

## **The legitimacy of the EU administration: between institutional and democratic claims**

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EU administrative actors – much alike national administrative actors – claim to act legitimately on a variety of grounds: expertise, fairness, efficiency, effectiveness, legality (of which competence is an important aspect). Normative judgments on the legitimacy of their actions may rely on a combination of these and other factors, thereby also combining the different values they convey, or single out one to the detriment of others. This chapter sets out to examine the broader legal constraints to the way EU administrative actors manage their legitimacy. Within the boundaries of legality, are EU administrative actors free to determine the sources of legitimacy, or a specific combination thereof, that justify their action? Possible legal bounds could derive from two sources. First, the core institutional features of these actors – their composition, functioning and formal powers – both ground their institutional capacity and allow them to relate to specific legitimacy assets to justify their decisions. Second, the Treaty defines legal principles that ought to ground and frame the actions of the Union. Here the focus will be on the implications of the Treaty provisions on democracy to normative assessments of the legitimacy of the EU administration. By examining these two aspects, this chapter will show the specific contours that the typical claims on the legitimacy of administrations ought to acquire in the institutional and constitutional frameworks of the EU.

Both the institutional configuration of the EU administrative actors and democracy as a founding principle of the Union (Bogdandy, 2010, 21-23, 47-53) convey a formal legal approach to the concept of legitimacy. The chapter begins by explaining the merits and limits of such an approach (Section 1). Surely, formal legal claims are only one way of approaching the legitimacy of administrations, one that does not capture the way they have sought to justify their authority by, *inter alia*, proclaiming or endorsing “principles of good governance”. One could even argue that formal legal claims belong

to the language of constitutionalism, which, in particular in the EU (Lindseth, 2010, 18-19) may be unsuited to explain (or constrain) the variety of ways through which administrative actors manage their legitimacy with a view to ensuring social legitimacy (Weiler, 1993, 413–14). And yet, administrative actors are legally constituted and act within the framework of a legal system grounded on legal principles. As such, even when their actions are not captured by Treaty determinations or simply go beyond what they could arguably allow for, the way administrative actors construct the legitimacy of their actions cannot be made independently of the Treaty and legislative frameworks. This chapter argues that both the institutional design of EU administrative and the principle of democracy ground justification and place normative limits to the ways the EU administrative actors manage their legitimacy claims (in the sense used by Baldwin, 1995, 41-42; and Black, 2008, 146).

Section 2 analyses the institutional design of selected EU administrative actors – the Commission, comitology committees and EU ‘quasi-regulatory’ agencies. The specific institutional role of the Commission and the composite nature of committees and agencies will qualify typical claims of expertise, impartiality and effectiveness. It will show the specific legitimacy assets these actors bring into EU decision-making procedures (drawing on Mendes and Venzke, 2015). Section 3 revisits the previous work of the author on the meaning of Article 11 TEU and other Treaty provisions on openness to discuss whether democracy should at all be a legitimacy claim made on the EU administration. Section 4 illustrates how the formal legal claims on legitimacy that the Treaty grounds, even if conflicting, constitute a normative yardstick to critique to the actions of the EU administration. It will do so by analysing the refusal of access to documents in infringement procedures conducted by the Commission, by reference to the Court judgment in the case of *LPN*.

## **1. Legitimacy: the limits and values of a legal code**

### **1.1. Legality and beyond**

Legitimacy is a polysemic concept. Strictly legal perspectives typically tend to conflate legitimacy with legality, in the sense of conformity to law. Conformity to law means abidance to legal mandates – not only to the specific determinations of enabling norms, but also, more broadly, to the specifications that stem from the general

institutional configuration of each administrative entity – and abidance to general principles of law. Yet, few would contest that conformity with the law is only one factor that may explain the acceptance of authority, or that may even be alien to such (Black, 2008, 144). The relevance of the argument of legality as a source of legitimacy decreases the further away public authority is from legal roots or the harder it can be captured by legal determinations. This is typically the case of discretionary decisions; of authority exercised via formally non-legal acts; of generally applicable rules that define policy choices, or, for that matter, of policy choices made in individual cases in the absence of pre-defined rules; of acts adopted by entities, bodies or networks that lack a legal mandate or basis, or whose activities are perceived as only imperfectly being captured by legal determinations. In these cases, the code of a lawyerly view on legitimacy – with its emphasis on certainty, rights-protection, and fairness – shows clearly its limits. Importantly, the lawyerly code also potentially clashes with efficiency, adaptability, technical quality and further canons or factors that other social scientists (including public administration scholars) would emphasise.

The tension between legitimacy grounded on legality and practices that cannot be justified by reference to law (at least not sufficiently) lie at the heart of administrations, at whichever level of governance they act, and at the heart of normative claims regarding their actions. While administrative bodies ought to act in conformity with the law, they also ought to deliver public goods – produce results – in areas where the complexity, unpredictability and variability of relevant factors manifestly impacts on the capacity of legal norms to deliver their promises of legal protection. At the same time, one should not overemphasise the opposition between legality (in the broad sense mentioned above) and other values that ought to guide administrative action. Law also incorporates them. In fact, it is not uncommon that legal mandates refer to efficiency as a principle of administrative action. Celerity is a value that can be legally enforced. Nevertheless, lurking in the background remains a tension between the law-abiding bureaucrat and the professional manager that is called to make an expert judgment – and, accordingly, needs flexibility – rather than a rational judgment that needs to be consistent with pre-defined rules (Baldwin, 1995, 28-29).

And yet, compliance with the law bears out some form of democratic consent to the authority that administrations exercise. It also carries with it the idea that administrative actions, whichever their form, still share, in some indirect way, the values that law conveys (certainty, openness, fairness, rights' protection). These values remain,

at a meta-level (i.e. beyond strict compliance with the enabling law), relevant to normative judgments on the legitimacy of administrative actions. This approach points, however, to an argument of a legitimacy chain between law and administration. The argument has both been de-constructed in several ways (Stewart, 1975, in particular, has seminally pointed out the obvious limits of a ‘transmission belt’ conception of the legitimacy of administration) and has remained anchored in legal systems (Schmidt-Assmann, 1993, 172-192). Despite its limits, the idea remains that law defines a frame of action, including the purpose of that action and the way choices are made about policy. Administrative actors are given specific functions because of their specific position in the institutional system which is grounded on the values that law conveys. That frame of action may be defined in very broad strokes, which, by themselves, are incapable of structuring the behaviour of administrations. They are hence insufficient to ground the legitimacy of their actions, but remain an inexorable element thereof. This is an enduring view that arguably still pervades public law, even if law ought not be conceived as “a bridle on an otherwise unrestrained exercise of power” (Loughlin, 2013, 21), as a means to protect liberty and property from incursions of public authority.

‘Compliance with law’ therefore stands for fulfilling values (and purposes) that in, a liberal constitutional tradition, ought to inform public processes, including administrative processes. It constitutes one grounds of the legitimacy of administrations – one claim that justifies administrative action by invoking a given set of values. Legality, is thus one legitimacy claim (in the sense used by Baldwin, 1995, 41-42). It competes with other claims that emphasise the pursuit of yet other values that are equally recognised as relevant justifications for administrative action. As Baldwin observed, ‘when legitimacy claims are made, those involved can recognise both relevant and irrelevant arguments and can see that relevant arguments invoke certain understood values and only these’; while different persons may ‘place different emphasis on the furtherance of certain values [...] they share a common recognition that certain values are relevant’ (Baldwin, 1995, 42; see also Black, 2008, 145). Legitimacy refers then to a ‘discourse of justification’ of the authority exercised by administrations (Baldwin, 1995, 41, Schmidt-Assmann, 1993, 164). Justification is grounded on the values invoked in relation to the actions of entities and bodies that have a specific institutional capacity.

## **1.2. Legitimacy claims of the EU administration**

The limits of legitimacy grounded on legality (and the underlying tensions) are perhaps exacerbated in the European Union. On the one hand, law is a constitutive element of the Union, which as a polity can only act on the basis of attributed competences. On the other hand, the legitimacy of the Union itself, within which the administrative bodies operate, is fundamentally questioned. Also different views on the nature of the Union itself impact on different constructions of the legitimacy of its administration (e.g. Lindseth, 2010, 10-11). This is a problem that national administrations do not face. But, irrespective of where one stands in the debate, also here political values that, presumably (at least judging from the letter of the Treaties), are shared across the Union ought also inform the administrative processes of the Union. Those indicated in Article 2 TEU have ‘a normative founding function for the whole of the Union’s legal order’ (Bogdandy, 2010, 21). They ought to frame the actions of the EU institutions, in whichever capacity they act. Their authority ought, ultimately be justified on their basis.

Also within the Union, the EU institutions and administrative bodies (or, to use the terms of the Treaty, its “bodies, offices and agencies” (Article 9 TEU; Article 24(4) TFEU) have sought to build legitimacy claims in grounds other than legality. Julia Black has stressed the influence of institutional environments in the ways administrative actors construct their legitimacy, showing how regulators whose actions are not “based or mandated by national, supranational, or international law” are likely to respond to legitimacy claims made by others (Black, 2008, 138). Such influence is perhaps stronger in those cases where legality is “thinner” or virtually lacking (Black, 2008, 145). But, arguably, the same dynamics apply to administrative entities that are clearly embedded in formal legal structures, such as the European Commission. In the case of the Union institution, bodies and agencies, the contested legitimacy of the Union itself and its functional character (the Union serves the purposes of integration, the aims and means defined in the Treaties – Article 3(6) TEU), more than the fact that they also act in ways that cannot be satisfactorily captured by law, have had arguably an important influence in the strategies they have used to manage their legitimacy (i.e. building, maintaining and repairing it - Black, 2008, 146).

The White Paper of Governance of the Commission is a conspicuous example of such strategies (Commission, 2001). Openness, participation, accountability, effectiveness and coherence (the so called “principles of good governance”) underpinned specific proposals for reform regarding, among others, a communication policy directed at

improving confidence in the EU institutions; the involvement of “civil society”; “better and faster regulation”, including reliance on expertise, and the combination of legal and non-legal instruments to ensure policy delivery; the re-focusing the tasks of the EU institutions, which would imply, inter alia, better control of the Parliament over the execution of EU policies, and the creation of more EU agencies that would relieve the Commission of more “technical” tasks. The White Paper has been highly influential. It defined the underpinnings of reforms that for over a decade have shaped the claims invoked by the Commission (and also of EU agencies) for justifying their actions (Commission Staff Working Document, 2012, 7). The context in which it was adopted is also relevant for demonstrating the point just made above. The Santer Commission had been forced to resign in 1999 amidst investigations of fraud, the process of Treaty reform was stalled and bound to produce results not earlier than 2004. To manage its contested legitimacy, the Commission clearly emphasised effectiveness (“delivering what is needed”), participation, responsiveness (vis-à-vis the “demands from the Institutions and from interest groups for new political initiatives”), expertise, and accountability.

But given the Treaty framework under which the EU institutions, bodies, offices and agencies operate, are there limits to the narratives they may create to justify their actions? Irrespective of the reasons and merits of such strategies to manage legitimacy, to what extent may the EU administrative bodies (including the institutions acting in an administrative capacity) create their own discourses on legitimacy? For instance, is it up to the Commission to define procedures freely in the areas that law does not cover, by imprinting there the values it chooses to emphasise?

## **2. Institutional design**

The institutional environments in which the EU administrative actors operate are more complex than what the Treaties or legislative frameworks let envisage. Yet, these actors are formally constituted by Treaty provisions or, in the case of comitology committees and agencies, by different combinations of institutional practices and legislative provisions. Formal frameworks define the *composition*, the *modes of decision* and the vague *mandates* that are further defined by institutional practices, agreements and conflicts between the institutions. In turn, these evolve on the basis of their own perceptions of their role and that of others within the Union. A similar dynamic has shaped comitology committees and European agencies at different points in time.

These constitutive elements define who they are (composition), what they do (functions), how they decide as an organisation (procedures). Through them, the legal frameworks of the EU administration – be it in the Treaty or in secondary acts – also indicate the legitimacy assets that different administrative actors ought to bring into the Union decision-making procedures. The link between constitutive elements and the legitimacy assets of EU administrative actors is important for two reasons. First, in these legitimacy assets lie the fundamental reasons why given actors are attributed certain powers and not others. Arguably, then, this criterion could delimit the possibilities of institutional growth. The argument may appear too formalistic. But it may be fruitful to further determining what is “the essential character of the powers conferred on [the] institutions by the [Treaties]” – the ultimate (thin) boundary that the Court has defined to the tasks the institutions may acquire outside of the formal framework of the Union (Case C-370/12, *Pringle*, para 158). Second, the formal definition of who they are and what they do provides an anchor to the justification for their acts. This is the aspect that will be developed here.

EU administrative actors adopt certain acts because, given their composition and the function they are attributed within a given institutional system, they are the bodies or institutions that are best suited to do so (in line with separation of powers thinking, see Mendes and Venzke, 2015). This vague proposition can be further concretised by looking in more detail at the values that, given their institutional design, ought to remain at the core of normative judgments on the legitimacy of their acts. By returning to the constitutive elements of EU administrative actors, it is possible to isolate the legitimacy assets that they derive from their institutional design from other values that may ground competing legitimacy claims. This analysis will qualify typical assumptions on the legitimacy of administrative action, namely, competence, including expert knowledge, impartiality, effectiveness. It will situate also other legitimacy claims that EU administrative actors have mobilised to justify their actions, namely those grounded on participation and transparency that in the EU (as elsewhere) have core tenets of the quality of governance. The later have acquired ‘constitutional’ relevance beyond institutional practices, as mentioned below (Section 3) and have, thereby, a different meaning than the one endorsed, for instance, in the 2001 White Paper on Governance. Also here polysemy may be a source of ambiguity. For now, in this section, they will be taken as predominantly approached by the EU institutions and bodies.

The following paragraphs will illustrate the argument with regard to selected EU administrative actors – the Commission, comitology committees and ‘quasi-regulatory’ agencies. They recall some of their basic institutional features to examine which assets can be inferred from the formal institutional frameworks in the Treaties and in secondary legislation. While the Commission has functions that the adjective ‘administrative’ clearly does not capture, the following observations will nonetheless examine the extent to which its core institutional features – as defined in Treaty provisions - reveal the grounds of its legitimate action that are also relevant in the administrative realm.

## **2.1. The Commission**

The Treaty description of the Commission’s institutional role clearly echoes the typical functions of an administration. As guardian and promoter of the Union interest, the Commission, among other core functions, ensures the application of the Treaties and of the acts of the institutions, executes the budget and performs coordinating, executive and management functions (Article 17(1) TEU). In accordance with the nature of these tasks, competence and independence of its members (Articles 17(3) TEU and 245 TFEU) are core tenets of the legitimacy of the Commission’s actions. Arguably, these are two factors that the internal organisation of the Commission ought to reflect. The Treaties also emphasise efficiency, consistency and collegiality (Article 17(6)(b) TEU). These are the assets that the Commission brings into decision-making procedures. But they do face significant challenges, in particular given the Commission’s heavy and complex internal bureaucratic structure. Coordination within the Commission is therefore crucial (Kassim et al., 2013, 183-187). At the same time, this structure remains nonetheless too thin for the manifold functions and areas of action of the Commission. To act competently, the Commission needs to rely on external expertise. Crucially, in doing so, it ought to preserve the independence of its decisions. Independence faces also other challenges: there still needs to be one commissioner per Member State; these retain an influence in the designation of ‘their’ commissioner; and the commissioners need to pass the close scrutiny of the European Parliament and remain accountable to it. These features are likely to condition, at least at a general level of political orientation, the preferences of the Commission as a whole. At the same time, they anchor the Commission’s power to define an abstract “Union interest” in the complex political



contexts in which the Commission operates. They are also constitutive elements that define “who” the Commission is that also legitimise what the Commission does.

While the composition of the Commission conveys competence and independence, collegiality – which is, at least in theory, instrumental to consistency – shapes the decision-making procedures within the Commission (Articles 1, 13 and 14 of the Commission’s Rules of Procedure). Collegiality is the core institutional feature of the Commission. It purports “the equal participation of the members of the Commission in the adoption of decisions” that decide on the basis of “a collective deliberation”; as a result, “all the members of the college of Commissioners [bear] collective responsibility on the political level for all decisions adopted” (Case C-137/92 P, *Commission v BASF*, para 63; Case C-191/95, *Commission v Germany*, para 39; Joined Cases T-427/04 and T-17/05, *France v Commission*, para 117). Collective deliberation is also relevant for the individuals affected by the decisions of the Commission: it means that “those decisions were actually taken by the college of Commissioners and correspond exactly to its intention” (*Commission v BASF*, para 64). Collegiality is translated in various forms of delegation of the power to adopt “administrative or management measures” (Article 13 and 14 of the Commission’s Rules of Procedure; *France v Commission*, para 117) and intra-services consultations (Kassim et al., 2013, 154). But these cannot jeopardise collegiality. Accordingly, in cases of delegation, the Court can review “whether the College may be regarded as having adopted all the factual and legal elements of the decision in question” (*France v Commission*, para 119). While, given the complex organisational structure of the Commission, collegiality may be more an assumption or a guiding principle than an effective organisational principle, judicial review confirms that it remains at the core of what the Commission does. It is collegiality that allows the Commission to claim that it defines and pursues the general interest of the Union beyond the interests of Member States and sectorial interests (Kassim et al., 2013, 154). Collegiality upholds the assumption that this general interest lurks behind the specific, specialised decisions the Commission adopts in competition, state aids, structural funds, agriculture, etc.

Beyond competence and independence, collegiality upholds the Commission’s political role in the Union, which undoubtedly extends to the administrative realm (see *France v Commission*, para 117). The reasons why ‘wide discretionary powers’ (in the sense of *Meroni*) ought not be delegated to the EU agencies lies also here (see further Section 2.3 below). Because of its composition and way of acting, the Commission has an institutional capacity that allows it to draw on legitimacy assets that the agencies do not

have: independence and competence that, importantly, are qualified by collegial responsibility. These allow the Commission to speak on behalf of the Union. They are the core assets that the Commission's strategies to manage its legitimacy – namely those grounded on participation and transparency through which the Commission links to “legitimacy communities” (Black, 2008, 147) other than political constituencies that are core to democratic theory (citizens and peoples) – ought not make vulnerable.

## 2.2. Comitology committees

Comitology committees bring Member States' civil servants formally into the Union decision-making processes, in meetings that are chaired by a Commission representative. Initially, they assisted and constrained the Commission in carrying forward “powers conferred on it by the *Council* for the implementation of the rules laid down by the latter” (Article 155 EEC Treaty, later Art. 211 EC, emphasis added). Since the Lisbon Treaty, comitology committees ensure that *Member States* have a say in the adoption of implementing acts (Article 291(3) TFEU and Article 1 of Regulation 182/2011 both refer to a function of “control”). Through different modalities, comitology committees allow the original holders of the power to implement legally binding Union acts (the Member States, under Article 291(1) TFEU) to *participate in, rather than control*, the exercise of that function at the Union level. The reason to take a critical distance to the function of control lies in another functional trait of these committees: throughout integration, they have institutionalised the links between the Member States administrations and the Commission (Blumann, 2011, 31; Chiti, 2013, 61-62). They are crucial “in between” administrative structures, formally legally detached from the Commission (now by force of the Treaty), while still being institutionally embedded as “adjunct” entities that assist it (Article 3(2) Regulation 182/2011); hence, they are also not part of the Member States' administrations.

Comitology committees constrain the capacity of the Commission to decide on the uniform conditions of implementation of legally binding Union acts. But, crucially, they also provide the Commission with expertise that it would otherwise lack. At the same time, they allow the Commission to accommodate the interests and concerns of Member States' administrations in the definition of acts that they will implement. Cooperation between Member States' administrations – in addition to their ‘assistance’ to the Commission – is a core aspect of committees. They function as “working [groups] [where] colleagues of different nationalities, representing different administrative

traditions, meet in the spirit of mutual respect to agree on common solutions to their problems” (Bergström, 2005, 32). Beyond the legal obligations of Member States’ administrations to comply with Commission’s implementing acts, their acceptance of these acts in these fora is important to ensure their effectiveness.

These structural and functional traits – what comitology committees are and what they do – are in keeping with the way they decide. The purpose of their deliberations is to “find solutions which command the widest possible support within the committee” (Article 3(4) of Regulation 182/2011). Accordingly, consensus may prevail over formal voting (Article 4(4) of the Standard Rules of Procedure). In addition, the chair has the duty to explain its decision – within the committee – in the light of the “suggestions and amendments” made, in particular those that “have been largely supported within the committee” (Article 3(4) of Regulation 182/2011). In keeping with their basic constitutive elements, comitology committees draw the legitimacy of their decisions (which are instrumental to the final acts adopted by the Commission, or, exceptionally, the Council) from the expertise of their members (members of national administrations) and from deliberation that ensures accommodation of divergent interests, which is important to ensure the effectiveness of the acts adopted.

But comitology committees have not been immune to contestations of their legitimacy from other angles. In particular, the secretive nature of their deliberations – and, for a long time, the absence of information on the committees themselves – has hindered the possibility of parliamentary oversight. The Parliament put the transparency of comitology committees on the agenda (Bergström, 2005, p. 274-78). The emphasis placed on transparency as a principle of good governance further strengthened the contestation of their legitimacy from this angle (Bergström, 2005, p. 271-2). The Comitology Regulation (as the comitology decision that it replaced) defines the legal duties of the Commission in this regard (Article 10). They are instrumental both to the limited powers of the Parliament and the Council under that Regulation and to the information provided to the public via the comitology register (Article 10(5)). Transparency is, thus, also one of the grounds on the basis of which one ought to assess the legitimacy of comitology committees. This is one ground that has formal-legal recognition, even if it is part of their more recent history, and it results less from their constitutive elements than from claims resulting from their evolving institutional context.

### **2.3. EU ‘quasi-regulatory’ agencies**

EU agencies are of various types. Among them, ‘quasi-regulatory’ agencies (Craig, 2012, 150) provide technical and scientific assistance to the Commission. The powers and organisational structures of these agencies are also varied, but they share common general features. As other EU agencies, they represent a compromise between the need to increase the administrative capacity of the Union in specialised fields and the need to avoid excessive centralisation that would be politically and practically undesirable or unfeasible (Dehousse, 1997, 251-4). They are therefore institutionalized forms of administrative collaboration and integration (Chiti, 2002, 56-8). This founding trait is reflected in their composition: the governing bodies of EU agencies (management boards) comprise representatives of Member States and of the Commission, in various combinations. Some also include representatives of other entities, if this is perceived to be relevant for the pursuance of the agencies’ functions. Because their main function is to provide technical and scientific support to the Commission, ‘quasi-regulatory’ agencies may also have scientific committees composed of experts designated by the management board (e.g. EFSA – Article 28(5) of Regulation No 178/2002) or by the Member States (e.g. EMA). Their composition – structurally anchored in the Member States and the Commission – reveals again an “in between” character. Agencies are formally autonomous from the Commission, but there are numerous ways by which the Commission retains influence over their action (Chiti, 2009, 1399-1400). The same observation can be made regarding the relationship with Member States of agencies that, in addition to a management board, have a board of supervisors composed of representatives from national supervisory authorities as the main decision-making body (as is the case of the European Financial Agencies – Busuioc, 2013, 17). Member States are part of the EU agencies, but these are at the same time EU bodies, formally constituted by a Union legislative act to fulfill EU functions.

Their specific composition and structure is relevant to the primary task of these agencies: as mentioned, the provision of technical and scientific advice. If the expertise that they bring to Union decision-making process is one of the rationales at the heart of their creation (Busuioc, 2013, 24-38), their input should also be capable of reflecting national knowledge, specificities and concerns regarding the scientific or technical issues. Their composite internal organisation suggests that, in providing specialized knowledge, they should also accommodate competing views on this knowledge. Thus, for instance, the members of the management board of the EFSA, who appoint the members of its scientific committees, “shall be appointed in such a way as to secure the highest

standards of competence, a broad range of relevant expertise and, *consistent with these, the broadest possible geographic distribution within the Union*” (Article 25(1) Regulation No 178/2002, emphasis added). Arguably, this is a core legitimacy asset that one may infer from the main institutional characteristics of “quasi-regulatory” agencies. Their capacity to gather expertise that draws on national knowledge ought to be preserved, and remains core to the legitimacy of agencies, even if, from other normative perspectives, may not be a sufficient condition thereof.

Typically, they act via non-binding opinions, non-formal regulatory instruments (such as best practices), or other forms of producing specialized information (the financial agencies, however, have stronger regulatory powers). There are conspicuous legal reasons for attributing them only instrumental powers (namely, the *Meroni* and *Romano* doctrine), but also important structural considerations. These are specialized bodies that have not been designed to balance competing public interests *outside* their strict field of expertise. This should therefore be the task of a EU institution whose institutional structure would support such function, namely, the Commission. Yet, there is often a very thin line between the agencies’ instrumental powers and the final Union acts that they ground (Chiti, 2009, 1405; Joined Cases T-74, 76, 83–85, 132, 137 and 141/00, *Artogodan v Commission*, para 198-199).

The tension between their effective powers and the legal limits of their powers – namely those placed by the *Meroni* and *Romano* doctrine – has accompanied most EU “quasi-regulatory” agencies (Chiti, 2009, 1422-24; recently, on the powers of ESMA, see Case C-270/12, *UK v Parliament and Council*, para 41-53 and 63-66). More fundamentally, the legal validity of their powers has been contested also because of weak legal bases for the creation of these agencies (Case C-66/04, *United Kingdom v Parliament and Council*).

The perception of EU agencies’ ‘thin’ legal legitimacy has placed stronger emphasis on various forms of agencies’ accountability, resulting in both “overloads” and deficits (Busuoiu, 2013, 264-9). Similar reasons explain – in part – the focus on transparency and on participation as potential sources for the legitimacy clout that they could otherwise lack, making agencies perhaps more susceptible to their social and regulatory environments (Black, 2008, 146-149). In some cases, such claims made their way to the agencies’ founding regulations. These thus reflected the specific contexts in which the agencies emerged or needed to operate, transparency being perceived in those cases to be a crucial condition for agencies to perform their functions legitimately (e.g. EFSA, according to Article 38 (1) EFSA Regulation). The same can be said regarding

participation, both via the agencies' organic structures and via procedural duties of consultation, where these were set up to ensure the agencies' capacity to integrate a plurality of views of those concerned by the agencies' actions in a way that would allow agencies to discharge their functions effectively. However, while the specific institutional role of agencies may have grounded participation, the value that can be attributed to the various forms of involvement in the activities of agencies varies significantly (Chiti, 2009, 1401-2; Mendes, 2011, 102-110). In general, the emphasis placed on accountability, transparency and participation to justify the legitimacy of the agencies action – whether enshrined on their constitutive acts or fostered by the agencies' practices – may both reinforce and be in tension with the legitimacy assets that, according to the agencies' institutional design, ought to be core to the justification of their actions: expertise that, drawing on national specificities, is capable of being embedded in its broader social context. This is also what grounds the agencies' autonomy, while embodying a particular form of collaboration with the entities that are relevant for the pursuance of the specific public interests they ought to pursue.

#### **2.4. Institutional design and legitimacy claims**

The institutional design of EU administrative bodies gives important indications that can guide a normative critique of the legitimacy of their actions. The way these bodies have been formally constituted – who they are and what they were created to do – allows us to qualify the legitimacy claims that are typically made on administrations, in particular, competence and impartiality. In the case of the Commission, competence and impartiality are not dissociable from collective responsibility. Collegiality grounds the Commission's action. More than acting competently and impartially in specialized areas, the Commission draws its legitimacy from its ability to balance competing interests in the name of an abstract Union interest that it has been designed to define and pursue in a given political context. This general interest ought to be reflected in the Commission's decisions. Internal procedures should be organized accordingly. Comitology committees, as European agencies, are “in between” structures that provide expertise in a way that integrates the views of the Member States' administrations. Comitology is built on the need to gather the widest possible support between the representatives of national bureaucracies and between them and the Commission, while bringing into Union decision-making processes expertise the Commission lacks. Institutionally, the

justification for their actions lies here. Agencies' actions are legitimate insofar as they convey the best available scientific or technical knowledge and this knowledge is embedded in the specificities stemming from the social contexts which the agencies (instrumental) acts will regulate, albeit indirectly. From a formal institutional perspective, these are the core legitimacy assets of the Commission, comitology committees and EU agencies. They have a specific function in the institutional system within which they operate. They are designed to fulfil that function: they have specific means of action, procedural and organisational forms. They are thereby capable of relating to specific legitimacy assets. They are legitimate by virtue of this capacity (what Schmidt-Assmann designates as "institutional legitimacy" - Schmidt-Assmann, 1993, 203).

These legitimacy assets provide a yardstick to assess the formal legitimacy of their actions. Thus, it is not enough that they "deliver" or produce results. Their acts need to build on the specific legitimacy assets that they connect to. This is different from producing results from a managerial perspective (delivering "what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience" – Commission, White Paper, p. 7), or from the standpoint of good governance principles (delivering in a inclusive way that "creates more confidence in the end result and in the institutions which deliver policies" – *idem*). One could argue that those core legitimacy assets should not be hindered by the way these actors manage their legitimacy to respond to other claims. Yet, legitimacy claims drawing from formal institutional arguments are not universally shared. They emphasize values that can be recognized as relevant but that may be insufficient to others defending competing views on legitimacy (Baldwin, 1995, 42). Importantly, however, the fact that they derive from the formal-institutional characterization of these bodies, places the corresponding legitimacy claims beyond the realm of mere value preferences.

### **3. The constitutional argument: the Union's democratic principles**

#### **3.1. Participation and democracy: a legitimacy claim and its vexed questions**

Even from a purely formal-legal perspective, the institutional characteristics of EU administrative actors are far from being the only determinants of legitimacy. These actors have a specific function in the institutional system in which they are inserted, but they

also act within a legal order that is informed by values and principles. Such values and principles should be carried forth through the actions of the EU administrative bodies. They may be autonomous in developing ways of acting that conform to their institutional design, but, arguably, these values and principles place limits to that autonomy. Thus, from the formal institutional perspective depicted above, the Commission can legitimately claim that, in the absence of express legal determinations, it is fully in its hands to decide the procedures through which it adopts delegated acts (for which there are virtually no legal determinations), as long as it respects the internal procedures that ensure collegiality, competence and independence. Yet, the Treaty provisions on the democratic principles of the Union convey a different claim on the legitimacy of its actions. The Commission, as other Union institutions, needs to “give citizens and representative associations the opportunity to make known and publicly exchange their views” (Article 11(1) TEU), and to “maintain an open, transparent and regular dialogue with representative associations and civil society” (Article 11(2) TEU). The Commission, specifically, ought to “carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent” (Article 11(3) TEU). Prima, facie, these could be specifications relevant only from a “good governance” perspective, in line with some of the claims of its White Paper on Governance. But the fact that they are enshrined in the Treaty as a pillar of the Union’s democracy gives them a fundamentally different normative perspective (Mendes, 2011, 1861-63) – one that the practices of participation that the Commission follows cannot support (Kohler-Koch, 2012, 818-20).

The legitimacy of the Commission’s actions cannot rely purely on the assets that it can connect to in view of its institutional configuration. By force of the Treaty, legitimacy ought to derive also from a way of relating to the EU citizens, representative associations and civil society that conforms to basic tenets of *democracy*. One that hence requires, at the very least, equal access (voice) to decision-making procedures, irrespective of the Commission’s preferences on who should participate (for expertise, responsiveness, or effectiveness reasons); and equal opportunities of influencing outcomes which purports equal treatment (Mendes, 2011, 1862). This shift in the way of approaching participation in the Union – postulated by the Lisbon Treaty – defines normative thresholds that ought to shape the practices of participation of the institutions. Thus, voice and equal treatment are likely to upset the participatory



arrangements that the Commission created with the purpose of ensuring “evidence-based policy-making” (Commission Staff Working Document, 2012, p. 3).

Nevertheless, a note of caution is due. The extent to which participation in the activities of the administration can ground a claim of *democratic* legitimacy is a vexed question – one that is far from being an issue unique to the EU. It links to deeper debates on the extent to which democracy should at all be a consideration when discussing the legitimacy of administration. One may claim that deliberative processes that allow to incorporate different views on the merits of administrative decisions are in fundamental tension with the values that administrations can derive from functional specialisation: they need to draw on expert knowledge to implement public policies in a way that effectively responds to social and economic problems. From a different perspective, one may rather stress the distance that mediates between the democratic legitimacy of representative institutions that define public policies and the authority of administrations in defining the various ways through which such policies may be pursued (Rivero, 1965, 828, 829). In this latter view, democracy ought not stop at the boundaries of the administration. The democratic legitimacy that administrations may derive from their specific constitutional position (Schmidt-Assman, 1993, 201, 202) is not sufficient to capture the authority that they effectively exercise. It should therefore be complemented by other means that ensure that the citizen appears before the administration as a *citizen* whose voice ought to be heard rather than as a *subject* of the authority that the administration derives from its institutional links to representative institutions (in the case of the EU, the Parliament, the European Council and the Council).

One of the fundamental problems of this claim lies in the fact that it implicitly raises subjects other than the citizens or the “Member States’ democratically organised peoples” (Bogdandy, 2010, 49) to subjects from whom democratic legitimacy can derive. Even if formally open to “citizens” or to the public, participation in administrative decisions elicits the intervention of a delimited group of affected persons. If by “affected” one is referring to persons affected in their rights and legally protected interests (Schmidt-Assman, 1993, 210), then participation informed by a democratic rationale easily acquires a different meaning: it allows those affected to voice their interests with a view to protecting their legally protected positions (legal protection more than participation in political choices). “Representative associations”, in any event, speak on behalf of sectorial interests defined by socio-economic criteria. If their intervention

may create opportunities of public discussion and debates with public entities on the concrete direction and in the implementation of public policies (Rivero, 1965, 829), they will seek access to decision-making for their own benefit. The fact that they speak on behalf of sectorial interests and that they intervene to defend them in the way administrative bodies shape public policies does not necessarily exclude the legitimating capacity of their participation (Schmidt-Assman, 1993, 209). But it does warrant caution regarding the extent to which one can claim participation to be a source of *democratic legitimacy*. At the very minimum, the internal structures, organisation and social bases of “representative associations” need to be such that would allow them to ‘speak on behalf’ of the citizens they purport to represent (Case T-135/96, *UEAPME v Council*, para 90), even if only as holders of affected rights or legally protected interests. These would then remain the ultimate repositories of legitimacy.

But if these issues are not exclusive or specific to the Union, its political system has one peculiarity: while the democratic legitimacy of the Union is grounded on representative democracy (Article 10(3) TEU), it also derives from the participation of citizens, representative associations, parties concerned (Article 11 TEU). The complementarity between representation and participation that the Treaty provisions on democratic principles call for is typically absent in the constitutions of Member States. Irrespective of the poor drafting of Article 11 TEU from a perspective of political theory, its systematic insertion in the Treaty – next to equality of citizens (Article 9) and the role of national parliaments (Article 12) – gives a normative underpinning to the claim that participation ought also be a source of democratic legitimacy that is absent in other legal systems. Crucially, as mentioned above, such a legitimacy claim can only be made if minimum democratic tenets are respected. Nevertheless, irrespective of the unsolved vexed issues underlying participation seen from this lens, Article 11 TEU squarely opens the Union decision-making to access by citizens and representative associations.

### **3.2. The EU administration: divided in two legitimacy claims**

How does this constitutional framework impact on normative views on the legitimacy of the EU administration? In particular, formally, what is the reach of a democratic legitimacy claim? Literally, Article 11 TEU only applies to the Union institutions. This would include the Commission and, possibly also, bodies created by the Commission.

Comitology committees and EU agencies are formally excluded from its scope. As the EU institutions, EU agencies have the legal duty to “conduct their work as openly as possible” (Article 15(1) TFEU). Despite the strong democratic connotations of openness (Alemanno, 2014, 88-89), one may differentiate the rationale of these two provisions (Mendes, 2011, 1853-54). Openness, in the sense of Article 15(1) TFEU, which embraces transparency and participation, may retain an instrumental rationale – in this sense, it is a means to enhance trust in regulatory outcomes, problem solving capacities and effectiveness. The legitimacy claim that one can build on the basis of these values is of a different kind than one that emphasizes the value of democracy. In this reading, the two provisions of the Treaty reflect the polysemy of the concepts of transparency and participation. They have different normative consequences: the requirements mentioned above as minimum threshold of a claim of democracy are not pertinent to openness if it has merely an instrumental rationale (even though one may query how sustainable this distinction is in practice, it remains arguably relevant to normative assessments and possible legal consequences).

Yet, Article 15(1) TFEU creates a duty that, in such general terms, did not exist before the Lisbon Treaty. This is significant in two ways. On the one hand, it crystallizes previous institutional practices, in particular those developed by EU agencies regarding participation. “Crystallizes” has an important consequence: the existing mechanisms, even if voluntarily adopted, cannot be rolled-back, at the risk of breaching Article 15(1) TFEU. On the other, it extends this duty to all “bodies, offices and agencies”. The duty is qualified by a proviso (“as far as possible”), but it is nevertheless constraining. Thus, even if this article may be more in line with existing institutional practices, it places limits to the preferences of EU administrative actors in managing their legitimacy.

At first sight, comitology committees are excluded from the scope of Article 15(1) TFEU. As seen above, comitology committees are, by force of the Treaty, formally legally detached from the Commission. Yet, they are also not part of the Member States’ administration. Importantly, they are “adjunct” entities that assist the Commission (Article 3(2) of Regulation 182/2011). They lack formal legal personality, but one may consider them “bodies” in a broad sense for the purposes of Article 15(1) TFEU. Even if a legal interpretation of the meaning of “bodies” grounded in the institutional characterization of comitology committees would conclude for their exclusion from the scope of Article 15(1) TFEU, they are nevertheless covered by a duty of openness by force of Article 298(1) TFEU. Article 3(2) Regulation 182/2011 squarely places

comitology committees as part of the EU administration. Thus, openness, even if only from an instrumental perspective, is a value that comitology committees need to uphold in the way they conduct their work. Legally, transparency is not alien to their functioning (Article 10 of Regulation 182/20110), but participation virtually is, except when specific legislative provisions determine otherwise (Article 7(1), (3) and (4) of the Standard Rules of Procedure for Committees). These rules ought to be read in the light of the Treaty determinations on openness that further reinforce the claim that the legitimacy of these bodies ought to be grounded also on openness. This claim may clash with the specific ways of acting that the institutional characterisation of these bodies postulate (Section 2 above). Yet, even if subject to interpretation, the 'Treaties' provisions postulate that claims grounded on openness ought not be dismissed without consideration and accommodation.

#### **4. Contending legitimacy claims**

It results from the above that both the institutional characteristics and the constitutional principles (specifically, that of democracy) support specific formal-legal legitimacy claims regarding the actions of the institutions and bodies composing the EU administration. Both place external limits to the ways EU administrative actors manage legitimacy claims. Both have consequences, in particular, to the way of conceiving the decision-making procedures of the EU administration. As already alluded, the claims that may flow from institutional design may be in tension with those that stem from a principle of democracy or from the requirements of openness that the Treaties enshrine. Where this is the case, they ought to be mutually accommodated. The point will be illustrated with an analysis of the *LPN* judgment of the Court of Justice of November 2013 (Joined Cases C-514/11 P and C-605/11 P) regarding access to documents to infringement procedures against Member States conducted by the Commission.

*LPN* – a non-governmental organisation whose statutory objective is the protection of the environment – complained formally with the Commission claiming that Portugal had infringed the Habitats Directive in the dam construction project on the River Sabor in Portugal. The dam construction has been a highly controversial project opposing the energy policy of the Government to several regional and environmental associations. The Commission initiated an infringement procedure regarding which *LPN* requested access to documents. The Commission denied its request and the Court upheld the Commission's decision. The *LPN* judgment shows the way the Court – in

line with the Commission – conceives the administrative stage of infringement procedures against Member States conducted by the Commission. The way these procedures have been structured by the Commission with the support of the Court points to a specific way of conceiving the legitimacy of the Commission’s decisions in these matters.

The Treaty defines merely the bare bones of the procedure. It stipulates that “if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations” (Article 258(1) TFEU). Failure to comply with that opinion may earn the Member State concerned a legal action in Court (Article 258(2) TFEU). On the basis of this provision, the Commission has created a procedure that, as far as legal documents let envisage, is conducted in diplomatic terms (Andersen, 2013, 94): infringement is treated a matter to be discussed confidentially between the Commission and the Member State concerned, as the purpose of the procedure is to reach a solution that may prevent resort to the Court.

This is the view the Court upheld in *LPN*, invoking three lines of argument. First, an infringement procedure is initiated against the Member State because the Commission considers that it failed to comply with EU law. It follows that it is up to the Commission to define whether it is appropriate to initiate the procedure, to choose when it will do so and to define the subject matter of the infringement (*LPN*, para 61). Secondly, this is a bilateral administrative procedure with regard to which third parties, including complainants, do not have access rights; in particular, they have no access to documents (*LPN*, para 59, 60). According to the Court, the fact that a third party may seek access to defend a public interest is no reason to grant access (*LPN*, para 60). Thus, the fact that *LPN* is an association whose statutory aims are the protection of the environment and that it requested access in pursuance of that interest, is irrelevant according to the Court. Thirdly, “the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligation under EU law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission” (*LPN*, para 62).

The first two arguments invoke the structure of the procedure, which is in accordance with its purpose (the third argument). It should be noted that it was the Commission who designed the procedure in internal rules of procedure that fleshed the bare bones of Article 258 TFEU, under the pressure of the European Parliament and the

Commission to ensure procedural rights to complainants (Andersen, 2013, 70-71, 82). The Court has fully endorsed the Commission's view on the position of third parties in these procedures. The argument regarding the purpose of the procedure was determinant in the Court's judgment: disclosure of documents during the administrative phase of the infringement procedure would "be likely to change the nature and progress of the procedure", since it could hinder the possibility to "reach an agreement between the Commission and the Member State concerned", and hence, to "enable EU law to be respected and to avoid legal proceedings" (*LPN*, para 63, 65). The Commission was therefore entitled to refuse access to documents on the basis of a general presumption that disclosure would in principle undermine the protection of the purpose of the investigation, within the meaning of Article 4(2) of Regulation 1049/2001 (*LPN*, para 65-68). Such general presumption relieved the Commission of a duty to carry out a specific examination of the documents requested to balance the interests of secrecy and access, thus placing a heavy burden of proof in those interested in gaining access: without knowing the content of the documents, they need to prove that disclosure is not covered by the general presumption or that there was an overriding interest in disclosing (*LPN*, para 66).

Infringement procedures are thus binary administrative procedures that are, in principle, exclusively a matter of the Commission and of the Member State whose possible infringement to EU law the Commission is investigating. Is this view on the nature of the administrative stage of infringement procedures legitimate? It results from an interpretation of the Commission of its role under Article 258(1) TFEU, which the European Parliament and the Ombudsman have contested and the Court has upheld.

### **5.1. The institutional claim**

From an institutional perspective, there are good reasons to conceive the procedure in this way. The independence of the Commission, grounded on the independence of its members, and its collegial way of deciding puts the Commission in the position to speak on behalf of the Union interest. If this ability is crucial in defining policy directions to the Union (a task that the Commission now shares with the European Council, at a different level), it is also crucial in the moment in which the Commission assesses compliance of Member States with EU law. EU infringement procedures are one of the core powers of the Commission as guardian of the Treaties. The Commission draws from its institutional configuration the legitimacy to define the

best course of action in each case, as seen above. This power includes defining the procedure in the way that, in its view, is best in keeping with the Union interest. If effectiveness recommends or even requires keeping negotiations closed, with the ultimate view of ensuring compliance, if possible by avoiding a Court case, then the Commission, because of its specific means of action, procedural and organisational forms, is legitimately entitled to define the procedure accordingly and deny access rights.

## **5.2. The democratic claim**

But from the perspective of democratic principles there are good reasons to contest this way of designing the procedure. Infringement procedures contend with the way Member States comply with EU law. This is a matter of interest to their citizens, and to the citizens of other Member States, who, as such, should *as a matter of principle* – in view also of the Treaty provisions on democracy – have access to documents in the terms defined in Regulation No 1049/2001. Transparency via access to documents would reveal how the Commission treats Member States and – crucially – the public interests at stake in the possible infringement in the pursuance of the Union interest. It would do so within the limits that safeguard legally protected interests that may conflict with access, in accordance with the regulation on access to documents.

The legal and Treaty duties of transparency place limits on the ability of the Commission to legitimise its decisions ensuing from Article 258 TFEU purely from an institutional perspective that draws on the Commission's managerial and political capacities (i.e. independence, competence, effectiveness, ability to voice the interest of the Union). Transparency is one of the drivers of a fundamental change in the way of acting of the institutions: in view of “policies that reach deep into national societies and daily life”, the Union ought to move “from a diplomatic to a democratic process”. These words of the Commission were written in a very different context to support a different claim – the need for changes in the way the Council works with a view to revitalising the Union method addressing the Council (White Paper on Governance, 2001, 25). Yet, arguably, they speak to the core of a fundamental tension in the way of acting of the Union institutions, which conditions normative assessments of the legitimacy of their actions, including of its administrative actions.

## **5.3. Tension and accommodation**

There is a fundamental tension between two different ways of approaching the ways of action of the EU institutions. They were designed to act within a polity guided by the pursuance of pre-defined objectives and legal competences. They are now called to act in a way that is consonant with constitutional principles defined in the founding Treaties. The legitimacy of the EU institutions and of its administrative bodies lives within this tension. In the former perspective, EU administrative actors can legitimate their actions on the grounds of the legitimacy assets that their institutional characteristics allow them to bring into decision-making procedure. In the latter, the legitimacy of their actions relies not only on the institutional role and in the way they relate to other institutions and bodies, but also on the access they grant to the EU citizens and representative associations (with the important caveats mentioned above) via transparency and opportunities of participation.

The Treaty underpins *both* types of claims, as seen above. Far from being only a matter of perspective, these two types of claims on the legitimacy of the EU institutions and administrative actors find a justification in the Treaties. Both empower and limit. One important consequence follows: these competing claims need to be accommodated. In view of the Treaties, none ought to be simply dismissed on the basis of the opposite argument. A legitimacy claim drawing on the value of democracy ought not to be dismissed without further ado by invoking a legitimacy claim that stresses the values conveyed by institutional capacity. This argument provides grounds for normative critique. Thus, in the case of *LPN*, it is doubtful that a general presumption is a normatively valid solution. A purely institutional perspective may support the view that such a general presumption is justified. However, this view is fundamentally contrary to the rationale of Regulation 1049/2001 – widest possible access to documents – now endorsed by the Treaty provisions on democratic principles. This does not mean that access ought to be granted, irrespective of the arguments that can be drawn, in the case of infringement procedures, from the Commission's institutional capacity. It means however that, whichever solution is reached, it is one that needs to respect the fundamental core of the legitimacy claims that contend in each given case. The argument has normative purchase, despite its abstract nature. The endorsement of a general presumption of secrecy precludes an adequate balancing between openness and the values ensured by the ability of the Commission to pursue the Union's interest in the case of investigations of infringement.

The broader underlying question is, indeed, the extent to which the Union institutions are entitled under the current constitutional framework to continue making



decisions via diplomatic means. As results from the above, this issue can neither be answered by simply relying on the Treaty provisions on democratic principles nor by invoking merely the legitimacy assets the institutions, bodies, offices and agencies of the Union can connect to by virtue of their formal-institutional features.

## 5. Conclusion

While acknowledging the polysemy of legitimacy, this chapter has sought to propose two anchors to normative assessments of the legitimacy of EU administrative actors, from a formal legal perspective. It has argued, first, that their core institutional features as defined in the Treaty, in legislative acts and shaped via institutional practices – who they are (composition), what they do (functions), how they decide as an organisation (procedures) – allow them to relate to legitimacy assets on the basis of which they can justify their actions. Secondly, the legitimacy of the EU institutions, also when they act in their administrative capacity, ought also be grounded on ways of acting that conform to the Treaties' provisions on democracy. There are considerable difficulties in this claim, but also enough bases on the Treaties to argue that openness – ambiguously situated between its links to democracy and less value-laden rationales – places limits on the way EU administrative actors manage their legitimacy.

This analysis has situated the legitimacy of the EU administration in its specific institutional context – assessed albeit only from a formal perspective – and within the constitutional frame of reference defined in the Treaties. Both the institutional features of EU administrative actors and the Treaty provisions on democracy place external limits to the ways in which they manage legitimacy claims. They are, however, in tension. To the extent that both have formal recognition at the Treaty level, they ought to be mutually accommodated by an adequate balance between competing claims. The formal legal legitimacy of the actions of the EU administration ought to be assessed accordingly.

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