The making of delegated and implementing acts: legitimacy beyond inter-institutional balances

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1. Constitutional framing

The Lisbon system of delegated and implementing acts has enough ingredients to feed constitutional disputes and debates that are core to the Union's legal and political system. Articles 290 and 291 TFEU embody, first, a new system of sources that purports to ensure flexibility of the EU lawmaking process and to further democracy, anchored on the enhanced role of the European Parliament.[2] Secondly, they establish a new distribution of powers between the European Parliament, the Council and the Commission in the making of non-legislative acts. Thirdly, Article 291 TFEU clarifies a vertical delimitation of Union and Member State executive competences that, depending on how it is practiced, may solidify a model of executive federalism.

The discussions around these provisions that have taken place during the last decade – roughly since the distinction was first presented in the Constitutional Treaty in 2004 –

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have focused on the consequences of the new scheme to the relative power of the institutions.[3] At issue has been, first, how to adjust the scheme of comitology to the specifications of Article 291 TFEU – a question that depended mostly on Regulation 182/2011 and on how it is implemented – and, second, how to re-establish the institutional balance between the Commission, the Parliament and the Council in the light of Article 290 TFEU – a point that remains largely open and at the core of institutional struggles.[4]

Yet, Articles 290 and 291 TFEU do not exhaust the constitutional framing of delegated and implementing acts. Even if one chooses to analyse the new system through an institutional and functional lens, these are acts of the Union subject to the principle of democracy fleshed out in Articles 9 to 12 TEU.[5] The institutions' margin of autonomy in defining procedures for the adoption of delegated and of implementing acts is limited by the normative standards that emerge from the Treaty provisions on democracy.[6] This chapter takes this argument further in a twofold way. First, it explains why procedures should also structure the relationships between the institutions, bodies, offices and agencies of the Union, on the one hand, and citizens and interest representatives, on the other, and why they should be designed to be also a source of democracy of delegated and implementing acts. Secondly, it shows that this external dimension of procedures has been hitherto neglected, in a way that is arguably incongruous with the current Treaty and with the rationale of enhancing the democracy of non-legislative acts of the Union, which also justified the distinction between delegated and implementing acts.[7]

[3] At the inception, see Final Report of Working Group IX on Simplification of 29 November 2002, CONV 424/02, WG IX 13 (henceforth, "Final Report").

[4] See European Parliament Resolution of 25 February 2014 on followup on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI) – henceforth, "EP Resolution of 2014 on delegated acts"); Council of the European Union – General Secretariat, Initiative to complement the Common Understanding on delegated acts as regards the consultation of experts, Doc. 6774/14 JUR 99-DELACT33-INST 121-PE 102, Brussels 21 February 2014 (henceforth, "Council Initiative 2014").

[5] The argument is premised on arguments I have made in two previous articles: there is a constitutional link between Article 290 and 291 and 11 TEU (J. Mendes, "Delegated and implementing rulemaking: proceduralisation and constitutional design" *European Law Journal*, Vol. 19, No. 1 (2013), pp. 22-41); Article 11 TEU has normative legal consequences (J. Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Art 11 TEU', *Common Market Law Review* Vol. 48, No. 6 (2011), pp. 1849-1878).

[6] Mendes, "Delegated and implementing rulemaking", note 5.

[7] The Report of Working Group on Simplification (*supra* note 3) shows that enhancing democracy was also one of the rationales of the Lisbon system of non-legislative acts of the Union is Report of Working Group on Simplification.

The chapter starts by pointing out the shortcomings of the controls envisaged in Articles 290 and 291 TEU from a perspective of democracy (Section 2). Next, it explains the insufficiencies of approaching procedures from a purely inter-institutional perspective. Such perspective fails to address procedures as a means to rationalise and lend legitimacy to public action (Section 3) and as a means to structure Union's actions in accordance with constitutional principles (Section 4). In this view, procedural rules that structure the public authority of the Union need to be designed and justified *also* in the light of the provisions on democracy that shape the way its institutions, bodies, offices, and agencies relate to the citizens and interest representatives (Sub-section 4.1). While there are important risks in making participation of interest representatives a source of democratic legitimacy, procedures can create the conditions (inexistent at present) to make participation a complementary source of democracy (Sub-section 4.2). The chapter concludes with a critical analysis of the resolution on a Law of Administrative Procedure of the European Union (Sub-section 4.3).[8] The Parliament's resolution makes no mention to procedural rules that would guide the making of acts of general application. A critical look at this choice will discuss the reasons that may explain this silence and confront it with the lack of legal-normative grounds that could justify ignoring rulemaking procedures. While the fate of this resolution is not certain in the current legislative term, the debate on the possibility to adopt such a law remains open.[9] The inclusion or exclusion of rulemaking from a future law on the EU administrative procedure remains therefore a relevant issue.

2. Controls and democratic legitimacy

2.1. Delegated acts – in the shadow of democracy

The controls envisaged in Article 290 TFEU are the main tools to ensure the democratic legitimacy of delegated acts.[10] They are crucial to the operation of the Lisbon system of non-legislative acts, which was intended to ensure the flexibility of the lawmaking process in

[8] European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)).

[9] In January 2015, Members of the European Parliament have called on the Commission "to adopt binding rules and table a legislative proposal on administrative procedure in the EU institutions" (see press release at http://www.europarl.europa.eu/news/en/news-room/content/20150109IPR06319/html/European-Ombudsman-transparency-a-key-concern-for-citizens-in-2013).

[10] On how far the rationale of democracy can explain the choices of Article 291 TFEU, see Sub-section 2.2. below.

a way that would not be detrimental to Union's democracy.[11] As underlined by the Parliament, the correct application of the Treaty is a condition to ensure a "sufficient level of democratic legitimacy of delegated acts".[12]

In accordance with the dual representative democratic basis of the Union (Article 10(2) TEU), the Parliament and the Council, first, define explicitly the "objectives, content, scope and duration of the delegation of power" (Article 290 (1) TFEU) and, secondly, retain controls over the exercise of delegation, either by using powers of revocation and veto (Article 290 (2) TFEU) or by establishing other controls.[13] The former allows the legislator to frame the delegation in considerably strict terms, although the exactness of this framing arguably hinges on the actual possibility to determine what are the "essential elements of an area".[14]

However, this construction has important weaknesses. Leaving aside for the moment the question – equally relevant for issues of legitimacy – of how far the definition of objectives, content, scope and duration of the delegation is capable of structuring the power of discretion the Commission exercises under Article 290 TFEU, the following remarks will point out the weaknesses of the controls; specifically, the weaknesses of the Parliament in exercising those controls, as portrayed in recent analyses and confirmed by official documents.

The weaknesses are both structural and practical. First, the powers to revoke and veto are radical powers. Formally, at least, do not entail the possibility to introduce

[11] The rationales behind the distinction between two types of non-legislative acts have been stressed often times in the debates and disputes arising from Articles 290 and 291 TFEU. They may be part of the "noisy interferences" that surround the origins of the new categorisation of non-legislative acts of the Union (Opinion AG Villalón in *Commission v Parliament and Council* (Biocides), C-427/12, ECLI:EU:C:2013:871, para. 21). They are, nevertheless, an important aspect thereof, in particular because of the difficulties in interpreting the wording of these provisions.

[12] EP Resolution of 2014 on delegated acts, *supra* note 4, recital A.

[13] On the real possibilities of establishing additional controls, see Claude Blumann, "À La Frontière de La Fonction Législative et de Fonction Exécutive: Les 'Nouveaux' Actes Délégués," in *Chemins d'Europe. Mélanges En L'honneur de Jean-Paul Jacqué* (Paris: Dalloz, 2010), 134–35.

[14] According to Blumann, "it is difficult to imagine a stricter framework" which "underlies the relative suspicion that *a priori* weights over the mechanism of delegation" (idem, 133-34 – see however Article 80(1) of the German Grundgesetz: "The content, purpose and scope of the authority must be stated in the statue that delegates authority to issue secondary legislation"). Sceptical about the constraining degree of these controls, see Paul Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 267. See also, M. Chamon, "How the concept of essential elements of a legislative act continues to elude the Court", *Common Market Law Review*, Vol. 50, No. 3 (2013), pp. 849-860; D. Ritleng "The law's domain: the notion of 'essential elements of an area'", and K.S.C. Bradley "The European Parliament and sub-legislative acts: political problems, legal solutions?", in this volume.

modifications in the envisaged delegated acts, although they may cast a shadow over their preparation (i.e., the Commission may work to avoid the exercise of the controls envisaged in Article 290(2) TFEU).[15] Due to the political implications and the practical difficulties entailed in the exercise of these controls, they are likely to be applied parsimoniously, to an extent that may amount to lack of effective control.[16] Timely access to information, lack of "personal and technical resources" and short timeframes to exercise oversight have revealed to be a problem.[17] Secondly, the Parliament is not on equal footing with the Council in triggering the controls of Article 290(2) TFEU, given the demanding voting majority required (majority of its component members).[18] Thirdly, the Commission's resort to expert committees – despite their formal absence in the adoption of delegated acts – tends to exclude the EP, which, in addition, might not have means to know who is being consulted and how.[19] The Committee of Constitutional Affairs of the Parliament has recently "urged" the Commission to involve the Parliament adequately in the preparation of delegated acts, which is a sign of the institutional difficulties it has been having in accessing the respective procedures, in particular access to the Commission's expert meetings.[20] Fourthly, the

[15] The Guidelines of the Commission on delegated acts confirm this point (see Commission, Implementation of the Treaty of Lisbon – Delegated Acts – Guidelines for the Services of the Commission, para 100 and 102 (henceforth "Commission Guidelines of 2011"). See also Craig, *The Lisbon Treaty, supra* note 14, 63-64, 262; Keading and Hardacre, "The European Parliament and the Future of Comitology After Lisbon", *European Law Journal*, Vol. 19, No 3 (2013), 382–403, 396, 401, although based on a study of the regulatory procedure with scrutiny.

[16] Thomas Christiansen and Mathias Dobbels, "Delegated Powers and Inter-Institutional Relations in the EU after Lisbon: A Normative Assessment," *West European Politics*,Vol. 36, No. 6 (2013), 1167, 1173. The study undertaken by the European Economic and Social Committee on delegated acts confirms the rare use of objection and revocation (Information Report of the Section for the Single Market, Production and Consumption on Better Regulation: Implementing acts and delegated acts, Rapporteur: Mr Pegado Liz, Brussels, 31 July 2013, para. 4.13, 4.15 (see also 1.3.8 of the Appendix II).

[17] EP Resolution of 2014 on delegated acts, *supra* note 4, para. 10, 12 and 15.

[18] K. Lenaerts and M. Desomer, "Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures", *European Law Journal*, Vol. 11, No. 6 (2005), pp. 744-765, at 755; C. Blumann, "A la frontière de la fonction législative et de la fonction exécutive", *supra* note 13, pp. 127-144 at p. 136; D. Ritleng, "La Délégation du Pouvoir Législatif de l'Union Européenne", in *Chemins d'Europe*, *idem*, pp. 559-576, at p. 572.

[19] See Christiansen and Dobbels, "Delegated Powers and Inter-Institutional Relations", *supra* note 16, p. 1166, p. 1173.

[20] European Parliament Resolution of 13 March 2014 on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI), 13 March 2014 - Strasbourg, para. 34 and 35. See also the EP Resolution of 2014 on delegated acts, *supra* note 4, para 13. These difficulties are also mentioned in the Report of the Economic and Social Committee on implementing and delegated acts (*supra* note 16), para. 1.9 (however, this report also indicates that the EP has access to the committees of experts with an observer status; this status prevents the EP from having an input in the experts' conclusions, but allows the EP to communicate "its concerns unofficially" to the committees and to establish "beneficial and valuable contacts" – see point 1.3.7. of Appendix II to the information report).

difficulties in determining when an act should be an implementing act or a delegated act supplementing non-essential elements of a legislative act have been solved by bargaining between the two co-legislators.[21] In this process, the Parliament may sacrifice its advocacy for delegated acts in exchange for accommodation by the Council on substantive points of the legislative act.[22] This may not speak against the legitimacy of the legislative process, but opens the possibility to decide matters that would otherwise fall under the controls of Article 290 TFEU (hence, under parliamentary control) via comitology procedures, where the Parliament has very little say. The European Parliament's position in the *Biocides* case confirms that, at least, there are limits to the Parliament's favourable reading of the scope of Article 290 TFEU.[23] In addition, the judgment in *Biocides* indicates that, within quite broad limits, the Court will be deferential to the use the Parliament and the Council decide to make of their powers. In fact, the Court stressed the discretion of the legislator without referring this time to the need to abide to objective criteria amenable to judicial review.[24] The fact that the Court explains in detail why it considers that the provision at stake in this case justifiably gives the Commission powers under Article 291 TFEU does not speak against the deferential approach of the Court.[25]

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[21] The EP Resolution of 2014 on delegated acts, *supra* note 4, para. 3; Secretary General of the Commission, "Note for the Attention of Directors General and Heads of Service on Delegated and Implementing acts – further guidance", SEC(2012) 537, Brussels, 14.09.2012, pp. 2-3.

[22] Thomas Christiansen and Mathias Dobbels have reported this possibility, but specify that these are "initial observations" (Thomas Christiansen and Mathias Dobbels, "Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts" *European Law Journal,* Vol. 19, No. 1 (2013). The extent to which this is effectively happening is still unknown and impacts on the argument being made here. The Commission mentions negotiations regarding delegated and implementing acts as a practice to be avoided, because it impacts on its institutional prerogatives (Secretary General of the Commission, Note for the Attention of Directors General and Heads of Service on Delegated and Implementing acts – further guidance, SEC(2012) 537, Brussels, 14.09.2012, p. 2-3).

[23] Judgment in *Commission v Parliament and Council* (Biocides), C-427/12, ECLI:EU:C:2014:170, where the Commission has contested the freedom of the legislator to choose between a delegated and an implementing act (para 31).

[24] Confront the *Biocides* case, para 40 with the *Schengen Borders* case (Case C-355/10, *European Parliament v Council*, para 67. Note that AG Villalón in the biocides case had both stressed the need of judicial review over this question and emphasised its limits (Opinion, *supra* note 11, para 70 to 72), upholding that the legislator has "full discretion" to choose between delegated and implementing acts (para 77).

[25] See, in particular, para 48, 49 and 51 of the judgment. Note also how quickly the Court considers that the, in the case at hand, the power conferred on the Commission "may be considered reasonable for the purposes of ensuring uniform conditions" of implementation (para 52). This may indicate reasons to be sceptical about the relevance of this condition in limiting the power of the Union to adopt implementing acts (see the contrasting views of R. Schütze, "'Delegated' Legislation in the (new) European Union: A Constitutional Analysis", *Modern Law Review,* Vol. 74, No. 5 pp. 661-693, at 691 and J. Bast, "New categories of acts after the Lisbon reform: dynamics of parliamentarization in EU law", *Common Market Law Review*, Vol. 49, No. 3 pp. 885-927, at 909-910).

In sum, the way these controls were designed, the lack of resources of the Parliament, and the existing indications on their operation (in particular, the institutional bargaining) ground reasons to be sceptical about the effectiveness of parliamentary control over delegated acts.[26] However, the political significance of the matters decided via their adoption – public health, consumer safety, security – stresses how important compliance with the provisions of the Treaty and with the principle of democracy is.[27] In particular, their political relevance ought to place the legitimacy of the procedures followed for the adoption of these acts at the core of the discussions on the legitimacy of the Union.

One may argue that, even if the controls of the Parliament may turn out to be too weak to uphold the democratic legitimacy of delegated acts, the controls that the Council (or the Member States via expert committees) may exercise would still preserve it. One of the sources of democracy of the Union – the one that relies on the representation of Member States in the Council (Article 10(2)) – would subsist unchanged by the possible weaknesses of the Parliament. Yet, that is precisely the problem: in face of those weaknesses, the duality in which the Union representative democracy relies no longer holds for the adoption of acts under the ordinary legislative procedure.[28] The democratic legitimacy of delegated acts grounded on representative democracy is no longer "beyond dispute".[29]

2.2. Implementing acts – out of the radar of democracy

The sources of democratic legitimacy of implementing acts are more difficult to trace back to a model of representative democracy. Given that the Union is exercising a competence that primarily belongs to the Member States, the Parliament has only minimal control over the adoption of implementing acts – a right to scrutiny that adds to a right to be informed –

[26] Note also that, as non-legislative acts, delegated acts are not subject to the scrutiny of national parliaments, under the protocol on subsidiarity (Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality (OJ C 326/206, 26/10/2012).

[27] Report of the Economic and Social Committee on implementing and delegated acts (*supra* note 16), point 1.1.2., Annex II, p. 15.

[28] The prevailing view seems to be that the EP does not have a right of revocation or objection when an act is adopted by the Council in consultation with the EP (see, for example, Article 96 Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ("Overseas Association Decision"), OJ L 344, 19/12/2013, p. 1–118). Defending this view as only applicable to acts that only require consulation of the EP (but not to acts that require its consent), see the Commission Guidelines of 2011, *supra* note 13, pp. 20-1.

[29] Final Report, *cit. supra* n. 3, p. 8.

as does the Council (in formal terms at least).[30] Control over the adoption of these acts rests in the Member States via the comitology procedures defined in the Comitology Regulation. "Control" is the term used in Article 291(3) TFEU, although the degree in which comitology committees are embedded in the Union's institutional set up may weaken the purported function of control.[31] Be that as it may, an argument cannot be made that the democratic legitimacy of implementing acts rests in the Member States' role in comitology procedures, based on the formal accountability of national governments to the respective parliaments. Seeking links of democratic accountability between national officials siting in comitology committees and the citizens' representatives in national parliaments is searching for, and relying on a very thin, formalistic and remote thread of democratic legitimacy.[32] At the same time, arguing that the democratic legitimacy of implementing acts is reinforced by the fact that, under Article 291(3) TFEU, the Parliament participated for the first time in the design and functioning of comitology procedures not only suffers from a similar formal myopia,[33] but also fails to address the legitimacy of the functioning of the system put in place by the Comitology Regulation.

But, taking one step back, the very question of the democratic legitimacy of implementing acts seems to be misplaced. The democratic concerns underlying the new system of non-legislative acts – present when setting up the category of delegated acts – seem to halt at the moment one moves across the "grey area" between the two categories of acts and enters the purported realm of implementing acts. Having formally carved out the

[30] Formally the Council has the same rights to information and scrutiny of the Parliament (Articles 10 and 11 of Regulation No 182/2011, OJ L 55/13, 28.2.2011). Yet, doubts have been expressed on whether the Appeal Committee is in fact a "Council in disguise" (Christiansen and Dobbels, "Delegated Powers and Inter-Institutional Relations…", cit. note 16, 1168). Underlying the legal differences between the old and the new regime, see Claude Blumann, "Un Nouveau Depart Pour La Comitologie: Le Règlement No 182/2011 Du 16 Février 2011," *Cahiers de Droit Européen* Vol. 47, No. 1 (2011), 23–52, at 46-48 (and 36-39, on the relative position of the Council and the Parliament in the Comitology Regulation).

[31] Blumann, "Un Nouveau Depart", *supra* note 30, p. 31, who underlines that the committees are strongly enmeshed in the Union institutional setting. "Control" by Member States is also the way the institutions view the function of committees under Article 291 TFEU (see, e.g. Council Initiative 2014, *supra* note 4, p. 5).

[32] It would rely on the effective parliamentary scrutiny of those government officials that, by sitting in comitology committees, act in a European function. The legitimacy of comitology committees has fed vivid discussions prior to the entering into force of the Lisbon Treaty (see, e.g., C. Joerges and J. Neyer, "From intergovernmental bargaining to deliberative political processes: the constitutionalisation of comitology" *European Law Journal*, Vol. 3, No. 3 (1997), pp. 273-299). The analysis above brackets these discussions to focus on a normative analysis of the Treaty framework and the institutional practice so far.

[33] Critical of the effective role the Parliament had in defining the content of Regulation 182/2011, see T. Christiansen and M. Dobbels, "Comitology after the Lisbon Treaty: Who is the Real Winner?", *European Integration Online Papers* , 16 (2012).

delegation of legislative power, and formally withdrawn it from the realm of comitology, the world of implementing acts seems to be purely run by concerns on how to distribute and structure the exercise of executive power.[34] We are no longer tackling a power that belongs originally to the Union legislator, the matter being mainly to define the modalities according to which the original holders of that power (the Member States) participate in, rather than control, the exercise of that function at the Union level, and the ensuing adjustments to the powers of the Union's institutions. In these equations, democracy seems to be no longer a concern. Remaining legitimacy issues are either only a matter of doctrinal elaboration on the functioning of the system, or are tackled via making the committee proceedings transparent through the comitology register.[35] While such registers are valuable, even assuming that all the information specified in the comitology regulation is systematically available, they are limited in giving access to the functioning of the system. The register may give ex-post access to information on decision-making, but it does not give access and voice to institutional and non-institutional actors outside the comitology system during decision-making.[36] The democratic principles of Articles 9 to 12 TEU seem to be far away from the regime of implementing acts based on Article 291 TFEU. And, in fact, one is at pains if, as attempted above, one proposes to read it in the light of the prevalent paradigm of democracy within the EU – representative democracy.

Indeed, Article 291 TFEU coveys more strongly than Article 290 TFEU that what is mainly at issue is how to manage a sharing of power (mainly vertically, but also with important horizontal implications). The fact that this provision has been perceived hitherto as dealing with executive power has arguably blocked considerations of democracy from the conception of the regime of Article 291 TFEU. That Article 291 would refer to matters of executive nature was the original conception of the Working Group on Simplification of the European Convention, whose members also acknowledged the pitfalls of distinguishing

[34] See further J.P. Jacqué "Some Consideration concerning the History of the Comitology in the European Union" in this volume.

[35] Article 10 of the Comitology Regulation. On the transparency of the register before current legal framework, see G. Brandsma, D. Curtin and A. Meijer, "How Transparent Are EU "Comitology" Committees in Practice?" *European Law Journal* , Vol.14, No. 6, (2008) pp. 819-838 (an empirical study of the register in 2005).

[36] Access is furthermore covered by the exceptions of Article 4(3) of Regulation No 1049/2001, of the European Parliament and of the Council, regarding public access to European Parliament, Council and Commission documents, OJ L145/43, 30.5.2001.

legislative and executive matters.[37] The Commission and the Parliament, in particular, have also resorted to this distinction when seeking to delimit their respective scope of action in the scheme of Article 290 and 291 TFEU.[38] Recently the Court, in the *Biocides* case seems to have avoided making a functional delimitation between the scopes of the two provisions based on a legislative-executive classification. The Advocate General had attempted to define the scope of "*pouvoir d'exécution*" ("*potestad ejecutiva*" in the original Spanish version) as referring to a concrete application of a "defined and finished norm" that does not require further normative specification.[39] The Court has, more ambiguously, referred to the "addition of further detail" to the content of a legislative act, which takes place within the "normative framework laid down by the legislative act itself".[40] The problem lies of course in the difficulty of defining where begins the phase of "regulation" that does not entail a normative development of a given legal regime, which could be "implementation" (*exécution*) in the sense of Article 291 TFEU and not "supplementation" in the sense of Article 290 TFEU.

It would then seem advisable to leave aside the legislative-executive distinction as a basis to delimit the scopes of Article 290 and 291 TFEU. The problem, however, remains, since Articles 290 and 291 do require a functional delimitation between "implementing" and

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[37] Final Report, *cit. supra* n. 3, p. 8, stressing the problems with delegating to the Commission "the more technical or detailed aspects of the legislation *as if they were implementing measures, subject to the control of Member States*" (emphasis added) as a justification to creating the category of delegated acts. On the importance of the work of the European Convention for the interpretation of the Lisbon Treaty provisions that originated there, see G. Garzón Clariana, "Les actes délégués dans le système du droit de l'Union européenne", ERA-Forum, Vol. 12, No 1 (2011), p. 107 (stressing the continuity between Article I-36 of the Constitutional Treaty and Article 290 TFEU, idem, p. 117-118).

[38] More recently, the EP reiterated that under Article 290 TFEU the Commission exercises "a power which is intrinsic to the legislator's own role" (EP Resolution of 2014 on delegated acts, *supra* note 4, Recital A). According to the Commission, under Article 290 "the legislator delegates *its powers* to the Commission in the interests of efficiency" while under Article 291 "its power is purely executive"(Commission Communication of 2009 on delegated acts, p. 3).

[39] Opinion of AG Villalón, *supra* note 11, para 26, 63, 47, 78. The obvious difficulties of drawing that line - which have fed many of the discussions around Article 290 and 291 – may explain, at least in part, the Court's position in this judgment.

[40] *Biocides* case, para 40 and 52, and para 49. The second defining characteristic is the purpose of Article 291 acts, i.e. to ensure uniform conditions of implementation (para 40), which the Court rather quickly considers verified in this case (para 53). The avoidance of the legislative-executive classification is more easily observable in the English translation of the judgment. The Court followed the Treaty terminology, which is more neutral in English (implementing power and implementing act) than in other languages that convey more strongly the executive-legislative terminology - "Compétences d'exécution" (Article 291(2)) and "actes d'exécution" (Article 291(4)); "competenze di esecuzione" and "atti di esecuzione" (respectively); "competências de execução" and "atos de execução" (respectively). But note that in the original French version, the Court does use the more loaded expression "*pouvoir* d'exécution" instead of "competences d'exécution" that figures in Article 291 (*Biocides* case, para 39, 40 and 53)

"supplementing" a legislative act. The Court suggested that implementing a legislative act would mean "only" adding "further detail" within a "normative framework laid down by the legislative act itself". This formula is ambiguous enough and fitting with the Court's dictum: the functional delimitation between Articles 290 and 291 is a matter of legislative discretion, where the Court will have little to say except perhaps in more extreme cases in which it would be able to establish a "manifest error of assessment". The message seems clear: whichever criterion of delimitation one may end up having, this is a matter for the institutions involved to decide.

If the main issue is in fact how to re-establish and stabilise the inter-institutional collaboration in exercising the non-legislative power of the Union, one should take a step back and query whether democracy is at all a suitable normative angle of analysis of 290 and 291 acts.

3. Only a matter of institutional collaboration?

Even the more legitimacy-laden delegated acts can be interpreted as mainly establishing a new scheme of collaboration between the Parliament, the Council and the Commission in the exercise of the legislative function of the Union.[41] This perspective repositions the problem. Irrespective of a rationale of democracy that may have inspired the distinction, the crux of the matter undoubtedly has been to re-establish the institutional balance under the new Treaty configuration. Democracy may at best be an effect of such re-balancing.[42] It is eventually downgraded to an argument that the Parliament and the Council (holders of direct legitimacy under Article 10 TEU) may invoke when setting the limits they wish to place on the exercise of the Commission's powers.[43] This is indeed the lens one is led to take when moving away from the interpretation of the Treaty provisions in the light of their

[41] Opinion of AG Villalón, *supra* note 11, para 36. This is also the prevailing view voiced by the Parliament, the Council and the Commission: see the EP Resolution of 2014 on delegated acts (*supra* note 4), where the EP underlines Article 290 as a "valuable means of rationalisation of the legislative process, which was its initial rationale in order to avoid micro-management and a heavy and lengthy co-decision procedure" (para 7); similarly, according to the Council delegated acts are "an important tool to guard the efficiency of the Union's decision-making processes as it avoids an overburdening of the legislator" (the Council Initiative 2014, *supra* note 4, p. 2). In the same sense, see Commission Communication, 'Implementation of Article 290 of the Treaty on the Functioning of the European Union', COM(2009) 673 final, Brussels, 9.12.2009, p. 3.

[42] Admittedly, separating democracy from power sharing between the institutions of the Union is, to a certain extent, artificial. The horizontal distribution of functions and the vertical allocation of executive power has important implications for the democracy in the Union.

[43] See, e.g., EP Resolution of 2014 on delegated acts, *supra* note 4, recital A.

roots (flexibility and democracy),[44] and looks instead at the institutional acts that have sought to flesh out Articles 290 and 291 TFEU.[45]

The existing rules that concretise Articles 290 and 291 TFEU have one common feature: more remotely (e.g. the traits of comitology that represent a continuation of the previous regime) or more directly, they are the result of a power struggle between the institutions.[46] They are directed at delimiting the respective realm of action and influence of the Council, the Parliament and the Commission in the system of non-legislative acts introduced by the Lisbon Treaty. The Comitology Regulation contains a wealth of procedural rules that constrain several aspects of the operation of comitology committees with the main purpose of stabilising the relationships between the institutions when they resort to Article 291 TFEU. It mainly shapes the new comitology system in accordance with this Treaty article, i.e. establishing a shared executive power between the Union and the Member States.[47] Similarly, the main purposes of the Common Understanding on Delegated Acts were to ensure the "smooth" exercise of delegated powers and the control of the European Parliament and the Council over the ensuing acts.[48] The Common Understanding was specifically intended to streamline the adoption of delegated acts after the first institutional clashes on whether and to what extent national governmental experts and EP experts should be consulted.[49] The more recent initiative to complement the Common

[44] "Their roots" refers to the Final Report, *cit. supra* n. 3, p. 2; on the relevance of a teleological and historical interpretation, see *supra* notes 11 and 37.

[45] See Council, "Common Understanding on delegated acts", Brussels, 4 April 2011, 8640/11 – PE-L 40, INST 192, and Regulation No 182/2011, of the European Parliament and of the Council, Laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementation powers, OJ L 55/13, 28.2.2011. See also the documents cited *supra* note 4, which underline flexibility and efficiency as the main rationales of delegated acts, and, indirectly of the Lisbon system of non-legislative acts (note that the Parliament does attach importance to the need to ensure a correct application of the Treaty that will "guarantee a sufficient level of democratic legitimacy for delegated acts" (recital A)).

[46] J.P. Jacqué "Some considerations concerning the history of comitology in the European Union" P. Craig "Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains", and P. Ponzano "The New System of Comitology and Delegated Acts: a point of view of the European Commission" in this volume.

[47] See in detail the analysis of "Un Nouveau Depart", *supra* note 30. It is important to note that the Standard Rules of Procedure for Committees contain rules on third parties and experts' attendance of committee meetings, access to documents and data protection that go beyond a purely inter-institutional dimension (Articles 5(1), 7, 11, 13 and 14; OJ C 206, 12/07/2011, p. 11–13)

[48] See Common Understanding, *supra* note 45, p. 2.

[49] See Garzón Clariana, "Les actes délégués" surpa note 37, pp. 122-124 on the procedure for the adoption of delegated acts. Christiansen and Dobbels,, "Non-Legislative Rule Making after the Lisbon Treaty", *supra* note 22, p. 50. On the institutional disputes regarding the consultation of experts, see P. Craig "Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains", and K.S.C. Bradley "The European Parliament and sub-legislative acts: political problems, legal solutions?" in this volume

Understanding on delegated acts regards the consultation of experts and confirms the centrality that controversies surrounding this issue retain.[50]

Yet, even if one holds that Articles 290 and 291 TFEU are predominantly about re-defining the powers of the institutions, the legitimacy of delegated and implementing acts can hardly rely only on institutional balancing. If the procedures in place are mainly directed at ensuring a mix of institutional controls that satisfies the expectations of each institution under Articles 290 and 291, they ignore important functions that are relevant to ensure the legitimacy of public acts. Procedures rationalise public action. They channel information and balance competing substantive interests, thereby enhancing the material justice and quality of the decisions adopted and allowing scrutiny of the choices made.[51] The specific weight of these functions will depend on the type of public action at issue (e.g. adjudication – whether administrative or judicial - or rulemaking – whether legislative or administrative) and procedures will vary significantly accordingly.

One may argue that, in order to fulfil these functions, procedures need not be formalised. This has been the predominant view in EU law and practice when it comes to non-legislative rulemaking. Outside comitology, rulemaking procedures are left to sparse and scattered sector provisions occasionally defined by the legislator. The Commission and the EU agencies make sure that the functions of procedures mentioned above are fulfilled without the need to be formally constrained by legal rules.

However, an assessment of the current procedure for the adoption of delegated acts hardly confirms this view. The making of delegated acts is at present largely in the hands of the Commission.[52] No formal procedural rules structure the respective process, except in the few instances where the legislator has determined specific and sparse requirements in the

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[50] Council Initiative 2014, *supra* note 4.See also T. Christiansen and M. Dobbels "Inter-Institutional Tensions in the EU's System of Delegated Powers after Lisbon", in this volume.

[51] E. Schmidt-Assman "Pluralidad de estructuras y funciones de los proeedimentos administrativos en el Derecho alemán, europeo e internacional" in Javier Barnes (ed.) *La Transformación del Procedimiento Adminsitrativo*, Sevilla: Global Law Press – Editorial Derecho Global, pp. 71-112, at p. 77. In national doctrine these remarks are usually made regarding administrative acts, but they are of broader relevance. Think of the problems raised by the informal meetings between the Parliament, the Council and Commission (trialogues) in the making of legislative acts.

[52] The Commission has defended this state of affairs, by stressing, inter alia, that Article 290 TFEU is "sufficient in itself" (Commission Communication, 'Implementation of Article 290 of the Treaty on the Functioning of the European Union', COM(2009) 673 final, Brussels, 9.12.2009, at p. 2) and Commission Guidelines of 2011, *supra* note 13. This statement has institutional consequences: the imbalances in the position of the Parliament, pointed out above, stem also from the lack of formal procedures that make visible what the Commission is doing when making delegated acts.

enabling act.[53] The only general rules are those specified in the Common Understanding. They refer to the consultation of experts and the transmission of information to the Council and the European Parliament.[54] [55] But the Commission has so far refused to be bound by any rules that would, inter alia, specify the extent to which it should take into account the views of the experts consulted, or that would identify the experts the Commission would be bound to consult.[56] This refusal is due to the Commission's resistance to put in place a system that would resemble comitology, which the Commission rightly deems incompatible with the Lisbon Treaty.[57] Nevertheless, this refusal hinders the transparency of public action and the scrutiny of the acts adopted.[58]

The inter-institutional controversy on how to consult experts has narrowed down the debate on the legitimacy of procedures to an exclusive focus on how the experts of Member States or of the Parliament can participate in the making of delegated acts. Thereby, it has silenced other equally relevant aspects of procedural legitimacy, in particular the issue of how to ensure the consideration of a plurality of views that is able to enhance the material justice and the quality of the final decision. In doing so, the current debate has ostensibly ignored another crucial dimension of procedures: their external dimension that structures the relationships between the makers of legal acts and the outer sphere composed of legally affected persons and of citizens in general.

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[53] E.g. Article 10(3) of Directive 2010/30/EU, of the European Parliament and the Council (labeling of energy consumption), OJ L 153/1, 18.6.2010.

[54] The Framework Agreement on the relations between the European Parliament and the European Commission further specifies that the Commission may invite Parliament's experts to attend the expert meetings (point 15 and Annex I, OJ L 304/47, 20.11.2010).

[55] These are the rules that have been at the core of the inter-institutional disputes.

[56] Commission Guidelines of 2011, *supra* note 13, para 82, (p. 21); Note to Directors General (2012), p. 5, where the Secretariat General specified that "one should refrain from including provisions on consultations in the basic act. Consultation requirements cannot be made part of a conferral of powers (…). They cannot be made essential procedural requirements (…)" and classified this as a non-negotiable point. See also Letter from Mr Maroš Šefčovič, Vice-President of the European Commission, enclosed in Cover Note, Initiative to complement the Common Understanding on delegated acts as regards the consultation of expert, 7792 2014 INIT, Brussels, 17/3/2014.

[57] Commission Guidelines of 2011, *supra* note 13, para 86.

[58] The Commission publishes explanatory memoranda where it explains the steps it took in the preparation of the delegated act. This practice has been specified in the Commission Communication of 2009 (Annex), and reiterated in the Commission Guidelines of 2011, *supra* note 13, para 124. But the terms of these explanatory memoranda are too concise to ensure transparency and scrutiny. In what regards procedures, often they do not go beyond stating that meetings were held with expert groups or with representatives of stakeholders, that these meetings allowed an exchange of views on the draft, and that observations and comments made orally in these meetings were taken into account in the final draft.

Procedures structure the relationships between the makers of legal acts, legally affected persons and citizens in a two fold way. They channel, in a visible way, the action of the various bodies and actors whose contributions are needed to reach an outcome. They allow access points along the way, be it in the form of access to information or access to decision-making. From a procedural protection perspective, the latter are particularly important in adjudicatory procedures, but should not be exclusively a concern of adjudicatory procedures.[59]

This external dimension is insufficiently heeded in the rules that guide the making of delegated and of implementing acts. The very limited way in which the current procedures are open to non-institutional or non-Member State actors is incapable of structuring adequately, in the sense indicated above, the relationship between the authors of delegated and implementing acts, on the one hand, and interested parties and citizens, on the other. In what concerns delegated acts, the Commission does consider the possible inclusion of "stakeholders". In the Commission's view, readily endorsed by the Council, the consultation of interested persons should be held after the meetings with the experts groups.[60] Moreover, both types of consultation preceded the internal service consultations, there being the possibility of consulting again the same experts (but not interested parties).[61] The sequence of consultations is purely designed to ensure the institutional prerogatives of the Council and of the Commission. Crucially, the terms of consultation are fully determined by the Commission, to protect its institutional prerogatives vis-à-vis the Council (expert groups) and vis-à-vis the possible over-legalisation and judicialisation of consultation of interested third parties. The Council and the Parliament are trying to change this situation, but only in what concerns their respective experts.[62] The situation is different in the making of implementing acts, but only regarding the consultation of experts, which is obviously mandatory under the Comitology Regulation. The Standard Rules of Procedure for Committees do envisage that the chair of the committees (a Commission representative) "*may* decide to invite representatives of other third parties or other experts" as observers,

[59] J Mendes, Participation in EU rulemaking. A rights-based approach (Oxford, OUP, 2011), Chapter 5.
[60] Commission Guidelines of 2011, *supra* note 13, para 96, Council Initiative 2014, *supra* note 4, para. 4.
[61] Commission Guidelines of 2011, *supra* note 13, para 103.
[62] Council Initiative 2014, *supra* note 4, para 4 (the reference to stakeholders merely endorses the stated practice of the Commission – see also the standard clauses suggested by the Council in the same document). EP Resolution of 2014 on delegated acts, *supra* note 4, para. 13.

who, in any event, cannot be present nor participate in the voting of the committee. Further, these rules specify that a simply majority of the component members of the committee may object to the participation of third parties or experts.[63] The only exception to this situation is when the enabling act specifically determines the consultation of interested parties or of other experts.[64] But, even then, the decisions on when, who and how to consult are largely left in the hands of the Commission. Admittedly, the broader perspective on the legitimacy of delegated and implementing acts adopted here is not a concern of the institutions. But it is questionable whether this state of affairs is normatively defensible under the current constitutional framework as will be argued below.

4. Procedures and democratic legitimacy

4.1. Procedures: concretising democracy as a Union founding principle

From a formal legal perspective, the principle of democracy as enshrined in Articles 9 to 12 TEU ought to frame the exercise of authority in the Union.[65] While the principle of democracy is not an innovation of the Treaty on European Union, the revision made by the Lisbon Treaty gave it a normative density unknown before. These Treaty norms provide the normative framework that ought to shape the relationships between the EU institutions and bodies, on the one hand, and the EU citizens, representative associations and civil society in general, on the other. The Treaty now determines that these relationships should be established both via procedures and institutional design based on representative democracy, and via procedures and mechanisms of participatory democracy.

It follows in particular from Articles 9, 10(3) and 11 TEU that the legitimacy of the Union's actions does not rely anymore purely in a combination of the different institutions representing the "Union interest", the Member States and the citizens.[66] This normative consequence may be an "irritant" in a polity that evolved via power struggles between institutions and between institutions and the Member States. But it is one that, mindful or

[63] Article 7(3) and (4) of the Standard Rules (*supra* note 47), emphasis added.
[64] See Article 7(1) of the Standard Rules. For examples of consultation during the making of delegated acts, see *supra* note 53.
[65] On democracy as a founding principle, see A. von Bogdandy, 'Founding Principles', in A. von Bogdandy and J. Bast (eds), Principles of European Constitutional Law (Hart Publishing, 2010), pp. 11-54.
[66] This statement only takes into account the procedures where the Commission, the Council and the Parliament intervene.

not, the Member States chose and to which they gave constitutional 'dignity'. If citizens have the right to participate in the democratic life of the Union (Article 10(3) TEU), the mechanisms that ensure citizens' representation via the Parliament need to be effective and as open as possible (Article 10(3) TEU). In addition, even if subject to an institutional choice of "appropriate means", there need to be mechanisms that give citizens and representative associations a voice "in all areas of Union action" (Article 11(1) TEU) in equal terms (Article 9 TEU). While participatory mechanisms established outside legal procedures are important tools to flesh out the provisions of Article 11 TEU, to deny the legal implications of this provision means denying the normative shift Article 11 introduced.[67]

Article 9 TEU, first sentence, is perhaps the most obscure of these provisions. More than recognising that the Union respects the principle of equality, it specifies that Union citizens ought receive equal attention from the Union's institutions, bodies and offices. The legal meaning of "attention" is far from clear. The "shall" used in the English version indicates that this could be a specific legal command. If this is the case, it is diluted in other official languages, which emphasise that Union citizens *benefit* – rather than "shall receive" – from equal attention.[68] Nevertheless, irrespective of more concrete interpretations that Article 9 TEU may allow, it is safe to conclude, first, that this provision implies that the Union establishes relationships with its citizens, and, second, that equality ought to shape these relationships. Even if these relationships may not be established "in all its activities", the external effects of delegated and implementing acts make it hard to deny that Article 9 would apply to acts of the Commission adopted in lieu of the legislator under the scheme of Article 290 TFEU and to acts of the Commission or of the Council adopted because uniform conditions of implementation require Union action. By the same token, it is difficult to envisage how the actions of the Union under Article 290 and 291 TFEU would be excluded from the scope of application of Articles 10(3) and 11 TEU.

Procedural rules are an important means to shape the relationships between the citizens and the institutions in a way that complies with the determinations of Articles 9, 10(3) and 11 TEU. These provisions establish normative parameters that are directly relevant to designing decision-making procedures. Participation, equality and transparency

[67] J Mendes, 'Participation and the Role of Law after Lisbon", *supra* note 5.
[68] Cf. the French, Italian, Portuguese and Spanish versions.

ought to shape the making of the acts of the Union. The encompassing way in which those provisions are drafted grounds the presumption that the making of delegated and implementing acts is no exception. The relevance of constitutional principles in defining procedural rules is not new in national legal systems, where procedures have been seen as a means to bridge constitutional determinations and administrative actions. That the administrative procedure ought to concretise constitutional principles by incorporating elements such principles require is accepted in Germany – whose constitution does not contain explicit norms on the administrative procedure – in Spain and in Portugal – where norms on the administrative procedure are part of the written constitution.[69] Arguably, this constitutional reading of procedures is equally valid in the European Union.[70] In what concerns the principle of democracy, and insofar as openness is a dimension of democracy, Articles 15(3) TFEU lends textual support to this interpretation, by specifically determining the way the Union's institutions, bodies, offices and agencies ought "*conduct their work"*.

4.2. Participatory procedures and representative democracy

Depending on how they are designed, procedures can be a complementary source of democracy that straddles representative and participatory democracy. This can be achieved by procedures that accommodate the participation of citizens and interest representatives. Undoubtedly, those that will use the opportunities of participation will be mostly interest representatives – i.e. interest groups of various kinds – and the most powerful groups may benefit from formal access points to the procedure, given in particular the possibilities of litigation that they may open. How their participation in decision-making can be a source of democracy is thus far from obvious. Particularly when considering Union decision-making procedures, the risks of conflating interest representation and participatory democracy are too important to be overlooked.[71] The relationships established between the Commission,

[69] On this approach in the German legal system, see Schmidt-Assman "Pluralidad de estructuras y funciones", *supra* note 51, pp. 81-86. From a Spanish perspective – albeit in a general analysis of the procedure detached from the Spanish constitutional precepts – J. Barnes "Reforma e innovación del procedimiento" in *idem*, pp. 11-69, at p. 16. Similarly, regarding the US, see Gillian E. Metzger, "Ordinary Administrative Law as Constitutional Common Law", *Columbia Law Review* ,479 (2010).

[70] D. Curtin, H. Hoffman, J. Mendes, "Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda", *European Law Journal*, Vol, 19 No 1 (2013), pp. 1-21. It applies to the making of both delegated and implementing acts Mendes, "Delegated and implementing rulemaking", *supra* note 5. See also *supra* note 51.

[71] See P. Allott, "European Governance and the Re-branding of Democracy", *European Law Review*, Vol. 27,

in particular, and interest representatives throughout the process of European integration, as well as the rhetorical use of the participation of civil society made by the Commission since its 2001 White Paper on Governance, recommend care, at the very least, when approaching participation from a perspective of democracy.[72] A minimum degree of caution prevents one from relying on current practices to make a claim of democracy. They serve different purposes.[73] In addition, no matter what one's normative perspectives may be, one should acknowledge that participation under Article 11 TEU is bound to rely largely (if not completely) on marshalling interest-specific input. Nevertheless, the caution required when viewing participation as a potential source of democracy is precisely a reason to uphold rather than to dismiss the role of procedures. Procedures will have the function of channelling participation in a way that can ground a claim of democratic legitimacy. How then can participatory procedures be a source of democracy?

A claim that participation in Union decision-making can be a source democracy depends on the verification of at least two premises. Voice ought to be given to those interested in participating, irrespective of the policy preferences of decision-makers. Participants ought to have equal opportunities of influencing outcomes.[74] Formal equality before the law may not address the power imbalances between different groups, but it potentially gives access to interest representatives that may be excluded from behind-the-scenes lobbying. Arguably, access (voice) and justification (equal treatment) are the core procedural issues on which hinges the normative shift from participatory governance to participatory democracy that Article 11 TEU entails.[75] Voice and equal treatment are likely to upset the participatory arrangements created with the purpose of ensuring "evidenced-based policy-making".[76] If designed accordingly, procedures are capable of ensuring the fulfilment of these conditions. Only then could participation in the making of delegated and implementing acts be considered a complementary source of their democratic legitimacy.

No. 1 (2002), pp. 60-71, and B. Kohler-Koch, "Post-Maastricht Civil Society and Participatory Democracy", *Journal of European Integration*, Vol. 34, No 7 (2012), pp. 809-24.

[72] For an overview, Mendes, *Participation in EU rulemaking*, *supra* note 59, Chapter 3.

[73] On the difference between participation from a governance perspective and from a perspective of democracy, see Mendes, "Participation and the Role of Law after Lisbon", *supra* note 5.

[74] Mendes, "Participation and the Role of Law after Lisbon", *supra* note 5, p. 1862.

[75] Mendes, "Participation and the role of law after Lisbon", *supra* note 5, p. 1866.

[76] Commission Staff Working Document, "Review of the Commission Consultation Policy", SWD(2012) 422 final, Strasbourg, 12.12.2012, p. 3. Pointing out the absence of equal participation and indicating this absence as a reason not to consider participation in the EU, as currently practiced, as a source of democracy, see Kohler-Koch, "Post-Maastricht Civil Society…", *supra* note 71, p. 818-20.

Furthermore, these acts, whether amending and supplementing non-essential elements of a legislative act, or implementing it, are subordinate to the 'essential' choices made in their 'parent' act. As such, they ought to further those choices. This means pursuing the range of public interests that the 'parent' act defined as legally protected.[77] Procedures ought to link the choices made in delegated and implementing acts back to the legal framework within which they are enacted. Participation – duly channelled by appropriate procedures – would be a means of ensuring that the decision-maker has a proper representation of the legally protected interests affected by its decisions. Thus, one criterion to assess the pertinence of the comments received via a participatory procedure would be the extent to which they contribute to a better representation and composition of the interests the legislator set as goals in a given area. From this perspective, participation of persons concerned or of the public may enhance representative democracy: it frames the choices of the Commission (or of the Council, in the exceptional cases of Article 291 TFEU) according to the law.

Participation needs to entail a moment of justification of the choices made in view of the legally protected interests the Commission (and the Council in its executive function under Article 291 TFEU) is bound to pursue. The justification of the balancing of competing interests is made in the light of the legislative mandate. Justification makes choices accessible not only to those who participated in the procedure, but also to the legislator, and, eventually, to the courts. Therefore, participation can aid both Parliament's (and Council's) oversight and judicial review of delegated and implementing acts. Its contribution to enhancing the role of the Parliament is particularly relevant regarding the adoption of delegated acts: the information gathered by participants could be used by the Parliament to strengthen its control over the Commission's choices, thus balancing the weaknesses of the existing controls that were pointed out above.[78] The timing of participation (i.e. the moment in which it would occur in the procedure) is crucial in this respect. It would need to be reconciled with the timing of the controls the Parliament has under Article 290 TFEU. From this perspective, it seems adequate that the consultation of interested parties takes place before the consultation of experts groups (provided that there are efficient ways for parliamentary involvement in these groups), as the Commission and

[77] Similarly, see Mendes, *Participation in EU rulemaking*, *supra* note 59, p. 17.
[78] I am grateful to Jurgen Bast for a discussion on this point.

the Council have proposed.[79] However, the period in which the Parliament or the Council can object – generally two months, renewable for another two – may need to be extended.[80] This sort of advocacy coalition between the Parliament and interest representatives qualifies the general claim that procedures support legislative control.[81] Participation by citizens and interests representatives in the making of delegated and implementing acts would allow the legislator to follow the process of making of rules and possibly influence their development.[82] In the case of implementing acts, participation would not be formally instrumental to parliamentary control, but it should enhance the possibility of public scrutiny, equally relevant under the principle of democracy.

Portraying procedures as a source of participatory democracy capable also of enforcing the choices made by the representative institutions of the Union does not mean that democracy is the only, or the prevailing principle that ought to guide the design of procedures. Far from it. As mentioned above, procedures rationalise public action. They do so in ways that need to go beyond strictly democratic concerns. Certainly, the making of delegated and implementing acts will need to draw its legitimacy also from the technical expertise the procedure allows to gather. Technical expertise is crucial to determine, for example, what is needed to adapt the annexes of a legislative act to scientific progress, or the possible obstacles to the uniform application of a legal act in the different Member States. There are of course trade-offs between competing sources or types of legitimacy.[83] The balancing of these trade-offs is bound to determine specific procedural designs. But what the considerations above stress is that procedures can further democratic legitimacy and that, under the current Treaty framework, democratic legitimacy needs at least be considered when designing the procedures for the making of delegated and implementing acts.

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[79] See *supra* note 60.

[80] This is in any event a general problem – see Report of the Economic and Social Committee on implementing and delegated acts (*supra* note 16), Annex II, point 1.3.5. Note that the Treaty does not specify a given time period for objection, which should be determined by the legislator (Article 290 (2) TFEU).

[81] McCubbins, Noll and Weingast, "Administrative procedures as instruments of political control", *Journal of Law, Economics and Organization,* Vol. 3 No. 2 (1987) and Schmidt-Assmann, *Teoria General Del Derecho Administrativo como Sistema*, Marcial Pons, Madrid, 2003, pp. 27ss, and 359ss.

[82] S. Rose-Ackerman, S. Egidy, J. Fowkes, "The Political Economy of the Law of Lawmaking: The United States in Comparative Perspective", Paper Prepared for the *Conference on Comparative Administrative Law and Regulation*, George Washington University Law School, January 31-February 1, 2014, Washington DC**,** p. 7, referring to procedures in general.

[83] Rose-Ackerman, Egidy, Fowkes, *idem*, p. 3.

Democracy-based participation entails costs and imbalances that need to be accommodated or accepted as a consequence of a constitutionally informed choice. As a result, which specific procedural rules are appropriate to accommodate democratic concerns is not an easy question to answer. Procedural rules, in addition, need to give leeway to the Commission, the Council (where pertinent) and the agencies to adjust constitutional and legislative requirements regarding procedures to the regulatory contexts in which they operate. Be that as it may, in the light of the above, within the current constitutional framework, choices on procedures ought not be in the full discretion of decision-makers. It is at least not fully in the hands of the Commission to decide on the priority it should give to consultations with national experts vis-à-vis consultations with interest representatives, nor the ways through which it decides to consult interest representatives.[84] The Commission's preferences need to be framed by the procedural constraints that follow from the Treaty provisions on democracy and need to be justified also in their light.

4.3. The Parliament's silence

If procedures can aid the Parliament in overseeing the actions of the Commission when making delegated and implementing acts, and enhance public scrutiny, the minimum view of the Parliament on a law on the administrative procedure is difficult to understand. By a resolution of 2013, the European Parliament requested the Commission to make a legislative proposal for a regulation on a European Law of Administrative Procedure. The Parliament's recommendations regarding the content of this proposal are, in substance, limited to codifying general principles and procedural rules applicable to individual decision-making.[85] Both the principles and the rules proposed have long been established in the case law and have been restated in the Code of Good Administrative Behaviour of the European

[84] See *supra* text accompanying notes 60-62.

[85] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)), Annex, recommendations 3 and 4. The other recommendations pertain to the objective and scope of the regulation to be adopted (Recommendation 1), to the relationship between the regulation and sectoral instruments (Recommendation 2), to the review and correction of own decisions (Recommendation 5), to the form and publicity to be given to the regulation (Recommendation 6).

Ombudsman.[86] The Parliament is completely silent regarding procedural rules that could guide the making of non-legislative acts.

No legal-normative reason justifies this silence. The legal basis for such an act (Article 298 TFEU) does not exclude the establishment of procedural rules on the making of non-legislative acts. An argument drawing on the "quasi-legislative" nature of delegated acts is weak, given the difficulties in defining the borderline between the two categories of acts and the fact that, as mentioned above, whether the Commission is given delegated and implementing powers is mainly a result of the political bargaining between the institutions. In any event, from a formal perspective delegated acts are non-legislative acts. There is also no legal or administrative reason why the openness, efficiency and independency of European administration should be attributes of the EU administration only when adopting individual decisions, or that would merit being specified in procedural rules only in this ambit.

True, the right to good administration of the Charter of Fundamental Rights is restricted to the relationships that the EU administration established with EU citizens via the adoption of individual decisions.[87] But, as significant as it may be, in particular since the Charter has become legally binding, Article 41 of the Charter is also only a codification of the Court's case law. While the protection of good administration as a fundamental right is restricted to individual decision-making, most procedural rights that Article 41(2), (3) and (4) enshrines have a "mirror" outside this type of procedures, or ought be extended to general rules.[88] A patent exception is the right to be heard. However, both the procedural protection of rights and legally protected interests and the principle of democracy would justify establishing participation rights in lawmaking procedures of the EU administration.[89] Article

[86] The Code is available at http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1. The legislative proposal requested would not turn the Ombudsman's Code binding. The content of the Code partially overlaps with principles and rules of judicial origin, but it also covers principles and rules that are not binding and that would remain non-binding if an act like the one the Parliament envisaged would be adopted (e.g. the duty of officials to be service-minded, correct and courteous).

[87] Article 41 of the Charter of Fundamental Rights of the European Union (OJ C 303/1, 14.12.2007),

[88] The right of access to documents mirrors the right of access to the file, despite its different rationales; the duty to give reasons is generally applicable to all legal acts of the Union (Article 296, second paragraph); the right to damages is also not restricted to individual decisions (Article 340 TFEU), neither is the right to address the institutions in one of the languages of the Treaty and to receive an answer in the same language (not restricted either by Article 41(4) of the Charter, or by Article 20(d) TFEU).

[89] From a rights-based perspective, see for arguments and conditions under which such rights should be established Mendes, *Participation in EU rulemaking*, *supra* note 59, Chapter 5 and Chapter 9; from a perspective of democracy, see Mendes, 'Participation and the Role of Law after Lisbon", *supra* note 5.

41 is not an obstacle to enshrining procedural rules on transparency and participation, which would remain outside the scope of a fundamental right to good administration.

Furthermore, if efficiency and independence do not have democratic connotations, the same is not true for openness. The reference to an "open administration" stresses the relationships between the EU administration and the EU citizens, third country nationals and legal persons. Article 298 TFEU should hence be read in the light of the provisions on democracy of the TEU. By requiring that there be an open administration, Article 298 TFEU makes clear that openness is not only an attribute of the legislative activities of the Union (stressed in Article 15 TFEU). Openness ought to pervade also those regulatory activities and institutional practices that shape the EU outside formalised procedures and contribute to shaping the EU polity (Article 15(1) TFEU).

The Parliament's silence regarding non-legislative acts can be explained (but not justified) by a different set of reasons. First, national laws on the administrative procedure largely lack rules on lawmaking by administrations. This fact may have influenced the choice of the Parliament. In favour of that choice, one may argue that the eventual coherence of a possible EU law on the administrative procedure with its national counter-parts could facilitate the Council's support to the Parliament's proposal. Nevertheless, the absence of rules on administrative lawmaking in most national laws on the administrative procedure makes them obsolete, rather than commendable.[90] In addition, most national constitutions do not include provisions on openness of the administration and on participation as a source of democratic legitimacy that ought to inform administrative procedures. Also from the perspective of rights' protection, the sheer significance of the use of general rules by contemporary administrations impoverishes a law on the administrative procedure that focuses only on individual decision-making.[91] Secondly, the Commission, traditionally resistant to the type of rules proposed by the Parliament, is more likely to favour (if at all) a minimum version of a EU law on the administrative procedure. Hence, the Parliament's chances that the Commission would follow its resolution could be higher.[92] However, if the

[90] J. Barnes "Reforma e innovación…", *supra* note 69, pp. 19-23.
[91] J. Mashaw, "Administrative due process: The Quest for a Dignitary Theory", 61 *Boston University Law Review*, pp. 889-91 (1981), p. 896.
[92] Under Article 225 TFEU the Commission is not bound to follow the Parliament's request. As the European Parliament stressed recently, although the Commission usually complies with the formal requirement to reply to Parliament's requests, it fails on "substantial follow-up". The problem seems to be serious enough, given that the Parliament has invoked the need for a Treaty revision that would force the Commission to follow up

resolution of the Parliament would be the template of a future Commission proposal, a future law on the administrative procedures of the European Union would have missed a crucial share of what the EU administration does – making delegated and implementing acts. A final reason that may explain, but does not justify, the silence of the Parliament would be lack of sufficient political interest in controlling lawmaking by the Commission. But, if this would be the case, the Parliament would be denying its constitutional role of overseeing the observance of the Commission's exercise of delegated powers and its legal right of scrutiny over the implementation of legislative acts adopted via the ordinary legislative procedure.

5. Conclusions

The procedures that guide the making of delegated and implementing acts have been conceived from a predominantly inter-institutional perspective. The re-arrangement of the powers of the respective institutions in the making of these acts prevailed in the provisions of the Comitology Regulation, and it is at the core of the disputes still involving the making of delegated acts. To the point that one may question whether democracy is indeed a suitable normative angle of analysis of these acts. Without denying that institutional collaboration and the stabilisation of inter-institutional relations is at the heart of the Lisbon system of delegated and implementing acts, in the current constitutional framework, the legitimacy of these acts cannot rely purely on the role that the institutions play in the respective procedures. First, thus far, the democratic legitimacy of these acts is not sufficiently ensured via the controls envisaged in the Treaty and via the procedures that were established as a result of Articles 290 and 291 TFEU. Secondly, viewing procedures from a purely inter-institutional perspective ignores that procedures should rationalise public action

on its proposals, thereby directly challenging the Commission's formal exclusive power of initiating legislation that has been at the core of the Union method since the outset of the Communities (see Report on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)), A70120/2014, 17.2.2014, Committee on Constitutional Affairs, Rapporteur: Paulo Rangel, para 28 and 29). In this case, the Commission purported to follow the Parliament's recommendation (see "Follow up to the European Parliament resolution with recommendations to the Commission on a Law of Administrative Procedure of the European Union, adopted by the Commission on 24 April 2013", available at http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/2024%28INL%29#tab-0).

by channeling information, weighing competing interests, and allowing scrutiny of the choices made. The exclusive focus of the current institutional debate on the role of the experts of Member States and of the Parliament in the making of delegated acts silences these equally relevant aspects of legitimacy. Thirdly, the current institutional approach to the making of delegated acts (but also the current provisions on the making of implementing acts) ostensibly ignores that procedures are a crucial means of structuring the relationships between decision-makers and the 'outer' sphere: those legally affected by the legal acts of the Union and the public. This is a dimension that cannot be ignored in the current constitutional framework, given that Articles 9, 10(3) and 11 TEU establish normative parameters that ought to shape the relationship between the institutions and the citizens. Therefore, as it presently stands, an inter-institutional perspective on procedures ignores the constitutional declinations of the principle of democracy as enshrined in the Treaty on European Union.

Procedural rules that structure the public authority of the Union need to be justified *also* in the light of the provisions on democracy that shape the way its institutions, bodies, offices, and agencies relate to the citizens and interest representatives that voice the concerns of the persons affected by the legal acts of the Union. The making of delegated and implementing acts is no exception, in particular given the political significance of the matters that can be decided via their adoption. While there are risks in making participation of interest representatives a source of democratic legitimacy, they need to be heeded, and, to the extent possible, tackled via procedures. Provided that minimum conditions of voice and equality are fulfilled, participation through suitably designed procedures can be a complementary source of democracy of non-legislative acts. Participation channelled through suitable procedures can favour the weighing of the competing public interests that the legislator mandates the Commission to pursue. Participatory procedures should then be designed as a means of linking the substantive choices made in delegated and implementing acts to the legislative framework that they supplement, amend or implement. They would also support legislative control of the choices made in the enactment of delegated and implementing acts. Finally, in view of the Treaty, openness, which such procedures would favour, ought also be an attribute of the rules adopted by the EU administration.