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ARTICLE

# Assessing the Post-Lisbon European Union's System of Delegated Powers at Fifteen

Herwig C.H. Hofmann[1], Florin Coman-Kund[2] and Zamira Xhaferri[3]

[1]Department of Law, University of Luxembourg, Luxembourg, [2]Erasmus School of Law, Erasmus University Rotterdam, Rotterdam, The Netherlands and [3]Faculty of Humanities, University of Amsterdam, Amsterdam, The Netherlands

***Corresponding author:** Florin Coman-Kund; Email: comankund@law.eur.nl

## Abstract

The aim of this article and the ensuing Special Issue is to assess, *après* fifteen years, the effects on the EU legal and political system of the overhaul of executive delegated powers inaugurated by the Lisbon Treaty. It identifies core parameters – i.e. (institutional) balance of powers, (democratic) legitimacy, control and accountability, effectiveness of EU policy implementation – considered by the contributions to this Special Issue to map and examine, both constitutionally and normatively, the EU system of delegated powers in law and practice. It also puts forward seven overarching reflections revealing some of the core issues and challenges posed by the current stage of development of the post-Lisbon EU system of delegated powers.

**Keywords:** delegated powers; (democratic) legitimacy; control and accountability; hybrid multilayered executive frameworks; (institutional) balance of powers; procedural standards

## I. Introduction

The Treaty of Lisbon reformed the constitutional framework for delegating executive rulemaking powers in the European Union (EU).[1] Ever since the European Commission (the Commission) may be granted either the power to amend or supplement certain non-essential elements of an EU legislative act (under Article 290 TFEU) or the power to implement legally binding Union acts where uniform conditions of implementation are necessary (Article 291(2) TFEU).[2] Fifteen years after the Treaty of Lisbon entered into force, this Special Issue brings together – in a kaleidoscopic fashion – contributions examining how the system of delegated powers enshrined in the EU Founding Treaties has evolved so far. The contributions cover legal and political science perspectives backed up by empirical insights from institutional practice. They also feature overarching horizontal analyses and more targeted and insightful EU policy-specific investigations.

[1] Delegation of *executive rulemaking* powers is understood here in a broad sense, encompassing all kinds of powers entrusted to an executive authority (delegated powers to amend or supplement a legislative act, as well as powers to implement a legislative act or a subsequent implementing act both via acts of general application and individual acts).

[2] The two delegation scenarios have some overlap, but they differ in terms of control and oversight procedures. Arguably the reason for this differentiation on the level of delegated rulemaking powers was to enshrine a particular balance of powers corresponding to the different nature, types and legal-political implications of the executive rulemaking powers delegated.

The inquiries in this Special Issue stem from the underlying assumption that nearly fifteen years post-Lisbon, the legal framework and practical implementation of the constitutional regime governing the delegation of executive rule-making powers remain profoundly relevant. Moreover, they persistently provoke critical theoretical, conceptual, legal, and empirical questions.

Hence, the aim of this Special Issue is twofold: (1) to map the anatomy of the system of delegated powers fifteen years post-Lisbon, and (2) to identify and tackle some of the core problems and challenges posed by the current stage of development of EU delegated powers in institutional practice.

## II. Understanding the overhaul of the system of delegated powers in the Treaty of Lisbon

The Treaty of Lisbon sought to bring more order and legal clarity into the already complicated system of delegated rulemaking powers within the EU. The reforms' objectives were to enhance transparency and democratic legitimacy and contribute to a better division of powers in the EU. An important item on the original Lisbon reform agenda was the "simplification" of the old EU/European Community (EC) system's typology of legal acts.[3] For this purpose, the Lisbon Treaty drew a double formal delineation: (1) between legislative and non-legislative acts; (2) within the latter category, between delegated and implementing acts (Articles 290 and 291 TFEU). The key conceptual distinction between the two forms of executive rulemaking powers is based on the delegation of non-essential EU legislative powers (Article 290 TFEU) overseen by EU institutions, and that of implementing powers controlled by Member States (Article 291 TFEU).

This distinction was designed to address several interconnected issues. First, it sought to clarify inter-institutional relations in terms of democratic oversight over the exercise of delegated rulemaking powers by the Commission.[4] Second, it was designed to address inter-institutional conflicts around the previous concept of "comitology" involving Member States' control.[5] Third, it sought to strengthen the overseeing powers of the European Parliament (EP) in delegated rulemaking. Fourth, it attempted to impose an idealised and arguably not well-adapted concept of "executive federalism"[6] to today's complexities of the EU legal system by distinguishing between delegated and implementing acts.

The reforms introduced by the Lisbon Treaty thus need to be reassessed for their effects on the legal and political multilevel system of the EU. Among the core parameters

[3] For an *ex ante* assessment see e.g.: Final Report of Working Group IX on Simplification (CONV 424/02, 29 November 2002) pp 2–13; P Stancanelli, "Le Système Décisionnel de l'Union" in G Amato, H Bribosa and B de Witte (eds), *Genèse et Destinée de la Constitution Européenne* (Bruylant 2007) pp 485–543.

[4] The term "executive rulemaking" is used in this context as referring specifically to the process of creating acts of general application that concretise policy or legislative options. These can be of various degrees of bindingness in terms of substance or procedure. See further e.g. D Curtin, HCH Hofmann, J Mendes, "Constitutionalising EU Executive Rule-Making Procedures" (2013) 19 European Law Journal pp 1–21.

[5] The pre-Lisbon "comitology" legal design was given expression initially in Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1987] OJ L197/33. The initial "Comitology" Decision was later replaced by Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23 ("Comitology" Decision 1999), later amended by Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L200/11.

[6] See on executive federalism within the EU, R Schütze, "From Rome to Lisbon: 'Executive Federalism' in the (New) European Union" (2010) 47 Common Market Law Review pp 1385–1427.

considered by the contributions to this Special Issue are the EU's institutional balance,[7] the balance of powers between the EU and its Member States, (democratic) legitimacy, control and accountability, and the effectiveness of EU policy implementation. They help map and assess (both constitutionally and normatively) the current stage of development of the EU system of delegated powers in law and practice.

## III. Reflections on the design and operation of the system of delegated powers post-Lisbon

Embarking on this exercise, we structure the various intersecting questions arising from delegating executive rulemaking powers in the EU's legal system along seven main lines of debate setting the stage for the more in-depth investigations in the contributions to this Special Issue. These address important institutional, multilevel, legality, organisational and procedural aspects, as well as core concerns relating to the EU balance of powers, (democratic) legitimacy, control and accountability.

### *1. The fuzzy distinction between delegated and implementing acts*

The *first* line of debate concerns conceptualising the distinctions between EU executive and Member State implementing actions. Conceptionally, in law and practice, the choice between executive rulemaking utilising delegated acts and executive rulemaking using implementing acts has not often been a clear-cut exercise. Both scenarios of explicit delegation of executive rulemaking powers to the Commission via delegated acts (Article 290) and implementing acts (Article 291 TFEU) establish a particular institutional balance, whereby the Commission is foreseen as the exclusive (Article 290 TFEU) or primary beneficiary alongside the Council of the EU (Article 291 TFEU) of the "delegation" of powers. In turn, the EU Treaties enshrine specific systems of oversight over the Commission's delegated powers depending on each delegation scenario: (1) the possibility to object to the entry into force of specific delegated acts and to revoke entirely the delegation by the EP and the Council (Article 290 TFEU); (2) the principle of control by the Member States over the exercise of implementing powers by the Commission (Article 291 (3) TFEU).

The underlying EU policy implementation model is still formally premised on a default concept of "indirect administration" enshrined in Article 291 (1) TFEU, under which Member States, in principle, adopt all measures necessary to implement legally binding Union acts.[8] Implementing powers are to be exercised at the EU level (and conferred generally to the Commission and more rarely to the Council) quite restrictively, only when "uniform conditions" are needed for the implementation of EU binding acts. The trade-off for the limited centralisation of executive power at the EU level consists of subjecting the exercise of such powers (in particular when the Commission exercises them) to control by the Member States as "default-owners" of the power to implement EU law. However, the design of the control system is left to the EU legislator (Article 291 (3) TFEU).

As a result, the shaping of the detailed control system over the Commission's implementing powers was for the first time adopted by both arms of the EU legislator in

[7] This is the so-called European code for "separation of powers" and its inherent "system of checks and balances." For a discussion on the general effect of such changes on the institutional balance pre-Lisbon, see, e.g. K Lenaerts and A Verhoeven, "Institutional Balance as a Guarantee for Democracy in EU Governance" in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) pp 35 et sqq.

[8] See on the concept of "indirect administration," J Schwarze, *European Administrative Law* (1st edn, Sweet & Maxwell, Revised 2006) pp 25–37.

the form of EU Regulation 182/2011 (also known as "Comitology" Regulation 2011),[9] as opposed to the previous "Comitology" Decisions adopted by the Council alone.[10] Yet, in line with Article 291 (3) TFEU, "comitology" procedures are Member States' control tools – like before Lisbon. However, in addition to Member States' control mechanisms, the "Comitology" Regulation also enshrines a limited right of scrutiny for the EP and the Council, enabling them to oversee whether the Commission is acting within the boundaries of its mandate for implementing powers enshrined in the basic legislative act.[11]

Despite the formal delineations in the Treaties, the scope of application of delegated and implementing acts in Articles 290 and 291 TFEU has been formulated in inconsistent language and lacks a joint conceptual context. From the outset, this resulted in ambiguity and some degree of overlapping fields of application. For example, it is difficult to imagine how "implementing" a norm (the term used in Article 291 TFEU) could be undertaken without further "supplementing" the details and non-essential original provisions (the concept of Article 290 TFEU) of the main legislative act. The lack of conceptual legal clarity has led to legislative discretion and inter-institutional disputes in trilogue negotiations. Each negotiating institution has a pre-determined set of preferences for delegation via Article 290 or 291 TFEU due to differences in adoption procedures and oversight mechanisms attached to each act. Areas of uncertainty and potential overlaps between the two types of rulemaking powers delegated to the Commission (in particular between supplementing delegated acts and implementing acts of general application) are legendary.[12] Therefore, EU legislative procedures and the reality of interinstitutional cooperation and practice have inevitably led to a further blurring of those few existing demarcation lines between Articles 290 and 291 TFEU.

### 2. *Oversight over EU delegated powers*

*Second*, the Treaty of Lisbon has not ended the conflict of how democratic oversight over executive rulemaking can be ensured. The formal albeit limited role of the EP and the Council in the oversight of the exercise of the Commission's implementing powers via the "Comitology" Regulation (Article 11) along with the informal involvement of the Member States (via the systematic consultation and involvement of national experts by the Commission) in the making of delegated acts before their adoption are already telling signs of difficulties in maintaining each in a tightly separated category. This would appear like a creeping *de facto* collusion between the (control) systems of delegation under Articles 290 and 291 TFEU. Is this a sign of a dynamic development of the legal framework for the conditions under which executive delegated rulemaking powers are exercised by the Commission? Or is this a sign of institutional practice moving away from the constitutional framework?

One way of considering this point is to examine why the idea of creating a category of "delegated acts" in Article 290 TFEU was introduced to the abandoned Constitutional Treaty and the subsequent Treaty of Lisbon. At first sight, the basic idea behind this was to unload "non-essential" elements of legislative matters to an executive body to avoid overly detailed legislation in the EU, and to strengthen the EP's control in overseeing

[9] 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 [2011] OJ L 55/13.

[10] The adoption of the "Comitology" Regulation gives expression to a fine-tuned balance of powers, arguably also reflecting a more enhanced say of the EP as regards the way in which Commission's implementing powers are controlled.

[11] Art. 11 of "Comitology" Regulation 182/2011.

[12] See also contribution by G Bellenghi and E Vos, in this Special Issue.

ex-post the powers delegated to the Commission under Article 290 TFEU.[13] However, that is what pre-Lisbon "comitology" procedures were already allowed to do under the case law of the Court of Justice of the European Union (CJEU),[14] accepting basically two hierarchical levels in derived law: (1) acts with a legal basis in the EC Treaty provisions and (2) implementing acts with a legal basis in a secondary legal Act.[15]

Therefore, the Treaty of Lisbon drafters intended to "tidy" matters by solving the underlying conflict of models of the legitimate exercise of public powers in the EU and the appropriate "institutional balance."[16] Within the decades-old conflict on the conditions for delegation of executive competencies to the Commission under the system of "comitology" committees, the EP had repeatedly tried to establish the right to become involved in the supervision of delegated powers under a parliamentary model of legitimacy.[17] The development of the Lisbon Treaty's typology must, therefore, also be seen – and reassessed – in view of the experiences with the intense inter-institutional disputes of the previous decades.[18]

### 3. Additional "delegation of powers" scenarios

*Third*, one needs to consider the various "delegation of powers" scenarios established in addition to those enshrined in Articles 290 and 291 TFEU. Deliberately or by oversight, the drafters of the Treaty of Lisbon had failed to recognise in the formulation of delegation of rulemaking powers the growing role of EU agencies and bodies in the system of implementation of EU law, as well as the complex reality of EU "composite"[19]

[13] See The European Convention, Draft of Articles 24 to 33 of the Constitutional Treaty, Brussels, 26 February 2003 (CONV 571/03) pp 3–4 and 15–17; K Lenaerts, "Comment Simplifier les Instruments d'Action de l'Union?", La Convention Européenne, Working Group IX, Working Document 07 (22 Octobre 2002) pp 2–4; Stancanelli, supra, note 3, pp 485–511.

[14] Case C-46/86 *Albert Romkes v Officier van Justitie for the District of Zwolle – Netherlands* [1987] ECLI:EU:C:1987:287, para 17; Case C-240/90 *Federal Republic Germany v Commission of the European Communities* [1992] ECLI:EU:C:1992:408; Case C-156-93 *European Parliament v Commission of the European Communities (supported by the Council of the European Union)* [1995] ECLI:EU:C:1995:238; Case 41/69 *ACF Chemiefarma NV v Commission of the European Communities* [1970] ECLI:EU:C:1970:71; Case 22/88 *Vreugdenhil and others v Minister van Landbouw en Visserij* [1970] ECLI:EU:C:1970:7; Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECLI:EU:C:1979:216; Case C-314/99, *Kingdom of the Netherlands v Commission of the European Communities (supported by Kingdom of Sweden)* [2002] ECLI:EU:C:2002:378; Case C-443/05P, *Common Market Fertilizers SA v Commission of the European Communities* [2007] ECLI:EU:C:2007:511.

[15] The former were acts decided under the decision-making procedures provided for in the Treaty provisions. The latter were implementing acts adopted on the basis of an act of secondary legislation covering a wide variety of categories, such as rule interpretation, rule application, rule setting/evaluation, approval of funds, the extension/new specification of funding programmes and information management. They ranged from single-case decisions to the adoption of acts "supplementing" or "amending non-essential elements" of a legislative act.

[16] For a review of the discussions on the Intergovernmental Conference leading to the Treaty of Maastricht, see J Cloos et al, *Le Traité de Maastricht: Genèse, Analyse, Commentaires* (2nd edn, Bruylant 1994) pp 369–373; for a discussion of the situation leading up to the Treaty of Lisbon, see HCH Hofmann, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality" (2009) 15 European Law Journal pp 482–505.

[17] This was opposed to a more regulatory model of the initial "Monet method" of a Commission being a quasi-agency adopting technical rules under the supervision of the Member States in the Council. The dispute of strengthening Parliamentary rights arises from the "Comitology" Decisions of 1987, 1999 and 2006, and the various inter-institutional agreements on EP information rights in "comitology" matters.

[18] Stancanelli, supra, note 3; K Lenaerts and M Desomer, "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" (2005) 11 European Law Journal pp 744–765, at p 754.

[19] See among others, HCH Hofmann, "Decision-making in EU Administrative Law – The Problem of Composite Procedures" (2009) 61 Administrative Law Review pp 199–221; D Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford University Press 2009) pp 65–66; F Brito Bastos "Derivative Illegality in

or "hybrid"[20] structures and procedures creating an integrated European administration. The entire debate on distinguishing between EU and Member States' powers in implementation is rather incomplete without an understanding of the role of EU agencies and bodies therein. Therefore, discussing forms of democratic oversight over implementation without understanding the reality of a multilevel and often composite or hybrid implementation of EU law, featuring a mix between EU and Member State agencies and bodies embedded in a close cooperation framework between the European and national levels appears somewhat anaemic.

Instead, EU agencies and bodies have been created mainly by EU legislative acts to develop expertise and act as coordinators of EU policy networks. They are designed to give recommendations, set standards, and issue guidelines for a more effective implementation of EU law. In some policy areas, they are supposed to draft delegated or implementing acts to be adopted by the Commission in procedures under Articles 290 and 291 TFEU, or by the Member States in their respective procedures. EU agencies and bodies are, therefore, some sort of "in-betweeners"[21] who can participate in composite rule-making procedures, giving decisive input into a final decision adopted by the Commission[22] or a Member State body.[23]

## 4. EU agencies as a complicating factor of the post-Lisbon system of delegated powers

*Fourth*, although the CJEU set some conditions for the empowerment of EU agencies and other bodies in its *ESMA/Short selling* judgment,[24] the large degree of discretion left to the EU legislator in designing such alternative delegation scenarios raises legitimate questions as to how such developments sit with the system of delegated powers in Articles 290 and 291 TFEU. In particular, whether they alter the interinstitutional balance and/or the balance of powers between the EU and its Member States reflected in these provisions.

The most central balancing exercise exists concerning policy-specific legal basis provisions allowing for the adoption of "measures" as well as other general legal basis

European Composite Administrative Procedures" (2018) 55 Common Market Law Review pp 101–134; Z. Xhaferri, "Delegated Acts, Implementing Acts and Institutional Balance Implications Post-Lisbon" (2013) 20 Maastricht Journal of European and Comparative Law pp 567–570.

[20] See on hybrid executive governance, F Coman-Kund, "Separation of Powers within the EU Multilayered System and the Challenges of Hybrid Executive Governance" in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Separation of Powers in the European Union* (Hart Publishing 2024) pp 269–288.

[21] See E Vos, "EU Agencies on the Move: Challenges Ahead" (2018) 1 SIEPS pp 6 and 8.

[22] In reality, one of the key tools to quasi-binding effects of EU agency and body input into the adoption by the Commission of delegated and implementing acts is the "comply-or-explain" approach, which has become a standard tool in EU legislation. Where such obligations exist, under the relevant case law, the Commission may diverge from the agency proposal only if it provides specific reasons for its findings and it must show why these change its approach by comparison to the EU agency's opinion and the considerations contained in the agency's statement of reasons; moreover, the Commission's " . . . statement of reasons must be of a scientific level at least commensurate with that of the opinion in question" given by the agency (Case T-13/99 *Pfizer Animal Health v Council* ECLI:EU:T:2002:209 [2002], para 199). See e.g. the powers of the European Supervisory Authorities (ESAs) in the field of banking and finance supervision (the European Banking Authority [EBA], the European Securities and Market Authority [ESMA], and the European Insurance and Occupational Pensions Authority [EIOPA] under Arts. 10 and 15 of Regulation 1093/2010 [2010] OJ L 331/12; Regulation 1094/2010 [2010] OJ L 331/48 and Regulation 1094/2010 [2010] OJ L 331/84). Similar powers exist in other policy areas, e.g. under Art. 75(2)(b) of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L 212/1.

[23] Art 16 of the three ESAs Founding Regulations enshrines quite a strict and demanding "comply or explain" mechanism regarding the guidelines and recommendations addressed by ESAs to national competent authorities of the Member States.

[24] Case C-270/12 UK v Council and Parliament (Short selling) [2014] ECLI:EU:C:2014:18.

provisions in the Treaties.[25] As to the general legal basis, initially, this was the so-called "flexibility" clause, which is now in Article 352 TFEU. Today, most of the EU agencies, created by legislative act, have Article 114 TFEU as their legal basis.[26] This allows for adopting measures for the approximation of Member State law, including Member State implementation of EU law (Article 291(1) TFEU). The CJEU confirmed earlier this understanding in cases such as *ENISA* and *Smoke flavourings*.[27] According to that case law, by granting the EU legislature the power to adopt "measures for the approximation" of Member State legislative or administrative acts, Article 114 TFEU confers on the legislator discretionary powers as regards the "matter to be harmonised" and the "method of approximation" including by creating EU agencies and bodies.[28] Next, in *ESMA*, the CJEU took EU agencies' empowerment to the next level by generously extending the powers that may be entrusted to EU agencies and bodies to measures of general application while simultaneously relaxing the initial criteria of the so-called *Meroni* doctrine.[29]

We are, therefore, confronted with a seemingly inconsistent double approach. On the one hand, the Treaty generally reserves implementing powers to the Member States. Some implementing powers can be conferred on the Commission and, more rarely, on the Council when "uniform conditions" are required. The TFEU also formally designates the Commission as the seemingly unique EU institution that may amend/supplement EU legislative acts via delegated acts. On the other hand, outside the realm of Articles 290–291 TFEU, the Treaty arguably allows harmonising executive rulemaking powers by means of legislation, creating EU agencies and bodies and delegating powers to them. Where this double approach is leading, what its constitutional limits are, and whether a clarification of delegation of rulemaking powers beyond the Commission would be helpful, must be further discussed. Currently, the quickly evolving EU agencies' system leaves many open questions. These concern the scope, conditions, limits and exercise of such delegated powers, how they may impact on the balance of powers within the EU institutional system

[25] The legal bases in the Treaties used for the creation of EU agencies are either policy-specific or general Treaty provisions. Policy-specific powers exist allowing for the creation of structural or procedural "measures," for example, in the area of research (Arts 182 (5) and 187 TFEU), in the environmental field (Art 192 TFEU), in the air and maritime transport (Art 100 (2) TFEU), or regarding border checks, asylum and immigration in the context of the so-called "Area of Freedom, Security and Justice" (Arts 74 and 77 (2) (d) TFEU), allowing for the adoption of "any measure for the gradual establishment of an integrated management system for external borders." See for a more detailed analysis of the legal basis of EU agencies, F Coman-Kund, *European Union Agencies as Global Actors. A Legal Study of the European Aviation Safety Agency, Frontex and Europol* (Routledge 2018) pp 22–24.

[26] For example, the European Food Safety Authority (EFSA), the European Network and Information Security Agency (ENISA), the Body of European Regulators for Electronic Communications (BEREC Office or the Agency for Support for BEREC), the European Supervisory Authorities (ESAs), the Single Resolution Board (SRB).

[27] Art 114 TFEU was explicitly confirmed by the Court of Justice as a legal basis for establishing EU agencies in Case C-66/04 *UK v Parliament and Council (Smoke flavourings)* [2005] ECLI:EU:C:2005:743 and Case C-217/04 *UK v Parliament and Council (ENISA)* [2006] ECLI:EU:C:2006:279, discussed in greater detail by K Bradley, "Comitology and the Courts: Tales of the Unexpected" in HCH Hofmann and A Türk (eds), *EU Administrative Governance* (Edward Elgar 2006) pp 417–447; HCH Hofmann, "Which Limits? Control of Powers in an Integrated Legal System" in C Barnard and O Odudu (eds), *The Outer Limits of EU Law* (Cambridge University Press 2008) pp 45–62; V Randazzo, "Case C-217/04, United Kingdom v. European Parliament and Council of the European Union" (2007) 44 Common Market Law Review pp 155–169.

[28] *Smoke flavourings*, supra, note 27, paras 44–45 and *ENISA* supra, note 27, para 43. In these cases, the CJEU acknowledged that it was possible to establish an EU body "responsible for contributing to the implementation of a process of harmonisation" of Member States administrative powers "in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate."

[29] See Coman-Kund, supra, note 25, pp 36–37, and Merijn Chamon, "The Empowerment of Agencies under the Meroni Doctrine and Art 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism" (2014) 39 European Law Review pp 380–403, at p 393.

as well as between the EU and its Member States. Open questions also remain regarding the control of such alternative delegated executive rulemaking powers.[30]

### 5. Hybrid multilayered executive frameworks and the system of delegated powers

*Fifth*, we should not ignore the composite and hybrid implementation of EU law through multilayered networks of regulators. The Union is based on a collaborative and cooperative model of integrated administration. Executive rulemaking powers – whether as delegated powers under Articles 290–291 TFEU or alternative delegation scenarios – are exercised within increasingly hybrid or composite models for implementing EU law and policies. Such models feature a mix of EU-level and national actors whose roles, tasks and powers are intricately intertwined.[31] Additionally, such hybrid frameworks may entail the involvement, in complex ways, of private actors who may also influence the exercise of executive rulemaking powers.

As illustrated by two contributions in this Special Issue examining the EU energy regulatory framework,[32] intricate configurations occur whereby delegated powers are exercised within networks of EU level and national regulators, sometimes with significant input from market players. Such policy areas are based on a distribution of powers in policy-specific ways linking, by procedure and by structural design, EU-level bodies and national actors. Examples of EU-level institutional structures illustrating this phenomenon include the network-oriented European Union Agency for the Cooperation of Energy Regulators (ACER),[33] examined more comprehensively in this Special Issue,[34] the Body of European Regulators for Electronic Communications (BEREC), an EU body set up as a cooperation network of European regulators, together with its Agency for Support for BEREC (the "BEREC" Office),[35] as well as the European Data Protection Board (EDPB),[36] with a similar composition of national Data Protection Authorities.

The same applies to procedures allowing EU agencies to conduct executive rulemaking in composite forms. Such are standard-setting by EU agencies for national implementation

[30] See Vos supra, note 21, pp 10 and 45–46.

[31] See Coman-Kund, supra, note 20.

[32] See contributions by L Hancher and J Rumpf, and by T Jevnaker, KK Taranger, PO Eikeland and MB Lindberg, in this Special Issue.

[33] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators [2019] OJ L 158/22.

[34] Contributions by L Hancher and J Rumpf, and by T Jevnaker, KK Taranger, PO Eikeland and MB Lindberg, in this Special Issue.

[35] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 [2018] OJ L 321/1, as amended subsequently. BEREC may issue guidelines on elements of European Electricity and grid regulation. On the face of them, these have a non-binding nature, but, just as Commission's guidance documents might have indirect binding effects, also BEREC guidelines may be indirectly binding. One element of "bindingness" comes from a procedural approach under which Member States are obliged to comply or explain their non-compliance to BEREC.

[36] The EDPB is another EU body having similar rulemaking power in the context of its coordinating role for cooperation between actors involved in the enforcement of privacy and data protection, being established by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (General Data Protection Regulation or GDPR). Under the GDPR, National Independent Data Protection Authorities (NDPAs) may request the EDPB's opinion on any matter "of general application or producing effects in more than one Member State" (Art 64 (2) GDPR). Initially, the EDPB's opinions are non-binding; however, the NDPAs are aware of the fact that the EDPB may issue binding decisions in case of non-compliance according to Art 65 (1) GDPR.

procedures and further fleshing out definitions of broad legislative terms in specific contexts, thus supplementing detail to broad legislative terms. Examples include standard-setting powers that leave the European Supervisory Authorities (ESAs) wide regulatory discretion to write rules defining acceptable risks for financial markets and the financial system's stability.[37] Some such standard-setting conducted by EU bodies and agencies, like the European Union Agency for the Cooperation of Energy Regulators (ACER), is also undertaken in forms of co-regulation as the example of codes in energy and trans-European networks.[38] Network codes-setting standards regulate matters in areas with considerable economic and political sensitivity, such as energy security.

Such complex, multilayered and multi-actor frameworks and decision-making processes raise important questions and concerns about the extent to which they reflect the system of delegated powers and the balance of powers enshrined in the Treaties.

### 6. *Taming delegated executive rulemaking through procedural standards*

A *sixth* aspect concerns the important notion of procedure. Given the context of the highly diversified set of actors involved in executive rulemaking, procedural law is central to ensuring compliance with constitutional norms. This covers not only the already discussed questions of the choice of legal basis, the limits of delegation to preserve legality and safeguard the balance of powers, but also the procedures following the establishment of a draft act. More generally, EU executive rulemaking procedures have to be structured in a way to ensure compliance with constitutional principles, including matters of transparency in terms of access to documentation, information about upcoming rulemaking activities, clarification of procedures and responsibilities, as well as in terms of participation, consultation, and the duty of care.[39] In this sense, there may well be the necessity of a set of meta-norms in the form of rules and principles that guide a rulemaking procedure and which thereby can infuse compliance with and realisation of core constitutional principles.

The discussions on inter-institutional relations and parliamentary oversight are also indicators of the necessities of such general procedural rules, which exist very partially in terms of the "Comitology" Regulation for the specific subsett of procedures after a

[37] For example, Arts 29 (1) and 32 of the ESAs founding regulations establish "common methodologies" for various supervisory duties such as assessing the effect of economic scenarios on an institution's financial position and for "assessing the effect of particular products or distribution-processes."

[38] Network codes are adopted in a variation of composite procedures with input by the regulatory network ENTSO (European Network of Transmission System Operators for Electricity), ACER, the Member States and the Commission. Art 37 of Regulation (EU) 2019/943 requires that network codes adopted on the basis of Art 6 (11) of Regulation (EC) No 714/2009 must be respected (Regulation (EU) 2019/943 of the European Parliament and Council of 5 June 2019 on the internal market for electricity [2019] OJ L 158/54, as amended subsequently). ENTSO network codes include rules on transmission reserve capacity for operational network security, network connection rules, third-party access rules, data exchange and settlement rules, interoperability rules, operational procedures in an emergency, capacity-allocation and congestion-management rules, rules for trading related to technical and operational provision of network access services and system balancing, transparency rules, balancing rules including network-related reserve power rules, rules regarding harmonised transmission tariff structures including locational signals and inter-transmission system operator compensation rules, and energy efficiency regarding electricity networks (see Art 8 (6) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L 211/15, currently repealed and replaced by Art 59 (1) (a), (b), (c) of Regulation (EU) 2019/943, as amended subsequently). For a full description of the ENTSO network codes system under Regulation (EC) No. 714/2009, see J Schneider, "Energy and Trans-European Networks" in HCH Hofmann, G Rowe, A Türk (eds), *Specialised Administrative Law of the European Union* (Oxford University Press 2018) pp 397–400.

[39] D Curtin, HCH Hofmann and J Mendes, "Constitutionalising EU Executive Rule-Making Procedures" (2013) 19 European Law Journal pp 1–21.

Commission proposal is made for the adoption of an implementing act. However, more generally, procedural norms can enhance decisional quality by *inter alia* ensuring that a wide range of information and opinions is available to a rule-maker. Procedural norms should not be policy-specific but, where possible, should be applicable across sectors and constellations of actors involved in executive rulemaking. The Interinstitutional Agreement on Better Law-Making of 2016[40] and the Commission guidelines on its implementation[41] apply to only very limited types of executive rulemaking. If procedural norms try to ensure that the right decision is made more often than not, preparatory stages of decision-making, from the moment it is put on the agenda to the moment of its formal adoption, are precisely the stages that may be essential for ensuring compliance with constitutional principles in EU law.

Fine-grained procedural standards can thus enhance the legitimacy and the intrinsic quality of EU executive rulemaking, facilitate better control of delegated executive powers, and foster clarity, coherence and constitutional compatibility within the increasingly eclectic post-Lisbon EU system of delegated powers.

## 7. Democratic legitimacy, control, accountability, transparency and balance of powers in delegated executive rulemaking

The *seventh* aspect concerns the Treaty of Lisbon's objectives to simplify legal instruments, enhance transparency, strengthen democratic legitimacy, increase efficiency and contribute to a better division of powers between the Commission and the EU legislator in delegated rulemaking.[42] However, transparency and democratic control of "comitology" and "Article 290 TFEU" delegated decision-making remain problematic.

Over decades, the EP has continuously expressed dissatisfaction due to concerns about transparency and limited review and oversight in comitology procedures.[43] Post-Lisbon, concern has been voiced that general or individual implementing acts (e.g. for GMO for crops, glyphosate, biocidal products, or endocrine disruptors) are not subject to in-depth parliamentary scrutiny, despite political relevance, due to limits on powers of oversight, confined to a mere "*droit de regard*" by the EP.[44] One may consider further enhancing the role of national and/or EP parliamentary experts in "comitology" meetings as a way to systematically improve transparency, political accountability and democratic legitimacy of executive rulemaking for implementing acts.

As for delegated acts, the role of the EP is confined to *ex-post* controls, which formally places this institution on an equal footing with the Council. Yet the intergovernmental interests of the latter are put forward in practice by the Member States' expert groups involved *ex-ante* in preparing the draft delegated act by the Commission. This may raise concerns regarding transparency and democratic accountability for delegated rulemaking in the EU, as well as the balance of powers between the EU institutions, and between the EU and its Member States. Thus, it appears that despite the institutional balance suggested by the wording of Article 290 TFEU, the balance of powers post-Lisbon in practice still favours the Council. Arguably, the involvement of expert groups mimicking "Comitology" additionally increases the influence of the Member States in adopting Commission

[40] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016 [2016] OJ L 123/1.

[41] European Commission, Delegated and Implementing Acts. Guidelines for the Services of the European Commission, 2020.

[42] Communication from the Commission to the European Parliament and the Council, Implementation of Article290 of the Treaty on the Functioning of the European Union, Brussels, 9.12.2009 COM (2009) 673 final pp 3–5; Laeken Declaration on the Future of the European Union (15 December 2001).

[43] See extensively, Z Xhaferri, *Law and Practices of Delegated Rulemaking by the European Commission* (Brill 2022).

[44] Art 11 of the "Comitology" Regulation.

delegated acts. Thereby, the balance of powers formally reflected in Article 290 TFEU is being reshaped to the benefit of the Council and not the EP as expected following the Lisbon Treaty's changes to the rules.

The whole discussion over controlling Commission's delegated executive rulemaking powers also risks remaining rather formal and theoretical in light of other developments shaped by institutional practice. There is apparently a degree of institutional neglect by the Council and the EP or, even more, a *de facto* collusion between the Council, EP and the Commission regarding the delegated and implementing acts adopted by the latter, with only rare instances of contestation of Commission's (intended) actions.[45] This suggests that the exercise of Commission's delegated executive rulemaking powers might remain *de facto* too loosely controlled. This raises intriguing questions of how consistent such a practice is with the institutional balance reflected in Articles 290–291 TFEU, and how effective formal and informal counterbalancing powers and controlling mechanisms really are when relevant EU institutional actors lack the willingness or capacities to make full use of their potential.

## IV. Towards a diagnosis and a cure for the current system of EU delegated powers

The contributions tackle several interconnected research directions within the theme and approach of the Special Issue, and along the main lines of debate introduced previously.

The contribution of Guido Bellenghi and Ellen Vos represents the first research direction. It uses the analytical frame of the institutional balance to offer an empirical analysis and a critical account of the constitutional framework for EU delegated rulemaking. This contribution argues that the Treaty of Lisbon's objectives to democratise and simplify EU delegated rulemaking have not been attained. Bellenghi and Vos highlight a more overarching picture of the dysfunctionalities of the EU delegated rulemaking process in practice using comitology-based decision-making on GMOs and the "Glyphosate saga" as case studies in the field of food safety to argue this point. They put forward some novel theoretical insights for framing EU delegated powers from a constitutional perspective as well as forward-looking recommendations to improve democracy in the constitutional set-up of delegated powers in the EU.

The second research direction (represented by the contribution of Thomas Christiansen and Giulia Gallinella) examines, mainly from a political science perspective, the question of democratic legitimacy and accountability within the EU's constitutional framework for delegated powers. As a case in point, it takes the exercise of delegated powers by the Commission and the parliamentary control/oversight over such powers in a crisis context. They observe that executive institutions often become the leaders of emergency politics while legislative institutions tend to become sidelined. The ensuing issues and challenges are addressed through a twofold approach consisting of a theoretical framework for the study of the relation between EU legislative-executive powers in times of crisis, backed up with empirical evidence via a cross-sectoral analysis of the Commission's exercise of emergency delegated powers in various policy areas.

The third research direction (represented by the contributions of Leigh Hancher and Julius Rumpf, and of Torbjørg Jevnaker, Karianne Krohn Taranger, Per Ove Eikeland and Marie Byskov Lindberg) examines the extent to which the regulatory process for delegated powers in a European network setting (viz., EU agencies, national regulators and/or private actors) adequately reflects the EU institutional balance and the balance of powers between the EU and its Member States. Torbjørg Jevnaker, Karianne Krohn Taranger, Per

[45] See contribution by T Christiansen and G Gallinella, in this Special Issue.

Ove Eikeland and Marie Byskov Lindberg question whether consensual rulemaking in a horizontal European regulatory network setting is (not) able to deliver policy output, with the implication that a shift to more hierarchical decision-making by an EU agency, more specifically the EU Agency for the Cooperation of Energy Regulators (ACER), for adopting regulatory output might be needed to avoid stalling. Leigh Hancher and Julius Rumpf examine how dual-level (internal-administrative and external-judicial) legal review of such an EU agency's decisions impacts the balance of powers between the actors involved in composite or hybrid multilayered procedures. The two contributions examine these issues in the context of the EU energy regulatory framework, with a specific focus on the EU electricity market regulation. They complement each other in combining more policy-oriented (Torbjørg Jevnaker, Karianne Krohn Taranger, Per Ove Eikeland and Marie Byskov Lindberg) and legal (Leigh Hancher and Julius Rumpf) perspectives on this topic, both contributions being supported by exemplary case studies and rich empirical insights. This research line thus provides an accurate and in-depth understanding of the operation in practice of the EU's legal framework for delegated powers in a more hybrid setting (comprising the European Commission, EU agencies [i.e. ACER], national regulatory agencies, and the industry).

The final article by Alexander Türk connects the dots between the contributions across the three research directions. It capitalises on their findings with a view to offering an overall diagnosis of the EU system of delegated powers fifteen years after Lisbon, together with thought-provoking forward-looking remarks on the remaining challenges and future evolution of delegated rulemaking within the Union's governance system.

All contributions discuss the various constructs concerning the delegation of executive rulemaking powers in the EU. They raise and attempt to answer important questions regarding how the design and exercise of such powers may affect and shape the Union's "constitutional" set-up as regards the actors involved (EU institutions, bodies, offices and agencies, and the Member States), the balance of powers between them, the system's transparency, democratic control and accountability, as well as the effectiveness and legitimacy of EU action.

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