the one hand, EU institutions and bodies, and, on the other, EU citizens, representatives associations and civil society.[97] This horizontal normative framework also applies to executive rulemaking, highlighting that democratic legitimacy of EU executive rulemaking "extends beyond representation"[98] and "goes beyond mere voting."[99] Therefore, where Articles 290 and 291 TFEU are arguably not only about institutional (re-)balancing, the making of delegated and implementing acts needs to respect this normative framework, taking into account in particular transparency and participation as founding principles of the EU.[100] Hence, participation in decision making beyond representative institutions, as enshrined in Article 11 TEU, can act as a complementary source of democratic legitimacy[101] also for delegated and implementing acts. Where well-known hurdles to participation relate for example to the articulation, representation and organisation of interests,[102] procedures can help overcoming such problems by conveying participation in a way that supports democratic legitimacy, provided that voice is given to the interested parties and that the latter have equal

[95] J Mendes, "The Making of Delegated and Implementing Acts: Legitimacy beyond Institutional Balance" in CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission* (Oxford University Press 2016) 234.

[96] Art 11 TEU. Art I-47 of the Constitutional Treaty called this Article explicitly participatory democracy. In the Lisbon Treaty this heading is deleted.

[97] Mendes, supra, note 95, 246.

[98] S Rose-Ackerman, "Democratic Legitimacy and Executive Rule-making: Positive Political Theory in Comparative Public Law" in J Mendes and I Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018) 48. The question concerning the suitable model to ensure democratic democracy of EU administrative law has been at the centre of a broad debate for many years. See, for instance, the various contributions in the special issue (2013) 19 European Law Journal 1; H Hofmann and RL Weaver (eds), *Transatlantic Perspectives on Administrative Law* (Bruylant 2011); C Harlow, "The Limping Legitimacy of EU Lawmaking: A Barrier to Integration" (2016) European Papers 29; S Rose-Ackerman, P Lindseth and B Emerson (eds.), *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing 2017); J Mendes and I Venzke (eds.), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018).

[99] M Morvillo, A Arcuri and D García-Caro, "Green Light to Glyphosate, Pesticides and NGTs: Backpedaling on the Green Deal?" (*European Law Blog*, 22 January 2024) <https://europeanlawblog.eu/2024/01/22/green-light-to-glyphosate-pesticides-and-ngts-backpedaling-on-the-green-deal/>.

[100] A von Bogdandy, "Founding Principles", in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2010) 21–23.

[101] Mendes, supra, note 52, 22–41.

[102] See P Stephenson, "Exploring the Throughput Legitimacy of European Union Policy Evaluation: Challenges to Transparency and Inclusiveness in the European Commission's Consultation Procedures and the Implications for Risk Regulation" (2023) 14 European Journal of Risk Regulation 351; A Skorkjær Binderkrantz, J Blom-Hansen and R Senninger, "Countering Bias? The EU Commission's Consultation with Interest Groups" (2021) 28 Journal of European Public Policy 469.

opportunities of influencing the outcomes.[103] Hereby it is important to distinguish this, normative democratic, rationale for participatory engagement from the substantive and instrumental rationales.[104]

2. *The role of the Parliament, Council and Member States in the executive rulemaking practice*

The oversight powers of the Parliament over delegated acts have re-adjusted the balance of powers in favour of the Parliament, setting it at equal footing with its co-legislator, the Council. Yet, according to the wording of Article 290 TFEU, the Parliament is not put completely on equal footing with the Council in view of the requirement that the Parliament must act by a majority of its component members instead of the habitual simple majority of votes.[105] In practice, this has appeared to be a hurdle for the Parliament.[106] In addition, delayed access to information, lack of resources and short timeframes to exercise oversight were problematic issues experienced by 2014 that made the Parliament call upon the Commission to improve its involvement in the preparation of delegated acts.[107] In 2016, twenty-eight years after the Plumb-Delors agreement,[108] the institutions agreed again, but this time in relation to delegated acts, that the Parliament (as well as the Council) receives all documents at the same time as Member States' experts. Moreover, experts from the Parliament and from the Council systematically have access to the meetings of Commission expert groups to which Member States' experts are invited and which concern the preparation of delegated acts.[109] In practice, the Parliament seems to rarely make use of its right to participate in these meetings.[110] Moreover, where the Parliament does attend, it does so through staff members of the secretariat of the relevant committee rather than directly through its Members.[111]

[103] Mendes, supra, note 95, 248.

[104] This conceptual distinction helps to define the need for participatory processes in particular contexts, with the normative democratic rationale ("because it is the right thing to do") linking to the rule of law and democracy, the substantive rationale ("because it leads to better decisions") linking to the quality of decision-making and the instrumental rationale ("because it facilitates particular favoured decisions") seeing to the desire to obtain certain results. See A Stirling, "Precaution, Foresight and Sustainability: Reflection and Reflexivity in the Governance of Science and Technology" in J Voß, D Bauknecht and R Kemp (eds), *Reflexive Governance for Sustainable Development* (Edward Elgar Publishing 2006) 225–72.

[105] Mendes, supra, note 95, 236; K Lenaerts and M Desomer, "Simplification of the Union's Instruments" in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (Robert Schuman Centre for Advanced Studies 2003) 755.

[106] V Marissen, "The European Parliament and EU Secondary Legislation: Improved Scrutiny Practices and Upstream Involvement for Delegated Acts and Implementing Acts" in O Costa (ed), *The European Parliament in Times of EU Crisis: Dynamics and Transformations* (Springer 2019) 148.

[107] European Parliament, "Resolution of 13 March 2014 on the Implementation of the Treaty of Lisbon with Respect to the European Parliament" (2014) 2013/2130(INI) paras 34–35; European Parliament, "Resolution of 25 February 2014 on Follow-up on the Delegation of Legislative Powers and Control by Member States of the Commission's Exercise of Implementing Powers", supra, note 85, paras 10–15.

[108] Vos, supra, note 3, 38.

[109] Interinstitutional Agreement on Better Law-Making, supra, note 64, para 28 and Annex "Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts."

[110] See the Register of Commission Expert Groups available at <https://ec.europa.eu/transparency/expert-groups-register/screen/home?lang=en>. In the literature, see GJ Brandsma, "Holding the European Commission to Account: The Promise of Delegated Acts" (2016) 82 International Review of Administrative Sciences 656, 666.

[111] For an example, see in the Register of Commission Expert Groups the minutes of the meetings of the Critical Entities Resilience Group (X03889) of 25 January 2023 and 20 March 2023, where the Group discussed a draft delegated regulation supplementing Directive (EU) 2022/2557 of the European Parliament and of the Council by establishing a list of essential services and the Parliament attended through the Secretariat of the LIBE Committee. See also Brandsma, supra, note 110, 666.

Both the Council and the Parliament have used their right to object. The number of objections is however extremely modest[112] and, as shown by Chamon, the proportion between delegated acts adopted and objected is in line with the figures concerning the objections raised in the PRAC.[113] While the low number of objections by the Council is not surprising in light of the involvement of Member States' experts in the preparation of delegated acts, the relatively low number of objections by the Parliament has been explained by reference to the technical nature of the acts, the institution's workload and the high majority threshold for the adoption of a veto motion.[114]

Above we already discussed the Council's imposition on the Commission to consult national experts before the adoption of delegated acts, formalised in the Interinstitutional Agreement of 2016.[115] Research reveals that often the same individuals are involved in both expert groups and comitology committees.[116] These expert groups, however, have a broader mandate and may be consulted, in addition to the drafting of delegated acts, also for the drawing up of legislative proposals, policy initiatives and even in the early preparation of an implementing act before sending it to comitology.[117]

For implementing acts, the situation is completely different due to the "palace revolution"[118] by the drafters of the Lisbon Treaty. The 2011 Comitology Regulation, adopted by both the Council and the Parliament, is based on the recalibrated institutional balance, taking into account the vertical dimension, and accordingly limits the involvement of the Council and the Parliament by solely recognising to those institutions a right of scrutiny.[119] The right of scrutiny allows both the Council and the Parliament to indicate to the Commission that, in their view, "a draft implementing act exceeds the implementing powers provided for in the basic act".[120] In that case, the Commission will have to review the act and inform the co-legislators of its intention to maintain, amend or withdraw the draft implementing act. The Council has made use of its right for the first time only in 2021.[121] The rarity of recourse to its right by the Council is not surprising, given the participation of Member States' representatives in committee meetings.

The Parliament has relied on its right of scrutiny, especially in the fields of GMOs[122] and pesticides. As a matter of fact, whilst under the 1999 Comitology decision the Parliament rarely used its scrutiny powers,[123] under the current Comitology Regulation the Parliament has made frequent use of it and objected more than eighty times.[124] Interestingly, there is a discrepancy between the wording of Article 11 of the Comitology Regulation, that allows the exercise of the right of scrutiny when "a draft implementing act exceeds the implementing powers provided

[112] At the moment of writing, twenty-one objections have been made. Fourteen objections were made by the European Parliament and seven by the Council. See the Interinstitutional register of delegated acts available at <https://webgate.ec.europa.eu/regdel/#/delegatedActs?lang=en>.

[113] Chamon, supra, note 20, 107.

[114] Marissen, supra, note 106, 148.

[115] Interinstitutional Agreement on Better Law-Making, supra, note 64, para 28.

[116] Xhaferri, supra, note 3, 94. This underlines again the blurring of delegated and implementing acts in practice.

[117] Art 3 of Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final.

[118] Bradley, supra, note 11, 71.

[119] While this right was originally only envisaged for the Parliament in the 1999 Comitology Decision, with the Comitology Regulation it has been extended to the Council.

[120] Art 11 of the Comitology Regulation.

[121] See infra.

[122] For an overview of the Parliament's objections, see the Legislative Observatory available at <https://oeil.secure.europarl.europa.eu/oeil/search/search.do?searchTab=y>.

[123] H Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 399.

[124] Chamon, supra, note 20, 171.

for in the basic act," and the Parliament's Rules of Procedure, that embrace a broader interpretation allowing the Parliament to check whether the implementing act "goes beyond the implementing powers conferred in the basic legislative act *or is not consistent with Union law in other respects*."[125] This difference in wording is also reflected into practice. In the case of glyphosate, the Parliament exercised its right of scrutiny in 2017 to observe that the Commission's draft implementing regulation not only "exceed[ed] the implementing powers" but also "fail[ed] to ensure a high level of protection of both human and animal health and the environment" and "fail[ed] to apply the precautionary principle".[126] The Parliament reacted there to the heavy reliance on science by the Commission and explicitly called for a new decision in line with the legislative framework, that is, a decision "including not only EFSA's opinion, but also other legitimate factors and the precautionary principle."[127]

Hence, we may observe that, in practice, the Parliament has been ready to use its powers, although these appear not to be very effective. On the one hand, often the Parliament objects when the implementing regulation has already been adopted. This is partly due to the fact that the Comitology Regulation does not foresee any standstill period for the exercise of the right of scrutiny.[128] Such a standstill period could arguably be introduced by changing the rules of procedures of the comitology committees. On the other hand, the Commission seems reluctant to take into account the Parliament's objections. For instance, in an important controversial dossier such as glyphosate, in 2017 the Parliament's objection did not prevent the Commission from authorising the controversial substance for five more years.[129] By way of comparison, the only time that the Council exercised its right of scrutiny, the Commission listened carefully to the Council's objections and adopted its implementing regulation without the provisions that were criticised by the Council.[130] In order to enhance democratic legitimacy and in view of the fact that the Parliament cannot on its own introduce new legislation when it is not content with the way the Commission exercises its powers, the Parliament should be able to obtain a veto right in comitology.[131] We will come back to this below.

3. *Participatory engagement in the executive rulemaking practice*

In practice, the Commission is opening up the making of delegated and implementing acts to experts, stakeholders and the public. It so promises, in the preparation of delegated acts, "with a view to enhancing transparency and consultation," to gather, prior to the adoption of delegated acts, all necessary expertise, including through the consultation of Member States' experts and through public consultations.[132] Moreover, the Commission commits, whenever broader expertise is needed in the early preparation of draft implementing acts, to use expert groups, consult targeted stakeholders and carry out public consultations, as appropriate.[133]

[125] Rule 112 of the Rules of Procedure of the European Parliament (emphasis added).

[126] European Parliament, "Resolution of 24 October 2017 on the Draft Commission Implementing Regulation Renewing the Approval of the Active Substance Glyphosate" (2017) D053565-01 – 2017/2904(RSP) para 1.

[127] ibid, 2.

[128] Chamon, supra, note 20, 172.

[129] Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate, C/2017/8419, OJ L 333.

[130] See Council of the European Union, File 9289/21, 4 June 2021, indicating two problematic provisions in the draft implementing act, and Commission Implementing Regulation (EU) 2022/1463 of 5 August 2022 setting out technical and operational specifications of the technical system for the cross-border automated exchange of evidence and application of the "once-only" principle, OJ L 231, where the problematic provisions identified by the Council have been excluded.

[131] See, more cautiously, Chamon, supra, note 20, 173.

[132] Interinstitutional Agreement on Better Law-Making, supra, note 64, para 28.

[133] ibid.

It appears that the Commission views the consultation of stakeholders as an important instrument to collect information for evidence-based policymaking, as "their views, practical experience and data will help deliver higher quality and more credible policy initiatives and evaluations."[134] The Commission thus collects, in the context of the preparation of delegated and implementing acts, the feedback of stakeholders, who can express general views on a specific document not based on specific questions or consultation background documents.[135] Although the collection of feedback is the rule, this is not done when one of the eight grounds for exception applies.[136] Whilst it goes beyond the scope of this contribution to examine those grounds in detail, we confine ourself to signalling two important issues. First, the Commission exempts authorisation decisions from the feedback mechanisms, where extensive consultation has already occurred during the risk assessment phase. Interestingly, this is presumed to be the case for all individual authorisation decisions but not for measures of general application.[137] Second, the application of exceptions seems to remain entirely within the Commission's discretion, without any review mechanism or duty to state reasons.[138] Hence, currently the Commission aims to commit to participatory engagement in a limited manner and rather for the substantive rationale, viz. to enhance the quality of the decision to be adopted, rather than the normative democratic rationale.

4. Problematic comitology-based decision-making

Whilst the lack of substantive control by the Parliament over implementing acts may appear problematic, the disappearance of the specific role of the Council in comitology is somewhat less challenging. For the Council has remained indirectly involved in the making of implementing acts through the committees, as they are composed of Member States' representatives. The practice confirms that Member States' participation in comitology has revealed sensitivities and different perspectives concerning the areas to be administrated through executive acts. For instance, Member States' behaviour in the case of GMOs has shown that certain internal market choices are inextricably linked with socioeconomic, cultural, ethical and ideological concerns,[139] which cannot be addressed by means of purely technical-scientific decision-making.[140] The case of GMOs is exemplary in underlining that, in the absence of absolute scientific certainty, decision-making requires complex assessments based on the balancing of multiple interests of different nature. With respect to the authorisation procedures for GMOs, between 2004 and 2015 Member States were never able to agree on the Commission's draft decisions in comitology meetings.[141]

[134] European Commission, "Better Regulation Toolbox" (2023) 444.

[135] ibid, 444 and 454.

[136] The grounds are listed in ibid, 455–57.

[137] ibid, 458.

[138] On the Commission's reluctance to endorse review mechanisms for its own participatory procedures, see S Rose-Ackerman, S Egidy and J Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union* (Cambridge University Press 2015) 236–37.

[139] M Weimer, *Risk Regulation in the EU Internal Market* (Oxford University Press 2019) 93; M Navah, E Versluis and MBA van Asselt, "The Politics of Risk Decision Making: The Voting Behaviour of the EU Member States on GMOs" in M BA van Asselt, E Versluis and E Vos (eds), *Balancing between Trade and Risk: Integrating legal and social science perspectives* (Routledge 2013). On the politicised nature of internal market choices, see JHH Weiler, "The Transformation of Europe" (1991) 100 The Yale Law Journal 2403, 2477.

[140] V Paskalev, "Can Science Tame Politics: The Collapse of the New GMO Regime in the EU" (2012) 3 European Journal of Risk Regulation 190, 200.

[141] M Lee, "GMOs in the Internal Market: New Legislation on National Flexibility" (2016) 79 The Modern Law Review 317, 320.

This deadlock revealed the high politicisation of the GMO issue,[142] with the frequent involvement of the Council to which the matter was ultimately referred in accordance with the pre-2011 comitology framework.

Similarly, a high degree of politicisation has permeated the process for the renewal of glyphosate's authorisation. The latter has constituted one of the most contentious EU regulatory sagas in recent years,[143] involving several institutional and non-institutional actors and triggering an extraordinary amount of "societal, political, scientific and legal contestation."[144] First, following the divergent assessments made by the International Agency for Research on Cancer (IARC), which in 2015 qualified glyphosate as "probably carcinogenic to humans,"[145] and the evaluation of the European Food Safety Authority (EFSA)[146] and the European Chemicals Agency (ECHA),[147] in 2017 no agreement was found in comitology and the Commission decided for a limited re-authorisation of the substance on EU markets.[148] In 2019, therefore, the Parliament called for more accountability and transparency in comitology procedures and in particular in the Standing Committee on Plants, Animals, Food and Feed (PAFF).[149] Second, in 2022, faced with EFSA's need for more time to complete glyphosate's risk assessment,[150] the PAFF did not deliver an opinion on the Commission's proposal for a temporary renewal of glyphosate's authorisation for one year, after which the Commission adopted this renewal. Finally, in 2023, notwithstanding EFSA's positive opinion, that glyphosate was not to be classified as carcinogen, mutagen or toxic,[151] again a no opinion scenario in both the PAFF committee and the appeal committee led the Commission to renew glyphosate authorisations for ten years, subject to certain conditions and restrictions.[152] These cases underline the problematic legitimacy of comitology-based decision-making and call for change.

[142] M Weimer, "Legitimacy through Precaution in European Regulation of GMOs? From the Standpoint of Governance as Analytical Perspective" in C Joerges and P Kjaer (eds), *Transnational Standards of Social Protection. Contrasting European and International Governance,* (2008) 188.

[143] See S Röttger-Wirtz, "Glyphosate Case Study" (2020) RECIPES Case Study 6 13.

[144] M Morvillo, "Glyphosate Effect: Has the Glyphosate Controversy Affected the EU's Regulatory Epistemology?" (2020) 11 European Journal of Risk Regulation 422, 422. See also T Van den Brink, "Danger! Glyphosate May Expose Weaknesses in Institutional Systems: EU Legislation and Comitology in the Face of a Controversial Reauthorisation" (2020) 11 European Journal of Risk Regulation 436; GC Leonelli, "The Glyphosate Saga and the Fading Democratic Legitimacy of European Union Risk Regulation" (2018) 25 Maastricht Journal of European and Comparative Law 582.

[145] International Agency for Research on Cancer, "IARC Monographs Volume 112: Evaluation of Five Organophosphate Insecticides and Herbicides" (2015) 1.

[146] EFSA concluded that the substance was "unlikely to pose a carcinogenic hazard to humans." See EFSA, "Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate" (2015) 13 EFSA Journal 1, 11.

[147] ECHA concluded that "the available scientific evidence did not meet the criteria to classify glyphosate as a carcinogen." See ECHA, "Glyphosate Not Classified as a Carcinogen by ECHA" (2017) ECHA/PR/17/06 https://echa.europa.eu/-/glyphosate-not-classified-as-a-carcinogen-by-echa.

[148] Five years instead of the usual ten-year licence. See Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate, C/2017/8419, OJ L 333.

[149] European Parliament, "Resolution of 16 January 2019 on the Union's Authorisation Procedure for Pesticides" (2019) 2018/2153(INI) para 79. In this respect, it is quite remarkable that an important committee dealing with controversial issues like the PAFF declares on its page in the Comitology register that "there are no rules of procedure for this committee": see https://ec.europa.eu/transparency/comitology-register/screen/committees/C20400/consult?lang=en. This, if true, clearly infringes Art 9 of the Comitology Regulation.

[150] EFSA, "Glyphosate: EFSA and ECHA Update Timelines for Assessments" (10 May 2022) <https://www.efsa.europa.eu/en/news/glyphosate-efsa-and-echa-update-timelines-assessments>.

[151] F Álvarez et al, "Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate" (2023) 21 EFSA Journal 46.

[152] Commission Implementing Regulation (EU) 2023/2660 of 28 November 2023 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) No 540/2011, OJ L, 2023/2660. However, the

5. Ignoring the constitutional requirements of the principle of democracy

Faced with the problematic dossiers of GMOs and glyphosate, the Commission acknowledged the need for change and proposed in 2017 to revise the Comitology Regulation.[153] Yet, this arguably had much more to do with the Commission's desire to shift the political blame for controversial decisions it would adopt, rather than with a genuine interest in enhancing the transparency and legitimacy of comitology-based decision-making. Accordingly, the Commission's proposal is centred on an interinstitutional perspective and the sharing of responsibility by introducing a second appeal and the possibility to ask the Council for an advisory opinion, shedding light on Member States' voting behaviour in comitology and sharpening the rules on how qualified majority is calculated.[154] The proposal to bring the Council back in the realm of comitology encountered fierce opposition by the Council Legal Service that strongly rejected it as "this would go beyond the role envisaged by the Treaties for the Council and would be in breach of the principle of institutional balance," and "would encroach on the competence of the Member States as foreseen by the Treaties."[155] Member States have supported this view.[156] Significantly, were one to follow the Council Legal Service's strict reading of Article 291(3) TFEU, this would be at odds even with the current Comitology Regulation, in that the latter provides for the right of scrutiny of the Council and the Parliament. As we argued above, however, such a reading is not in line with the underlying rationale of the EU's constitutional and institutional structures and the democratic principle of Articles 9 to 12 TEU. The Parliament has expressed less constitutional concern[157] and suggested to be accorded an advisory role like the Council[158] and to broaden the right of scrutiny also to cases in which the draft implementing act is in conflict with the objectives of the basic act.[159]

Notwithstanding this deadlock, the newly appointed Von der Leyen Commission decided in 2020 not to withdraw the proposal but instead announced that it wanted to go ahead with it within its pending legislative initiatives, in the pursuit of "a new push for European Democracy."[160] Unsurprisingly, the proposal has not moved forward. As a matter of fact, we argue that the blame-shifting suggested in the proposal as it stands will not give

2023 re-authorisation of glyphosate has not put an end to widespread societal contestation: see B Brzeziński, "Glyphosate: Raft of Legal Challenges Launched against EU Approval" (*POLITICO* 25 January 2024) <https://www.politico.eu/article/glyphosate-legal-launched-against-eu-approval-pan-europe/>. In this respect, see the internal review that EFSA and ECHA were required to carry out in "Technical and scientific assistance on the internal review under Regulation (EC) No 1367/2006 of Commission Implementing Regulation (EU) 2023/2660 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009" (2024) 21 EFSA Supporting Publications 1. Concerning instead the actions for annulment lodged before the Court of Justice, it is worth noting that in another recent case the General Court ruled that even the identification by EFSA of critical areas of concern does not prevent the Commission from adopting appropriate mitigating measures and renewing the approval of a substance: see Case T-536/22 *PAN Europe v Commission* [2024] ECLI:EU:T:2024:98, paras 92–97.

[153] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM/2017/085 final - 2017/035 (COD).

[154] See, for a detailed analysis, Chamon, supra, note 20, 174–79.

[155] Council of the European Union, "Opinion of the Legal Service 6752/18" (2018) para 20. Full version of this document is available at <https://images.dirittounioneeuropea.eu/f/sentenze/documento_tURna_due.pdf>.

[156] Council of the European Union, "Interinstitutional File: 2017/0035 (COD)" (2018) para 9.

[157] European Parliament, "Amendments Adopted by the European Parliament on 17 December 2020 on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 182/2011 Laying down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers" (2020) COM(2017)0085 – C8-0034/2017 – 2017/0035(COD).

[158] See amendment 15.

[159] And not only when it exceeds the Commission's implementing powers (see amendment 24).

[160] European Commission, "Commission Work Programme 2020: A Union That Strives for More" (2020) COM(2020) 37 final, Annex III, No. 117.

any substantive "push for democracy" as it completely ignores the constitutional requirements of the principle of democracy enshrined in the TEU. A genuine push for democracy necessitates more fundamental changes, including the introduction of a veto right for both the Council and the Parliament, and the setting of suitable procedural rules detailing participatory engagement in executive rulemaking and requiring increased transparency.[161] Such procedural rules will diversify participation in the adoption of delegated and implementing acts according to the powers the Parliament has to control these acts.[162] These reforms would allow executive rulemaking to go beyond being merely "science-based" to enhance the knowledge and collect more information in the specific dossiers, and respond instead to the normative democratic imperative for participatory engagement, thus allowing participation to serve as a complementary source of democratic legitimacy for delegated and implementing acts.[163]

V. Back to the future[164] and beyond

The above makes clear that the Lisbon Treaty has neither rationalised nor simplified the framework of delegation. On the contrary, the construction of Articles 290 and 291 TFEU has resulted in a convoluted, fragmented and inconsistent legal landscape. In practice, resisting the "Lisbonisation" of executive rulemaking, both EU institutions and Member States have been reluctant to embrace the novelties brought by the reform. The Commission, which aimed at getting rid of comitology, has unexpectedly found itself preferring implementing over delegated acts. The Parliament, albeit largely marginalised within the framework of Article 291 TFEU and insisting on paper on the appropriateness of delegated acts for the adoption of acts of general nature, has in practice compromised and accepted the Commission's increasing reliance on implementing acts. As a matter of fact, the vast majority of executive acts adopted by the Commission are implementing acts.[165] The Council has imposed the consultation of a group of national experts in the making of delegated acts, which means that a comitology-light was introduced even in the making of delegated acts. Moreover, even the Court seems to have hardly digested the new framework, often opting for elusive positions rather than providing precise elucidations.[166]

This, taken together with the erroneous blending of the two distinct concepts of implementation, leads us to suggest a return to an integrated system for EU executive

[161] To be sure, the much-needed transparency that the proposal suggests will in all likelihood soon have to be introduced, in view of the Court's ruling in the *Pollinis* case. The latter confirmed the applicability of Article 4(3) of Regulation 1049/2001 to access to Member States' votes within comitology procedures, so that the Commission will be obliged to shed more transparency on the voting of Member States in comitology and allow access to the relevant documents. See Case T-371/20 *Pollinis France v Commission* [2022] ECLI:EU:T:2022:556 (see also Case T-201/21 *Covington & Burling and Van Vooren v Commission* [2023] ECLI:EU:T:2023:333). If upheld in appeal, this ruling will likely require adjustment of the rules of procedure of both the appeal and standing committees. See the pending appeal in Case C-726/22 P *Commission v Pollinis France* (see also the pending appeal in Case C-540/23 P *Commission v Covington & Burling*).

[162] Mendes, supra, note 52, 38.

[163] See, to this end, already some interesting initiatives concerning the involvement of stakeholders in comitology of the former DG SANCO under the leadership of DG R Madelin, advanced by the Peer Review Group on Stakeholder Involvement in 2006 in a document called "Healthy Democracy", <https://ec.europa.eu/health/ph_overview/health_forum/docs/ev_20070601_rd08_en.pdf>.

[164] See Türk, supra, note 48, 422.

[165] In 2022, the Commission adopted 2072 implementing acts versus 196 delegated acts. See European Commission, supra, note 35, 7. The number of implementing acts was considerably higher in 2022 that the ones adopted in 2021 (i.e. 1592). See <https://eur-lex.europa.eu/statistics/2022/legislative-acts-statistics.html>.

[166] See Volpato, supra, note 3, 62–64.

rulemaking and to call for Treaty change.[167] Such a reform requires amending and integrating Articles 290 and 291 TFEU in one Article dedicated to EU executive rulemaking. Treaty change should also provide express recognition of the role of agencies as part of the EU's executive alongside a solid, express constitutional ground for the adoption of legally binding acts.[168]

Reform of Articles 290 and 291 TFEU should entail going back to the essence of comitology as a general mechanism for consultation and control in rulemaking, allowing Member States to deliberate with the Commission, thus embracing the idea of executive subsidiarity, whilst conferring a veto right on both the Parliament and the Council. Yet, such a new comitology setting requires also going beyond mere considerations of institutional balance embedded in the old comitology mechanisms, by connecting to the principle of democracy enshrined in Articles 9 to 12 TEU and recognising the need for participatory engagement in EU executive rulemaking. Whilst the Commission's current practice of both delegated and implementing decision-making shows an embryonic orientation towards opening up to observers, feedback and public consultation, it proves at the same time its weakness as it serves to enhance mere knowledge and information collection rather than responding to a normative democratic imperative. The current practice of the Commission will, therefore, not lead to more legitimacy and acceptance of its executive decision-making. For example, the problematic decision-making in highly political sensitive matters such as GMOs and glyphosate, based on regulatory science, highlights that the normative democratic rationale for participatory engagement is key to foster trust, credibility and support in addition to the substantive rationale. The reform therefore requires not only Treaty change but also the setting of suitable procedural rules. Such rules should design and shape participatory engagement, detailing how, in which circumstances and under which conditions participation of interested parties is needed, including rules on transparency on issues like voting in comitology, who is consulted and how consultation has taken place as well as rules on voice and equality of interested parties.

The merging of Articles 290 and 291 TFEU together with the setting of specific procedural rules that carefully design the conditions of participatory engagement in delegated and implementing acts will pay tribute to both the principles of institutional balance and democracy.

Competing interests. The authors declare not to have any competing interests.

[167] See E Vos, "White and Black Smoke Coming from the Justus Lipsius Building" (2004) 11 Maastricht Journal of European and Comparative Law 225; Xhaferri, supra, note 3, 288; Türk, supra, note 48, 422. Conversely, Chamon, supra, note 20, 201 views that the Lisbon split should remain intact.

[168] This should be done in a new article or separate paragraph of the merged article, making clear that comitology would not be applicable to decisions adopted by EU agencies.

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