

THE QUEST FOR LEGITIMACY IN EU SECONDARY LEGISLATION

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Abstract

According to classic democratic theory legislative decision-making presupposes some involvement of the people or their representatives. Their involvement is a prerequisite for the legitimacy of enacted legislation. At the same time, however, the lack of public involvement is a weak spot of EU legislative decision-making. This represents a growing problem because the European Union (EU) is built on and predominantly governed by EU law that is enacted in EU-legislation without direct input from the people. In fact more than 75% of EU legislation is currently enacted by the European Commission (EC). This lack of democratic pedigree of so-called ‘EU secondary legislation’ allegedly causes various legitimacy-related problems at the EU level. With the introduction of a new system on delegated and implementing acts by the Treaty of Lisbon, the EU however aims to address the apparent democratic deficit. This contribution takes up this call and against this backdrop answers the question whether the Lisbon ‘arrangements’ have, indeed, changed ‘things for the better’. It presents a legitimacy review of the post-Lisbon regime on delegated and implementing acts of the last four years. We first look into the concept of legitimacy of EU secondary legislation to assess the post-Lisbon developments. After focusing on the question of whether the legitimacy of secondary legislation has increased since the Lisbon Treaty and in what respect we then turn to the Lisbon institutional and procedural empowerment of the European Parliament in the legislative procedure to see whether it has, in reality, increased the Parliament’s influence and control of EU legislation vis à vis the Council and the Commission. Our findings suggest that the high expectations for improving the legitimacy of EU secondary legislation have not (yet) materialized. Furthermore, facts and figures give cause for doubt as to the feasibility of achieving this objective in the near future.

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Keywords

EU law; EU legislative process; ordinary legislative procedure; EU secondary legislation; legitimacy; delegated acts; implementing acts; EU post-Lisbon; rule-making; comitology.

A. GOVERNING THE EU BY RULE-MAKING: THE LEGITIMACY OF EU LEGISLATION IN FOCUS

A key feature of the EU's system of governance is the preeminence of the law. The law is the basis upon which the Union is built, it is the law that (is supposed to) keep(s) the Union together, and it is predominantly with the law that the institutions govern the Union and its markets. One can raise serious questions whether ruling by law is not an intrinsically flawed mode of governance. It can be questioned whether it is sustainable in a situation where there is no collective political identity underpinning it (and will not be in the foreseeable future). In the long term, there is a very real danger that a perceived lack of legitimacy will eventually result in political conflict and non-compliance. We will not pause to discuss all of these issues here. What we would like to note is that the bulk of the law of the EU is enshrined in rules, to be found in the Treaties, regulations, directives, delegated acts and implementing acts as well as the case law of the Court of Justice. The large body of EU law even involves a great part of the domestic law of the Member States – one might argue – because some domestic law implements EU law. EU law, in turn, refers to it and ‘rests & relies’ on it to a certain extent. And then there are the so-called ‘soft law’ instruments of the EU, i.e. instruments that do not actually have the force of law but aim to change patterns of (institutional) behaviour using normative notions; because of their indirect legal effect these soft law instruments are sometimes labelled pseudo- or quasi-legislation.¹

1. Legitimacy of EU legislation

Law and even pseudo-law are the EU's weapons of choice to achieve its policy goals, be it from an innate overreliance on law in the continental legal culture or from want of any other instrument to govern with. Unsurprisingly, the body of EU rules is large as a result. But it is also increasingly controversial and criticized by the Member States and their citizens. For that reason, the Union embarked on an ongoing ‘better regulation’ programme² more than ten years ago, in an attempt to push back the volume of EU legislation by legislative reduction, simplification

¹ L. Senden, *Soft Law in European Community Law* (Hart Publishing, Oxford 2004) 110.

² Followed up by the Commission's current *Smart Regulation initiative* <<http://ec.europa.eu/smart-regulation/>> (Last visited 15 January 2014).

and a more informed preparation of legislative proposals using better consultation and impact assessment amongst others. Although this programme did yield some tangible results³ – to our mind – it neither addressed nor appeased the heart of the criticism on EU law and EU legislation.⁴ A substantive part of the criticism on EU legislation is related to the perceived or actual lack of legitimacy of EU legislation⁵ especially the instruments that are enacted by the European Commission (hereafter EU Commission or Commission) without the involvement of the European Parliament (EP). Considering that the approval ratings of the EU and its leadership hit an all-time low in 2013⁶ the legitimacy of legislation is of course of the utmost importance for different reasons. First of all, we know from recent research that the chances of effective implementation of and compliance with legislation are dependent to a certain extent upon its legitimacy.⁷ Secondly, and more or less in the same vein, the legitimacy of EU legislation is important because the likelihood of the EU meeting its primary goals⁸ largely hinges on the effectiveness of its legislation, which in turn depends on its perceived legitimacy.⁹ Ineffective EU legislation, becoming apparent in the Greek government debt crisis of 2010-2012 and the whole EMU crisis that followed on from this, is according to some observers connected to the lack of legitimacy and solidarity amongst Member States following the arrangements of the Maastricht Treaty of

³ W. Voermans, C. Moll, N. Florijn & P. van Lochem 'Codification and Consolidation in Europe as Means to Untie Red Tape' (2008) 29(2) *Statute Law Review* 65-81.

⁴ M. Kaeding, 'In Search of Better Quality of EU Regulations for Prompt Transposition: The Brussels Perspective' (2008) 14(5) *European Law Journal* 583-603.

⁵ A. Menon and S. Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues its States' (2008) 31(3) *West European Politics* 397-416; P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox' (2011) 17(3) *European Public Law* 555-569.

⁶ See the recent Gallup Poll of 8 January 2014 <http://www.gallup.com/poll/166757/leadership-approval-record-low-spain-Greece.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=mor elink&utm_term=All%20Gallup%20Headlines%20-%20World>

⁷ D. Beetham, *The Legitimation of Power* (Palgrave Macmillan, Basingstoke 1999); T. R. Tyler, *Why do People Obey the Law?* (Princeton University Press, 2006); W. Voermans, 'Motive-based Enforcement' in L. Mader, S. Kabyshev (eds.) *Regulatory Reforms; Implementation and Compliance*, Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28th-29th 2012, nr. 17 (Nomos, Baden-Baden 2014) 41-61.

⁸ As expressed by article 2 Treaty on European Union (TEU). These goals are in a nutshell: the promotion of economic and social progress by an economic and monetary union, cooperation in the field of international relations, strengthening the protection of the rights and interests of the nationals of its Member States and fostering the Union as an area of freedom, security and justice.

⁹ Kaeding assesses different forms of European policy instruments in the field of financial services, public administration, transport and social policy to show what instrument works under what circumstances in order to overcome many of the impediments to using alternative EU policy instruments as appropriate responses to pressing European and global governance challenges, such as legitimacy. See M. Kaeding, *Towards An EU Regulatory Framework For An Effective Single Market. Implementing the Many Forms of European Policy Instruments across Member States* (Springer, Wiesbaden 2012).

1992.¹⁰ Thirdly, the constitutional credo of the Union states that the Union is founded on the principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law.¹¹ This would of course entail that decision-making in the EU, especially on legislation, needs to be democratic, transparent and outreaching to the public. In fact, however, as our research indicates, in the bulk of EU legislation – in 2010-2013 some 86% – neither the European Parliament, nor the national parliaments, nor the European public participates directly. The major part of EU legislation is enacted by the EU Commission acting alone, as concerns subordinate legislation in the form of delegated or implementing acts, or the Commission assisted by committees consisting of Member States representatives (comitology).¹² In these instances citizens are at best involved in ad hoc ways as stakeholders or consulted parties. The effect of their voice and view is taken into consideration but does not yield any direct effect as such. As for comitology, Eriksen and Fossum contend that ‘assessed by means of a simple majoritarian model of democracy, comitology is illegitimate, as it is subjected neither to strict national control nor to control by the EP.’¹³ Brandsma notes that ‘lack of public scrutiny and few opportunities for parliamentary involvement constitute a democratic legitimacy problem for comitology.’¹⁴ It therefore comes as no surprise that the democratic legitimacy of comitology was criticised prior to the Lisbon Treaty¹⁵ and has remained controversial since its re-emergence in 2011.¹⁶

¹⁰ K. Featherstone, ‘The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime’ (2011) 49(2) *JCMS Journal of Common Market Studies* 211.

¹¹ Article 2 and article 6 TEU.

¹² M. Kaeding and A. Hardacre, ‘The European Parliament and the Future of Comitology after Lisbon’ (2013) 19(3) *European Law Journal* 382-403.

¹³ E. O. Eriksen and J. E. Fossum, ‘Democracy through Strong Publics in the European Union?’ (2002) 40(3) *JCMS Journal of Common Market Studies* 409. Considered on the basis of a more deliberative notion of democracy – which values equal access and public debate as the legitimating principle of popular sovereignty – comitology is less problematic in the view of Eriksen and Fossum. Like Bohmann they feel that expert-based decision-making is not on its own illegitimate and antithetical to democracy – it can be conducive to democratic legitimacy under certain modern conditions. See also J. Bohmann, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press, Cambridge MA 1996).

¹⁴ G. J. Brandsma, *Backstage Europe; Comitology, Accountability and Democracy in the European Union*, PhD thesis (University of Utrecht, Arnhem 2010) 19. The case for indirect democratic legitimacy via national parliaments and intergovernmentalism is also weak. Brandsma observes: ‘As the comitology procedure applies to the major part of implementation measures – about 60 percent every year – it is quite representative for the implementation phase as a whole. Given these results, the argument for democratic legitimacy through intergovernmentalism seems untenable, at least as far as it concerns the legitimacy of comitology.’ Ibid. 197.

¹⁵ M. Rhinard, ‘The Democratic Legitimacy of the European Union Committee System’ (2002) 15(2) *Governance, An International Journal of Policy, Administration, and Institutions* 185-210; see Brandsma (n 14).

¹⁶ C. Stratulat, and E. Molino, ‘Implementing Lisbon: What’s New in Comitology?’ (2011) *European Policy Center, Policy Brief* at <http://www.epc.eu/documents/uploads/pub_1258_implementing_lisbon_what_s_new_in_comitology.pdf> (Last visited 11 February 2014); V. Georgiev, ‘Too much executive power? Delegated Law-making and Comitology in Perspective’ (2013) 20(4) *Journal of European Public Policy* 535-551.

2. Attempts to fill the democratic gap in EU rule-making

Although there is more to legitimacy of legislation than mere democratic legitimacy,¹⁷ to wit forms of output legitimacy like effectiveness, and even though the concept of democracy itself maybe shifting,¹⁸ the poor democratic rating of EU legislation was one of the major reasons to change the old system. With the Lisbon Treaty of 2009 the ‘ordinary legislative procedure’ (article 294 TFEU) was introduced, which makes the European Parliament a full legislative partner next to the Council for almost all policy areas. Following a proposal of the EU Commission, Parliament and Council may amend, reject or adopt the Union’s legislative acts (article 288 TFEU). This new procedure is an attempt at boosting the democratic legitimacy of EU secondary legislation.

Likewise, the old system of implementing measures under the former article 202 of the EC Treaty – the basis for pre-Lisbon comitology – underwent to some extent a democratic update. Under the Lisbon Treaty, Council and Parliament - may delegate or confer powers upon the Commission to elaborate legislative basic acts adopted by them. Depending on the type of task to be delegated, delegation may proceed in two ways. On the one hand, in a regulation or a directive (basic act) the principal legislator may delegate power to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act, referred to as delegated acts (article 290 TFEU). On the other hand, it may confer implementing powers to adopt implementing acts (article 291 TFEU).

The adoption of delegated acts and implementing acts (together labelled non-legislative instruments or ‘secondary’ legislation¹⁹) are subject to different legal frameworks providing forms of control and review. According to article 290 TFEU the principal legislator controls the exercise of the Commission’s powers to supplement or amend non-essential elements by means of a right of revocation and/or a right of objection (on any grounds). For the EP it is a yes or no-option. It does not have the power to amend delegated acts. These provisions of article 290 TFEU are sufficient in themselves and do not require any legally binding framework to make them operational.²⁰ Both control mechanisms add to the

Regulation (EU) 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 EU* 2011 L 55/13.

¹⁷ C. Lord, *Democracy in the European Union* (Sheffield Academic Press, Sheffield 1998).

¹⁸ See Popelier, (n 5).

¹⁹ Some prefer to speak of ‘tertiary’ EU legislation. This however does not align all that well with the more customary way of referring to non-parliamentary, delegated legislation worldwide. Therefore we use the term ‘secondary’ EU legislation. See (n 25).

²⁰ In 2009 the Commission did make some suggestions in a communication on a *modus operandi* for delegation under article 291 TFEU. Communication on the Implementation of Article 290 of the Treaty on the Functioning of the European Union COM(2009) 673 final. The Commission and the European Parliament could not see eye to eye on the communication. The suggestions made in the form of some model clauses for delegating provisions were instead turned into a non-binding ‘common understanding’.

democratic legitimacy of delegated acts. Furthermore, given that the objectives, scope, duration and conditions to which the delegation is subject will have to be defined in every basic act, delegated acts will be subject to more inter-institutional discussions.²¹

By contrast, the provisions of the new Treaty on implementing acts, which are set out in article 291, do not provide for more democratic legitimacy. First, Parliament and Council are regularly kept informed via the comitology register about committee proceedings, but are not invited to attend them. Second, implementing acts lack any meaningful control mechanism for the legislator. Parliament and Council have a so-called 'right of scrutiny', which 'enables either legislator to pass a non-binding resolution, at any time, if they believe that the implementing act exceeds the implementing powers provided for in the basic act'.²² This Parliament's 'right of scrutiny' is however not an innovation, but had already been introduced with the first major comitology reform in 1999. All in all the procedure under article 291 has much weaker democratic credentials than its counterpart under article 290 TFEU for delegated acts.

3. Outline of this contribution

The foregoing sketch makes clear that whether the legislative arrangements of the Lisbon Treaty are successful in raising the democratic legitimacy of the EU as a whole, and the legitimacy of EU secondary legislation in particular, is still a matter under debate. Judging from the political noise and controversy since the entry into force of the Lisbon Treaty over the question of democratic control of the procedures under articles 290 TFEU and 291 TFEU,²³ demonstrated for instance in two actions brought before the Court in 2012 (by the Commission) and 2013 (by the European Parliament),²⁴ we believe that there are good grounds for studying the developments in post-Lisbon secondary legislation.²⁵ This view is further strengthened by our own new findings and scholarly debate suggesting that the European Parliament is losing the 'implementation game'.²⁶

²¹ A. Hardacre and M. Kaeding, 'Delegated & Implementing Acts-The New Comitology' in *The EIPA Practical Guide* (European Institute of Public Administration (EIPA), Maastricht 2013).

²² *Ibid.* 17.

²³ W. Voermans, 'The Birth of a Legislature - The EU Parliament after the Lisbon Treaty' (2011) 17(2) *The Brown Journal of World Affairs* 163-180.

²⁴ Application C-427/12 of 26 October 2012 *Commission v Parliament and Council* and application C-65/13 of 22 March 2013 *Parliament v Commission*.

²⁵ We use the term post-Lisbon 'EU secondary legislation' as an umbrella term for delegated and implementing acts, or non-legislative acts under the TFEU. In most English-speaking countries delegated or subordinated legislation is synonym to secondary legislation. Until recently in EU-parlance secondary legislation meant non-treaty legislation, like directives or regulations. Although the notion of secondary legislation can be somewhat confusing, we use secondary legislation in the sense it is used in most English speaking countries.

²⁶ T. Christiansen, T. and M. Dobbels, 'Comitology and Delegated Acts after Lisbon: How the European Parliament Lost the Implementation Game' (2013) 16(3) *European Integration online Papers* (EIoP) <<http://eiop.or.at/eiop/texte/2012-013a.htm>> (Last visited 12 January 2013).

This present contribution aims to give an introductory bird's eye view: to set the stage for discussing legitimacy as a concept and giving facts and figures on the developments in EU secondary legislation over the last four years and what one could deduce from these in terms of influence and control over the process leading up to the enactment of secondary legislation.

B. THE LEGITIMACY PROBLEM OF EU SECONDARY LEGISLATION

Legitimacy is a particularly difficult, elusive as well as a contentious concept.²⁷ If we want to know whether for instance government action is accepted and supported, we can try to measure it. This may boil down to attempts to get into the minds of the addressees – with uncertain results as to what one may read from this, look at the dynamics of the process of decision-making and the arguments and legitimacy claims put forward in it – which gives an account of a case but not a comprehensive insight in legitimacy, or just look and see whether government action is abided by or not, or is resisted – which does not necessarily tell whether this is the result of the perceived illegitimacy. Legitimacy is notoriously difficult to measure and to predict due to it being so deeply rooted in our beliefs and motives and volatile to boot. On the other hand, when we narrow it down to our present subject, legislation, legitimacy is vital because compliance partly depends on it.²⁸ Legislators should be well aware of that and be able to make some estimate. This is no mean feat because legislation is not merely a product of political action; legislation is a vehicle of legitimation as well.²⁹

To better understand this two-sided relation between legislation and legitimacy we need to take a closer look at the concept of legitimacy itself. What do we actually mean when we say that legislation is legitimate or lacks legitimacy? Legitimacy is – in our shorthand – the legally recognised and morally internalised acceptance or assumption thereof.³⁰ An instance of legitimacy is political legitimacy which relates to the recognition and acceptance of actions of political institutions (e.g. the legislator) in a political system (like a liberal democracy).

²⁷ See Beetham, (n 7) 3.

²⁸ A. Føllesdal, 'Legitimacy Theories of the European Union,' (2004) 15(4) *Arena Working Papers*, Centre for European Studies, University of Oslo, 1-38; see Kaeding, (n 9).

²⁹ See Beetham, (n 7), 60-72, 91-92.

³⁰ Our shorthand is loosely based on Suchman's – somewhat operational – definition which reads "legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions." See M. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academic Management Review* 574.

1. Elements and dimensions of political legitimacy

Political legitimacy has various dimensions. According to Beetham and Lord political legitimacy is comprised basically of three different elements: legality, normative justifiability and legitimation. A political system – in their view – fulfils the condition of legality if the political authority is acquired and exercised according to established rules; quite a formal criterion. Normative justifiability, the more substantive criterion, refers to the political context of the rules. Are they justifiable according to socially accepted beliefs about what is the rightful source of authority, and the proper ends and standards of government? If a political system aspires to be normatively justifiable, its citizens must accept that different categories of rules are imposed on them by different levels of authority and that they feel that these levels conduct their policies according to the right ends and procedures. Finally, legitimation means that the positions of authority have to be confirmed by an explicit approval and confirmation of its subordinates and recognized by other legitimate authorities.³¹ Beside these elements, Beetham and Lord distinguish three dimensions of legitimacy, notably democracy, identification and performance. Democracy refers to structural aspects such as the representation of the population and the separation of powers; identification points to the popular acceptance of the project of the political authority that governs (the recognition by the people of the exertion of power) and to issues such as identity and citizenship. The last dimension is performance, defined as the relation of the political system to the ends or purposes it should serve and the effectiveness of its decision-making procedures.³²

2. Sources and vectors of legitimacy

It is the merit of Beetham and Lord's work to have shown that legitimacy is a multi-dimensional concept, consisting of different levels and elements, and dynamic as such. Their work makes us understand legitimacy better and the legitimacy of EU legislation for that matter. If – on the other hand – we want to influence (e.g. enhance) the legitimacy of EU legislation, a mere understanding of the concept alone will not suffice. We will need to know how legitimacy is influenced, what kind of factors and actors contribute to it and from where it can be derived.

Legislation, as a form in which government interventions are cast, can derive its legitimacy from basically three sources. Legitimacy can either well up from democratic input in legislation, i.e. the way citizens, interested parties or stakeholders participate or are involved in the decision-making process, or, originate from the performance and delivery of legislation – its output for short. In this respect Scharpf has made a now famous distinction between input and

³¹ D. Beetham and C. Lord (eds.), *Legitimacy and the European Union* (Longman, Harlow 1998).

³² *Ibid.* 4-5.

output legitimacy³³ which, couching the foregoing in terms of classic democratic theory, expresses on the one hand the authenticity dimension of democratic self-determination and on the other hand the effectiveness dimension of democratic self-determination.³⁴ The acceptance of government action and especially legislation is – as Schmidt has argued recently – also dependent on its throughput, i.e. the governance process (interactions) with the people in terms of efficacy, accountability, transparency, inclusiveness and openness to interest consultation and deliberative procedures.³⁵ While throughput legitimacy has received a favourable review in the EU of late because input and output legitimacy are waning, it is not a complete remedy.

What distinguishes throughput processes from input and output processes – according to Schmidt – is that input and output can involve trade-offs, where more of the one may make up for less of the other, whereas more (and better) throughput does not make up for problems with either input or output while less (and worse) throughput can de-legitimise both input and output.³⁶ Schmidt concludes that the multi-level nature of the EU complicates this set of interactions effects further, since more EU-level input or output can negatively affect national-level input legitimacy.³⁷ The EU's answer to this problem has been largely to improve throughput processes of converting input into output (through efficacy, accountability, transparency, openness and inclusiveness) to make up for the loss of national-level input and for national problems with EU output. But this fails to recognize that no amount of throughput can make up for a dearth of input or deleterious output.³⁸

For a better understanding of the multi-faceted drivers of the legitimacy of EU legislation – and the importance of the national-level input – we feel that the idea of vectors of legitimacy put forward by Lord and Magnette is better suited.³⁹ Lord and Magnette distinguish four vectors of legitimacy of EU legislation:

³³ F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford 1999).

³⁴ F. Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4(1) *Journal of European Public Policy* 18-36.

³⁵ V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 (1) *Political Studies* 2-22. The concept of *throughput legitimacy* is – when it concerns matters of law and legislation – more or less on par with what Tom Tyler has coined 'procedural justice'. There seems indeed to be some evidence that authorities and institutions are viewed as more *legitimate* and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through *procedures* that people experience as being *fair*. See T.R. Tyler, 'Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members want from the Law and Legal Authorities?' (2001) 19(2) *Behavioral Sciences & the Law* 215-235.

³⁶ *Ibid.* 19.

³⁷ According to Scharpf, also national output legitimacy may be negatively affected by EU legislation. He argues that economic integration has led to a decrease in the effectiveness of democratic self-determination (read: output legitimacy) at the national level, especially as regards national social policy. See Scharpf 1997 (n 34).

³⁸ See (n 34).

³⁹ C. Lord and P. Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU' (2004) 42(1) *Journal of Common Market Studies* 183-202.

indirect (derived from the legitimacy of the Member States); parliamentary (dual legitimation by a Council of governments and a directly elected Parliament); technocratic (derived through the ability of supranational institutions to offer ‘Pareto-improving’ solutions); and procedural (legitimation by observing principles such as transparency, balance of interests, proportionality, legal certainty and consultation of stakeholders).⁴⁰ In this issue Stack uses this scheme as a legitimacy lens, and for good reason. The vectors as described by Lord and Magnette are tailored to the EU-situation and well suited to understanding elements and issues of the legitimacy of EU legislation.

But even though the vector-scheme is useful for appraising the legitimacy of EU legislation in a qualitative way, it is much more difficult to quantify the legitimacy rate of it. One cannot simply put a number or percentage on legitimacy saying that the procedural legitimacy of a delegated or implementing act is 72%. Political legitimacy is a matter of degree.⁴¹ The vector-scheme, however, does make it possible to see how the different vectors are intertwined, how they correlate, and how – based on this – one can estimate and rate the legitimacy of an act or sorts of acts.

3. Legitimacy review of the post-Lisbon regime on delegated acts and implementing acts

Georgiev has recently put the legitimacy of delegated acts and implementing acts under the Lisbon-regime to the test using the notion of vectors of legitimacy as a framework for analysis.⁴²

As regards the preparation, adoption and implementation of delegated acts he concludes that although the regulation of delegated acts in article 290 TFEU does resemble existing political controls of the legislators in Western democracies over the adoption of delegated acts by the executive, it is in fact quite different. In contrast to some Member State countries, the TFEU-regime on delegated acts, for example, does not provide for an ex ante control mechanism where the approval of the legislature is a condition *sine qua non*.⁴³ Georgiev – like Van Gestel in this issue – argues that delegated acts draw heavily on the indirect and parliamentary vectors of legitimacy although the basis is quite weak.⁴⁴ And indeed, from the vantage point of classic democratic theory, which is based on the notion of the people’s right to self-determination, the legitimacy of EU legislation rates quite poorly. In the first place, this is due to the fact that the decision-making processes

⁴⁰ Ibid. 185-188.

⁴¹ Andrei M. Muntean, ‘The European Parliament’s Political Legitimacy and the Commission’s “Misleading Management”: Towards a “Parliamentarian” European Union?’ (2014) 4(5) *European Integration online Papers (EIoP)*, <<http://eiop.or.at/eiop/texte/2000-005a.htm>> (Last consulted 15 January 2014).

⁴² See Georgiev (n 16).

⁴³ For instance the UK in the form of an affirmative resolution procedure, or – in some cases – in the Netherlands with the preliminary scrutiny procedure for delegated acts (‘voorhangprocedure’).

⁴⁴ See Georgiev (n 16), 545.

in the EU resemble largely those of an international organisation, based on the principle of the equality of states rather than on the equality of citizens – the latter being a core element of democratic legitimacy.⁴⁵ ⁴⁶ The will of the people in the present EU is predominantly represented by and exercised through the Member States, rather than by the European Parliament. Having said that, chances are that needs and values of the public will remain unvoiced and therefore be unknown to the principal decision-makers.⁴⁷ The European Parliament would – according to the German Constitutional Court in its Lisbon-judgment of 2009 – only then be properly ‘democratic’ if parliamentary elections were held on the basis of continent-wide equality in accordance with the principle of ‘one-man-one-vote.’⁴⁸ This means that, as Van Gestel argues in his contribution, the democratic underpinnings of EU secondary legislation are weak since the conditional transfer of democratic legitimacy from the EU legislator – Council and Parliament working under article 294 TFEU – to delegated rule-makers and administrators for that matter to advance legislative goals does not function in the same way as in the parliamentary systems of the Member States – not to mention the fact that powers delegated are at the same time limited, thus constraining rule-makers’ actions in seeking to attain those goals. First of all, the European Parliament (EP) differs – as we have seen – from national parliaments when it comes down to its democratic mandate. Secondly, as Van Gestel notes,⁴⁹ the EP serves different roles than national parliaments. Thirdly, the EP does not have the same resources in terms of time and expertise to effectively scrutinize every form of delegated rule-making. And – on a fourth note – since neither the EP nor the Member States have a formalised direct part nor say in the elaboration of delegated acts under the post-Lisbon regime of article 290 TFEU the indirect legitimacy is weak as well. The chances of delegated acts to benefit from technocratic legitimacy are better, Georgiev concludes, due to the expertise and administrative resources the Commission can, presumably, pool and muster for the drafting of delegated acts. Another aspect in this respect, as Georgiev points out, is the effectiveness of the procedure to adopt delegated acts: it is hardly constrained by any additional procedure apart from the right of tacit approval which, however, can only slow

⁴⁵ C. Lord and D. Beetham, ‘Legitimizing the EU: Is there a ‘Post-parliamentary Basis’ for its Legitimation?’ (2011) 39(3) *Journal of Common Market Studies* 443-462.

⁴⁶ In its *Lisbon-judgment* the German Constitutional Court held that in a *Staatenverbund* (i.e. transnational organisation/confederacy), which the EU currently presents, the principle of equality of states and the principle of political equality of citizens are nearly impossible to reconcile. Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html> (Last visited on 20 January 2014).

⁴⁷ See Lord and Beetham (n 45) 454.

⁴⁸ This would however require both Treaty-changes as well as amendments to the German constitution and most national constitutions of the Member States for that matter. Lisbon-judgement paragraphs 279 and 282.

⁴⁹ In his contribution to this special issue and R. van Gestel, ‘The ‘Deparliamentarisation’ of Legislation: Framework Laws and the Primacy of the Legislature’ (2013) 9(2) *Utrecht Law Review* 106-122.

down the process by two months.⁵⁰ This is a point worth mentioning. The use of the rights of objection and/or revocation is very difficult indeed because of the big majorities needed in both institutions. It is very much the ‘nuclear option’.⁵¹ The procedural legitimacy of delegated acts under article 290 TFEU is problematic as well owing to the lack of institutionalisation of the consultation process and unclear rules regarding the involvement of third-party representatives of various stakeholders, as well as the EP.

Where the vectors of legitimacy do not have a strong pull in store for delegated acts, implementing acts under the new post-Lisbon comitology procedure, article 291 TFEU, underperform even more on the legitimacy scales. First of all, the would-be-indirect legitimacy drawn from the presence of Member States representatives and experts in the various 270 committees controlling the adoption of implementing acts is very low. Comitology committees, especially if they are operating under the advisory procedure, are not in the driver’s seat. The Commission is the dominant actor, chairing the meeting, mediating between the representatives of Member States, and scheduling the vote. The same holds for the committees operating under the examination procedure and notwithstanding the option of recourse to the Appeal Committee. On top of that, the domestic superiors of experts sitting on comitology committees are in most cases relatively poorly informed and do not tend to discuss the input in comitology, as Brandsma has shown.⁵² This of course presents an accountability problem and erosion of legitimacy in its wake.

As for the parliamentary vector in the elaboration of implementing acts, it is nearly non-existent owing to the lack of participation of the EP and the weak position of the Council for that matter. Georgiev does not value the technocratic legitimacy of implementing acts highly either. Drawing on different studies, he notes that the actual yield of Pareto improvements as a result of comitology is quite low.⁵³ And to finally top it off: the procedural legitimacy of comitology suffers the same shortcomings as the procedure leading up to delegated acts. In Georgiev words a ‘worrying’ picture is revealed by the practice under the new institutional setting of the post-Lisbon implementing powers. His bottom line is that ‘the new comitology regime in particular is contributing to, rather than helping to reduce, the democratic deficit of the EU’.⁵⁴

⁵⁰ See Georgiev (n 16), 545.

⁵¹ In the words of David O’Leary. See <<http://www.eu-academy.eu/freeresources/eu-regulatory-affairs-implementing-delegated-acts/>>

⁵² See Brandsma (n 14), 193.

⁵³ Pareto efficiency of the Pareto optimality is a state of allocation of [resources](#) in which it is impossible to make any one individual better off without making at least one individual worse off. Pareto improvement here refers to a balance in which – in this case – every Member State is better off without it coming to the expense of one or a few other Member States. Georgiev (n 16) 546.

⁵⁴ Ibid. 547.

C. THE DEVELOPING PRACTICE

If the legitimacy rate is so low why then does the EU legislator continue to confer powers upon the Commission? There are different reasons. First of all, principles – including the EU legislator – resort to the delegation of legislative powers because they want to reduce workload, save time and take advantage of the expertise and flexibility of other agents (typically that of a non-majoritarian agency, like the administration),⁵⁵ and resolve commitment problems of the legislator by implementing the norms set forth in the basic legislation. Delegation to an agent may also be grounded on the fact that a professional administration is the more suitable actor in terms of expertise and (geographical) location to make better informed, tailor-made and less politicized decisions and policies thus adding to the effectiveness of the legislation. And finally, by delegating to an agent, the principal (the legislator in our case) can avoid taking blame for unpopular policies.⁵⁶ On the other hand delegation implies a possible loss of control of the principal legislator and the recipient of the delegated power may abuse it for its own ends.⁵⁷

In order to accommodate the necessity of delegation on the one hand but control its exercise on the other different approaches have been adopted in the EU. The *Meroni*-doctrine of non-delegation - named after the 1958 *Meroni*-judgements of the Court of Justice - considered the conferral of broad discretionary powers on a body other than the EC Commission to be a violation of the Treaty, for this would frustrate the institutional balance of power under the EC Treaty.⁵⁸ This did not mean that the Treaty resisted delegation as such but that it must be restricted to technical details (no broad discretionary powers), being very precisely limited and being subject to the same rules as those prescribed in the treaties in relation to the exercise of these powers by the delegating institutions themselves.⁵⁹ The Court justified this restrictive position by stressing that the balance of power between European institutions is "a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies".⁶⁰ The gist of this doctrine still holds today where most of the framework for the delegation of legislative power and conferral

⁵⁵ Governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials. M. Thatcher and A. Stone Sweet, 'Theory and Practice of Delegation to Non-majoritarian Institutions' (2002) 25(1) *West European Politics* 1-22.

⁵⁶ Thatcher & Stone Sweet (n 55).

⁵⁷ F. Franchino, 'Delegating Powers in the European Community' (2004) 34(2) *British Journal of Political Science*, 269-293. The EU system of delegated and implementing acts is important for a number of reasons, three of which (speed, efficiency/flexibility and control) are highlighted in M. Szapiro, and M. Kaeding, 'Commission's executive powers to adopt non-legislative acts', in M. Szapiro (ed.), *The European Commission: A Practical Guide. What Is It, What It Does, and How It Does It* (John Harper, London 2013) 217.

⁵⁸ CJ EC 13 June 1958 C-9/56 [1958] ECR 133 (*Meroni I*).

⁵⁹ CJ EC 13 June 1958 C-10/56 [1958] ECR 157 (*Meroni II*).

⁶⁰ *Meroni II*-case (n 59), 173.

of implementing powers is enshrined in the articles 290 and 291 TFEU, Regulation 182/2011 ("the Comitology Regulation") and the Common Understanding on delegated acts from April 2011.

If we look at the present-day use of delegated acts and implementing acts in the EU⁶¹ we do not see a lot of evidence of a restrictive practice. Estimates on the pre-Lisbon proportion of delegated and implementing acts vis-à-vis the basic legislation range from up to some 90% of non-legislative acts from the total legislative output⁶² to 77,2% between 1970 and 2006 and 74,1% in 2008.⁶³ Our analysis of the post-Lisbon period 2010-2013 basing itself on the number of adopted legislative and non-legislative acts shows a proportion of 95% for delegated and implementing acts/measures (figure 1).⁶⁴

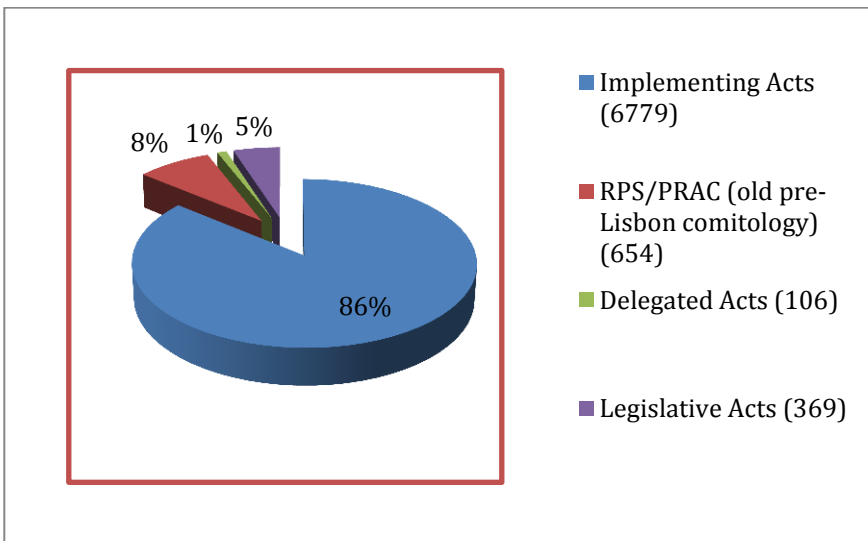


Figure 1 Delegated and implementing acts/measures during 7th legislative term (2010-2013)

⁶¹ See Hardacre and Kaeding (n 21).

⁶² M. Szapiro, 'Comitology: The Ongoing Reform', in H.C.H. Hofmann & A.H. Türk (eds.), *Legal Challenges in EU Administrative Law* (Edward Elgar, 2009) 89–15.

⁶³ A. Héritier, C. Moury, C. Bisschoff and F. Bergström, *Changing Rules of Delegation* (Oxford University Press, Oxford 2013) 2. As cited by Van Gestel (n 49).

⁶⁴ We conducted a Eurlex search taking advantage of article 290 and article 291 TFEU which require an indication of the type of act as well as an indication of the adopting institutions in the title of the act. Titles also refer to the type of act (amending or not). We looked for legislation (directive, regulation), then refined it by institution (Commission, Council and Parliament or simply Commission), then refined it by sort of directive (amending or not). We used the publication date of the OJEU.

Data for the seventh legislature illustrate that a large proportion of EU secondary legislation is composed of implementing and delegated acts (95%), while legislative acts (regulations and directives adopted by both legislators under article 294 TFEU) represent a meagre 5% of the total. The proportion of acts adopted by the Commission under comitology traditionally has been very high. Obviously the new Lisbon arrangement, and the new possibilities it offers, has of yet not really tipped the scales in favour of basic acts or delegated acts. The numbers, volume and proportion of Commission enacted implementing acts seem to indicate that the old pre-Lisbon comitology moved to a more or less similar practice under Article 291 TFEU. The 2009 Lisbon innovations do not seem to have changed very much in this respect.

The only more or less distinct pattern is that of a slight – not very surprising – drop in the number of implementing acts in 2009 (adoption of the Lisbon Treaty) and an increase from 2010 to 2013. There may be different explanations for this apparent increase over the last couple of years. The first one is the *acquis* ‘Lisbonisation’. After the entry into force of the Lisbon Treaty on 1st December 2009 pre-Lisbon basic acts needed to be aligned according to the new treaty regime of articles 290 and 291 TFEU, including the new Comitology Regulation (182/2011). As for implementing acts article 13 of this latter regulation provided for two regimes: an “automatic alignment” aligning the old pre-Lisbon procedures (advisory, management, regulatory) to the new rules⁶⁵ with the entry into force of the new Comitology Regulation (1st March 2011) and an 18-month transitory regime for common commercial policy files. As for delegated acts the Commission has committed itself to three things: Firstly, to assess how basic acts not adapted to the regulatory procedure with scrutiny (PRAC/RPS)⁶⁶ before Lisbon⁶⁷ need to be adapted to the new regime of delegated acts and to make the appropriate proposals as soon as possible. This concerned 150 acts. Secondly, to review the provisions attached to PRAC/RPS in each instrument the Commission proposes to modify, in order to adapt them to the Lisbon Treaty on a case by case basis. Thirdly, to assess this process by the end of 2012 in order to prepare the appropriate legislative initiatives to complete the adaptation by the end of the 7th term of the EP (June 2014), so that all PRAC/RPS provisions are removed from all legislative acts. This concerns 300 acts.

⁶⁵ See Hardacre and Kaeding, (n 21), 9.

⁶⁶ 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 Council Decision 2006/512/EC of 17 July 2006, OJ L 200 and Regulation (EC) 1137/2008 of the European Parliament and of the Council of 22 October 2008, OJ L 311 and Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009, OJ L 87.

⁶⁷ See Kaeding and Hardacre (n 12).

This process is well under way⁶⁸ and of course has an impact on the statute books. Legislative ‘traffic’ is also caused by the ongoing simplification process and the transformation of directives into regulations.⁶⁹ Since the TFEU has a uniform regime for legislative and non-legislative acts it is now up to the institutions to decide whether an act will be a directive or a regulation. Directives with detailed provisions that have already resulted in a harmonized regime can be turned into regulations. This seems to have caused the overall volume of directives to drop.

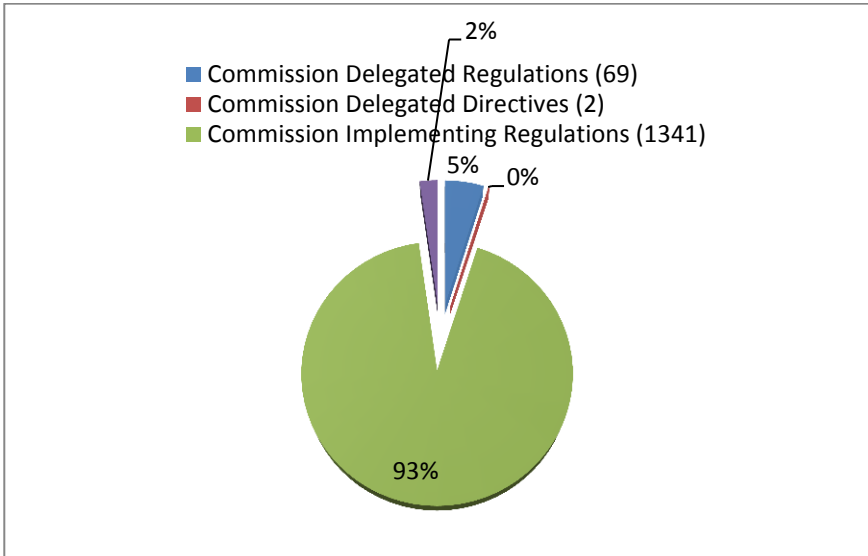


Figure 2 Proportion of delegated and implementing acts during 7th legislative term (2010-2013)

Figure 4 (in annex 1) illustrates the evolution of regulations and directives (legislative and non-legislative) during the 7th legislative term of the EP (2010-2013). The data show a clear trend over the last couple of years towards more regulations at the expense of directives. At the same time, and even more striking perhaps, is the proportion of implementing regulations (figure 2). 93% of all EU non-legislative acts are implementing regulations.⁷⁰ But this seems to be a recent

⁶⁸ See the three omnibus proposals aligning PRAC/RPS provisions to the Lisbon Treaty: Omnibus I 2013/0220, Omnibus II 2013/0218, Omnibus III 2013/0365.

⁶⁹ See the Simplification plan under the REFIT programme (part of the SMART-regulation initiative) of the Commission. <http://ec.europa.eu/smart-regulation/refit/simplification/index_en.htm> (Last visited 30 January 2014).

⁷⁰ The online statistics website of Eurlex yields more or less the same result over the 2009-2013 period, with a peak of implementing regulations in 2010.

trend. Figure 3 displays that the sharp increase in implementing regulations is a phenomenon of the 7th legislative term.

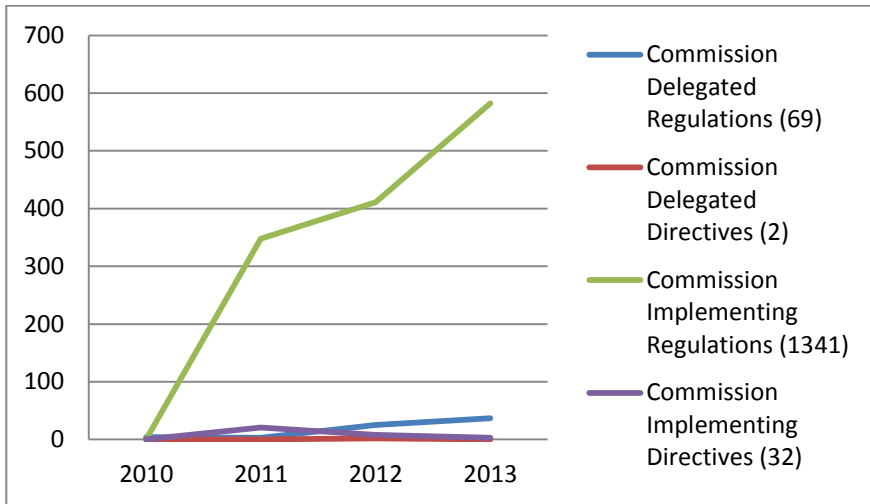


Figure 3 The 2010-2013 increase of Implementing Regulations

The surge of the implementing regulations over the last four years – see figure 3 and figure 5 (annex 1) – remains a bit of a mystery. In part it could reflect ‘business as usual’. In the pre-Lisbon era the proportion of implementing measures that were not subject to the RPS-procedure already overtook the RPS-implementing measures nearly by a factor of 10. The surge may well be spurred on by the preference of the Council for implementing acts over delegated acts – as Christiansen and Dobbels observe as well.⁷¹ Maybe it is just easier to update implementing acts than to align delegated acts, or maybe it is the effect of the unscrambling of old implementing measures or backlogs in alignments. A last explanation might be that we are not as much looking at an increase of the level of implementing regulations but at a catch-up operation after a lapse of the numbers in 2009. We cannot tell for sure on the basis of the data we have available and the research we did.

The Commission is currently working hard to step up the pace of the alignment of delegated acts. In the second half of 2013 it proposed three so-called ‘omnibus packages’;⁷² two of them suggesting to align *en bloc* 165 RPS/PRAC instruments to the new article 290 delegated act regime. Although this will not

⁷¹ See Christiansen and Dobbels (n 26), 16-17.

⁷² COM(2013) 451 final and COM(2013) 452 final of 27 June 2013.

upset the disproportionate balance between implementing and delegated acts dramatically, it will most probably bring down the proportion of the implementing acts in the coming years – once the *acquis* is fully ‘lisbonised’.

This effect, however, will not be permanent. Alignments are one-off operations. A huge proportion of EU secondary legislation will continue to consist of implementing acts. Several reasons may explain this situation. First of all – as Christiansen and Dobbels have observed – the Council seems eager to limit the scope and use of delegated acts – because individual Member States have more influence and control over implementing acts – in comitology committees.⁷³ Especially during the first years after the entry into force of the Lisbon Treaty, Member States were very successful in that attempt because during the negotiations (informal trialogues) the European Parliament dropped often its insistence on delegation of powers under article 290 TFEU in return for amendments on the substance of regulations.⁷⁴ The fact that the EP has experienced difficulties in exercising effectively its newly gained powers and influence over delegated acts due to difficulties in timing, expertise and lack of political interest furthermore adds to a preference for implementing acts over delegated acts.⁷⁵ In addition, and contrary to prior expectations,⁷⁶ EP and Council have not used their legislative vetoes. Expecting an increased number of objections to delegated acts from the legislator, only recently Council objected to the very first delegated act (Galileo file) in December 2013. It was expected that the Parliament would be the legislator to make the most use of its right of objection, but it has not so far. This is also reflected in the way both legislators have used their veto powers under the RPS/PRAC procedure (i.e. Regulatory Procedure with Scrutiny – abbreviated RPS and PRAC in French), introduced in 2006. Experience with the RPS/PRAC procedure confirms that both legislators did not abuse their veto power or frustrate the smooth implementation of legislation. Again, the first use of the RPS/PRAC veto came not from the Parliament but from the Council. ‘In July 2008, the Council objected to six draft measures that had previously been adopted by the comitology committee’.⁷⁷ In the meantime, until December 2013, Council vetoed eleven RSP/PRAC instruments, whereas the EP objected six RPS/PRAC measures.

Another reason touches upon the sometimes difficult delineation between the scope of delegated and implementing acts.⁷⁸ According to its original meaning implementing acts were intended purely to execute the basic legislative act in cases where uniform conditions for the implementation were deemed necessary. But ever since the entry into force of the Lisbon Treaty the use of implementing

⁷³ See Christiansen and Dobbels, (n 26), 16-17.

⁷⁴ *Ibid.* 16-17.

⁷⁵ *Ibid.* 18-19.

⁷⁶ M. Kaeding and A. Hardacre, ‘The Execution of Delegated Powers after Lisbon. A Timely Analysis of the Regulatory Procedure with Scrutiny and its Lessons for Delegated Acts’ (2010) 85 *EU Working Paper*, RCAS.

⁷⁷ See Kaeding and Hardacre (n 12) 390.

⁷⁸ W. Voermans, ‘Delegation Is a Matter of Confidence’ (2011) 17(2) *European Public Law* 313–330.

measures of general application has surged. The present interpretation of article 291 TFEU is that, in essence, it can cover all those acts which are not "delegated acts". It is worth noting that implementing acts are, unlike delegated acts, not limited to non-essential elements of the basic legislative act. It follows from the foregoing that the distinction between delegated acts of article 290 TFEU and the implementing acts of article 291 TFEU is not clear cut.⁷⁹ It can rather be characterized as a 'grey area'.

In a recent opinion the European Economic and Social Committee on the aforementioned proposals for the en bloc alignment of 165 legislative instruments⁸⁰ criticised the unclear distinction between delegated acts and implementing acts. Especially the notion of 'non-essential elements', in article 290 TFEU, remains vague. In a 2012 judgment the Court of Justice recognised that 'fundamental rights' of individuals are to be considered essential elements in a piece of Union legislation, and therefore the prerogative of the legislator. Hence, it can never be covered by a delegation to the Commission.⁸¹ Although this gives a first indication of what the Court considers as essential elements, a detailed definition is still wanting and the demarcation between articles 290 and 291 TFEU is still left open. This too – on a more technical note – adds to the preference of implementing acts over delegated acts. Arguably, the 2012 judgment may also cover implementing acts which, however, cannot be taken for granted since the 2012 judgment concerned a pre-Lisbon implementing RSP/PRAC measure).⁸² But even if this were the case the text of article 291 TFEU does not seem to limit implementing powers to non-essential elements of a legislative complex.

This development may be reversed if the Court details its doctrine on 'non-essential elements'. There is a good chance that this will happen in the foreseeable future now that, as mentioned before, two actions have been brought before the Court in 2012 (by the Commission)⁸³ and 2013 (by the European Parliament).⁸⁴ Both these cases pertain to the demarcation of delegated acts under

⁷⁹ See P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36(5) *European Law Review* 671-687; See Voermans, (n 23), 170.

⁸⁰ INT/719-720 Adapting RPS acts to article 290 TFEU.

⁸¹ CJ EU 5 September 2012, C-355/10, *European Parliament v Council of the European Union*, on the surveillance of the Union's external maritime borders and on the powers of border guards to disembark immigrants in the third country from which the boarded ship had originated.

⁸² The judgment of 2012 C-355/10 the Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code and was adopted by the Council – under the post-Lisbon transitory regime – in the course of the regulatory procedure with scrutiny governed by Article 5a (4) of the second "comitology" Decision (Council Decision 1999/468/EC as amended by Council Decision 2006/512/EC).

⁸³ Application C-427/12 of 26 October 2012.

⁸⁴ Application C-65/13 of 22 March 2013 *Parliament v Commission* seeking to annul Commission Implementing Decision [2012/733/EU] of 26 November 2013 implementing Regulation (EU) No 492/2011 on the basis that article 38 only confers implementing powers to the Commission, which precludes the adoption of acts of general application which supplement certain non-essential elements of the legislative act – as the implementing decision of 2012 does.

Article 290 TFEU and implementing acts under article 291 TFEU. The Court has already signalled that the interpretation of what counts as ‘non-essential elements’ is not merely a question of free interpretation and policy of the legislative institutions. In the eyes of the Court it is a question of “ascertaining which elements of a matter must be categorised as essential is not for (...) the assessment of the [EU] legislature alone, but must be based on objective factors amenable to judicial review.”⁸⁵ Very recently - 18 March 2014 - the Court ruled on the 2012 case lodged by the Commission.⁸⁶ In this case of the *Commission v Parliament and Council* the Commission sought to annul Article 80(1) of Regulation (EU) No 528/2012 insofar as it provided for the adoption of measures establishing the fees payable to the European Chemicals Agency (ECHA) by an *implementing* act under Article 291 TFEU and not by a *delegated* act in accordance with Article 290 TFEU. The Commission felt that essential elements of the whole legal framework were regulated in an implementing act and that this would undermine and contravene the requirements article 290 TFEU sets. The Court takes a very institutional approach to the case, although a bit less aloof than that of the position Advocate General Cruz Villalón takes in his opinion of 19 December 2013. Cruz Villalón’s opinion basically held that it is not up to the Court to decide on the reserve of delegated acts or implementing acts, but that this is rather a question for the legislator to decide. The Court takes a slightly different view holding that the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. Consequently, judicial review in this case must be limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 needs only the addition of further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.⁸⁷ The outcome of the review of the Court is that in this case the EU legislature could reasonably take the view that Article 80(1) of Regulation No 528/2012 confers on the Commission the power, not to supplement certain non-essential elements of that legislative act, but to provide further detail in relation to the normative content of that act, in accordance with Article 291(2) TFEU.⁸⁸ And, hence no contravention of article 290 TFEU. From this we can conclude that although the Court of Justice takes a deferential approach to the question whether essential elements are in play or not, it does not totally leave this question up to the legislation bodies themselves.

⁸⁵ CJ EU 5 September 2012, C-355/10, para. 67.

⁸⁶ CJ EU 18 March 2014, C-427/12.

⁸⁷ Para. 40.

⁸⁸ Para. 52.

D. CONCLUSIONS – STILL A LONG WAY TO GO...

In one of his latest follow-up reports on delegated and implementing powers⁸⁹ Legal Affairs Committee rapporteur József Szájer noted that Parliament up until the middle of 2013 had received a mere 69 delegated acts since 2010 and neither co-legislator had objected to a delegated act. The high hopes, he stated, that had been attached to the reports of his committee on the delegation of legislative power and the Implementing Acts Regulation (182/2011) had as of then not materialised in the way originally foreseen. These instruments – according to Szájer – were designed to further improve the control exercised by the co-legislators of EU secondary legislation, thereby reinforcing the democratic legitimacy of these acts. They also aimed at enhancing effectiveness and further simplifying legislation at European level. That this has not been realized in the past years has, in Szájer's view, to do with the unclear delineation of delegated and implementing acts, and the absence of clear-cut criteria for the correct and most appropriate choice of provisions to be included in the basic act. The report therefore argues for clearer criteria – be it non-binding – for the application of articles 290 and 291 TFEU. In sum, these suggested criteria (see annex II) limit the scope of implementing acts and extend the scope of delegated acts in order to bring back the important and politically substantial elements of a legislative complex under the control of the original legislator (Council and Parliament). From this the democratic legitimacy of secondary legitimacy would benefit.

1. The European Parliament is catching up

Recent changes to the EP's internal rules of procedure, however, show that the EP is catching up. Two of them are worth mentioning: Firstly, in case the choice between delegated or implementing acts poses a problem in the negotiations with the other institutions, it is possible for the committee responsible in the EP to request the opinion of the Committee on Legal Affairs (JURI) – the so-called 'Rule 37a procedure'. This rule also provides for the possibility for JURI to take up questions, on its own initiatives, concerning the delegation of legislative powers. Secondly, for delegated acts Parliament may declare prior to the expiry of the deadline that it has no objections to the delegated act. This so-called 'early non-objection' follows a series of fine-tuned procedural steps. In case of final approval in full plenary any subsequent proposal objecting to the delegated act would be inadmissible. Until December 2013 the EP approved five early non-objections successfully.

⁸⁹ Report of 4 December 2013 on the follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI)).

2. Drift towards using implementing acts

On the other hand there seems to be an unmistakable drift – as the data show – towards using implementing acts rather than delegated acts. This drift is caused by a combination of lack of a clear-cut criteria for the choice between delegation of legislative power and the conferral of implementing powers, the still under-developed doctrine of what constitutes non-essential elements, the long standing tradition of comitology, the lack of interest for delegated legislation in Parliament, and the preference of the Council for comitology rather than delegation pursuant to Article 290 TFEU due to the lacking of institutionalized consultations.

One may ask oneself whether this is something to worry about from the viewpoint of legitimacy of EU secondary legislation. The record for the legitimacy of delegated acts is quite poor. On the other hand the legitimacy of implementing acts is even worse – especially since the lack of input and parliamentary legitimacy of implementing acts does not seem to be compensated by elements of technocratic or procedural legitimacy.

3. EU law-making – too technical?

As suggested in the very beginning of our contribution, for compliance with EU legislation to become a likely matter, a positive public perception of its legitimacy is of vital importance. What kind of decisions are taken and how they come into being at the EU level, should reflect that public interest is really taken into account at least to an extent that safeguards informed decision(-making), and gives the impression to the public that procedures are fair and the results they deliver acceptable.

The EU, however, tends to have the image of a “bureaucratic beast”,⁹⁰ being quite distant from the reality of peoples’ lives. As two thirds of its perceived key actors, the Commission and the Council are not directly-elected institutions, the EP’s role as co-legislator, scrutinizing and controlling the delegation of executive powers to the Commission is a very relevant one. The EU legislative decision-making process is characterized as being strongly bureaucratic adding to the impression that the EU is an ‘executive’ matter which seems to be further confirmed through the great reliance on administrative rule-making putting the Commission in a strong position and contributing to an increase of regulatory agencies assisting in the elaboration of EU secondary legislation.

⁹⁰ A. A. Ellinas and E. Suleiman, *The European Commission and Bureaucratic Autonomy: Europe’s Custodians*, (Cambridge University Press, New York 2012).

4. The delegation of rule-making powers has become a typical feature of many modern legal systems

The outsourcing of parts of the decision-making process - for sound reasons that were mentioned before - is not so much the problem, however. The delegation of rule-making powers has become a typical feature of many modern legal systems and can add to the effectiveness of legislation. But it needs to be ensured that the discretionary freedom that comes with it and is vested into the hands of administrative actors without direct democratic mandate is used for achieving the objectives commonly agreed upon by the Member States which, at best, meet public needs and values.

Against this background, efforts to boost the legitimacy of EU secondary legislation through the 'Lisbon innovations' introduced by the articles 290 and 291 on delegated and implementing acts are therefore a welcome initiative, although there is a long way to go in practice. Due to the interrelationship between EU and national levels as well as their efforts to boost the legitimacy of EU secondary legislation are, in fact, not confined to the EU level but also pursued at the national level. After all, according to the basic principle of democracy, decision-making processes and political decisions to be made, should be established at the same level within a political system,⁹¹ hence as close as possible to those that are affected by them. Ironically – in the light of the legitimacy problems of EU secondary legislation just discussed, it is exactly through this legislation, and to be more precise European directives, that efforts in this direction have been underway for quite some time already. Despite being a typical top-down, hard law instrument prescribing a fixed objective, directives provide Member States with discretionary freedom that can be used to involve national stakeholders when deciding upon the most suitable implementation forms and methods to make EU rules best fit in within national legal frameworks. This can in turn contribute to shaping understanding and support for EU measures amongst national constituencies. In this fashion, discretionary freedom may, thus, even add to the legitimacy of EU secondary legislation at the national level.

The tendency to transform European directives into directly binding regulations however shows that the EU legislator started to sacrifice this idea for the sake of achieving its ultimate goal, uniformity in laws of its Member States. But there are always two sides to a coin. Considering legitimacy again from an input and output side, the already mentioned trade-off between the two seems to kick in here. For it cannot be ignored that the transformation of directives into regulations has the potential to increase the effectiveness of EU secondary legislation and therefore the output dimension of its legitimacy. The diversity in member states' implementation performances, even if discretionary freedom offers the possibility for public involvement and input legitimacy to be

⁹¹ J. Thomassen and H. Schmitt, 'Democracy and Legitimacy in the European Union' (2004) 45(2) *Tidsskrift for samfunnsforskning* 377-410.

strengthened, appears to be difficult to reconcile with the overall objective of fully aligning national legislation with EU law.

5. Strengthening the legitimacy of EU secondary legislation early on in the decision-making process is of crucial importance

This does not however, alter the fact that to strengthen the legitimacy of EU secondary legislation early on in the decision-making process as intended through the control and review mechanisms of the new legal frameworks, articles 290 and 291 TFEU, is of crucial importance. And yet, as our sketch of their initial effects show, it is at least open to question if not doubtful whether these new mechanisms will turn out to be beneficial for legitimacy of EU law, rendering its need and arguably its benefit more comprehensible and transparent for the public. On the other hand we should not jump to conclusions. The recent steps taken by the EP, showing that it is committed to take up the role envisaged under the procedure of Article 290 TFEU, may in the end result in the Lisbon changes to bear fruit.

Be that as it may, legitimacy issues related to EU law, and post-Lisbon EU secondary legislation in particular, continue to spark off critical debates. And as this special issue tellingly demonstrates, there are reasons enough to put them under the spotlight.

ANNEX I DEVELOPMENT 2009-2013⁹²

Figure 4 Number of directives 2009-2013

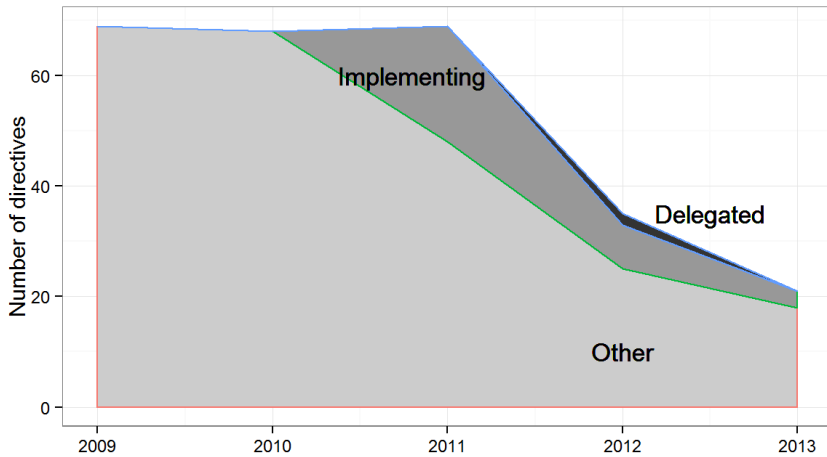
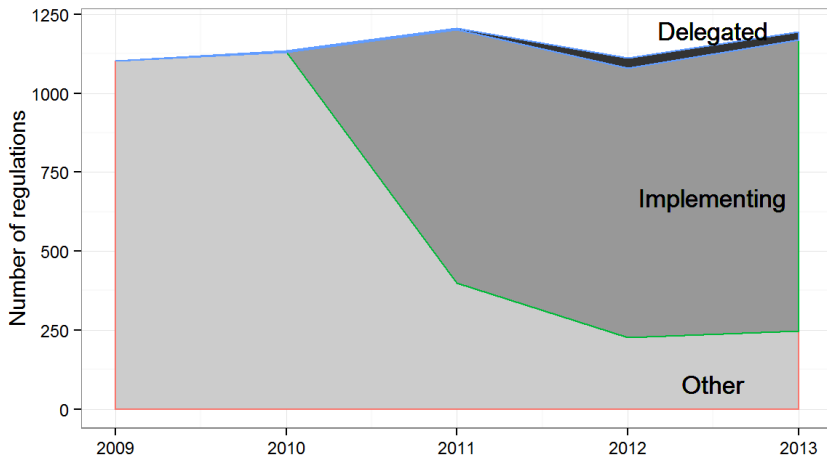


Figure 5 Number of regulations 2009-2013

⁹² The figures 4 and 5 were authored by Dimitar Toshkov, assistant professor at the Institute of Public Administration at Leiden University. More data on the proportion and growth of Commission acts over the last 55 years can be found on his website <<http://www.dimitar.eu/Eurlex.html>>



ANNEX 2 CRITERIA FOR THE APPLICATION OF ARTICLES 290 AND 291 TFEU

(Taken from the Report of 4 December 2013 on the follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI))

- The binding or non-binding character of a measure must be decided on the basis of its nature and content; only the power to adopt legally binding measures may be delegated under Article 290 TFEU.
- The Commission may only amend legislative acts by means of delegated acts. This includes amendment of annexes, as annexes are an integral part of the legislative act.
- Measures leading to a choice of priorities, objectives or expected results should be adopted by means of delegated acts, if the legislator decides not to include them in the legislative act itself.
- Measures designed to lay down (further) conditions, criteria or requirements to be met – the fulfilment of which must be ensured by the Member States or other persons or entities directly concerned by the legislation – will, by definition, alter the content of the legislation and add new rules of general application. Consequently, the creation of such further rules or criteria may be accomplished only by means of a delegated act. By contrast, the implementation of the rules or

criteria already established in the basic act (or in a future delegated act), without modifying the substance of the rights or obligations stemming from them and without making further policy choices, can take place through implementing acts.

- Under certain circumstances the Commission is empowered to adopt additional binding rules of general scope that affect in substance the rights or obligations laid down in the basic act. Those measures will, by definition, supplement those laid down in the basic act, further defining the Union policy. This can be achieved only by means of a delegated act.

- Depending on the structure of the financial programme in question, non-essential elements amending or supplementing the basic act, such as those concerning specific technical matters, strategic interests, objectives, expected results, etc. could be adopted by delegated acts to the extent that they are not included in the basic act. Only for elements that do not reflect any further political or policy orientation the legislator may decide to allow for their adoption through implementing acts.

- A measure that determines the type of information to be provided under the basic act (i.e. the exact content of the information) generally supplements the obligation to provide information and should be carried out by means of a delegated act.

- A measure determining arrangements for the provision of information (i.e. the format) does not generally add to the obligation to provide information. Instead, such a measure enables uniform implementation. This should therefore be carried out, as a general rule, by means of an implementing act.

- Measures establishing a procedure (i.e. a way of performing or giving effect to something) can be laid down either in a delegated or in an implementing act (or even be an essential element of the basic act), depending on their content, context and the nature of the provisions set out in the basic act. Measures establishing elements of procedures involving further non-essential policy choices in order to supplement the legislative framework laid down in the basic act should in general be laid down in delegated acts. Measures establishing details of procedures in order to ensure uniform conditions for the implementation of an obligation laid down in the basic act should in general be implementing measures.

- As with procedures, an empowerment to determine methods (i.e. ways of doing something in particular in a regular and systematic way) or methodology (i.e. rules to determine the methods) can provide for delegated or implementing acts depending on the content and the context.

- In general, delegated acts should be used where the basic act leaves a considerable margin of discretion to the Commission to supplement the legislative framework laid down in the basic act.

- Authorisations can be measures of general application. This is for instance the case where decisions concern the authorisation or prohibition of the inclusion of a specific substance in food, cosmetics etc. Those decisions are general because they concern any operator willing to use such substance. In such cases, if the Commission decision is fully based on criteria contained in the basic act, it could

be an implementing act; where, however, the criteria still allow the Commission to make further non-essential/secondary political or policy choices such authorisation should be a delegated act, because it would supplement the basic act.

- A legislative act may only delegate to the Commission the power to adopt non-legislative acts of general application. Measures of individual application may not, therefore, be adopted by means of delegated acts. An act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons generally and in the abstract.

- Implementing acts should not add any further political orientation and the powers given to the Commission should not leave any significant margin of discretion.