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Controlling delegated powers in the post-Lisbon European Union

Gijs Jan Brandsma and Jens Blom-Hansen

ABSTRACT Most European Union rules are made by the Commission, not the Council of Ministers or the European Parliament. But although the Commission is an important rule-maker, it is not autonomous. The member states have always taken care to install committees to control the Commission (comitology). However, the Lisbon Treaty introduced alternative control mechanisms (delegated acts) and a reform of the comitology system (implementing acts). This article investigates how the post-Lisbon control system works in daily legislative practice. It represents the first investigation of the institutional preferences of the Council, the Parliament and the Commission in the new system. Further, it utilizes better data than previous studies. The analysis is based on data on the control preferences of all actors before the first trilogue meeting for a large number of cases in the period 2010–13. The results indicate that the institutional battle over the control of delegated rule-making is far from over.

KEY WORDS Comitology; delegated acts; delegation; legislative control; legislative politics

INTRODUCTION

The European Union (EU) produces and delivers no public services to citizens such as education or elderly care: its most important output is rules. Every year it adopts thousands of regulations, directives and decisions to regulate trade, environmental protection, animal welfare and many other issues. Popularly, these rules are decided by the famed community method: proposals are made by the Commission and decided upon by the Council of Ministers and the European Parliament (EP). However, in reality rules made in this fashion only represent the tip of the iceberg. Below the surface, the Commission issues a large number of supplementary rules to clarify, update or specify legislation decided by the Council and the European Parliament. In fact, the majority of EU rules are made by the Commission, not by the Council or the European Parliament (Brandsma 2013: 22–4).

This makes the Commission an important but overlooked executive rule-maker in the EU system. On the one hand, this is not unusual. In most systems, the legislature delegates rule-making powers to the executive to supplement legislation (Epstein and O'Halloran 1999; Page 2012). On the other hand, the EU is not like most systems. The member states are much more

reluctant to delegate powers to the Commission than to their national executive. But in order to create a level playing field for the member states, rules supplementing EU legislation are made at the supranational level by the Commission.

But while the Commission is an important rule-maker, it is not an autonomous one. The member states have always taken care to insert carefully specified control mechanisms when delegating powers to the Commission. From a comparative perspective, the Commission stands out as a constrained executive because of its limited autonomy (Page [2012: 123–45]; see also Kassim *et al.* [2013: 130–50] and Wille [2013: 33–57]). More specifically, the member states customarily install committees of member state representatives to monitor the Commission. To insiders this control system is known as ‘comitology’, and it comprises hundreds of monitoring committees. In this sense, the system is an example of ‘stacking of the deck’ in control systems, or ‘institutional power maximization’, favouring selected constituencies (*cf.* Héritier *et al.* 2012; McCubbins *et al.* 1987). For that reason, the European Parliament has always been critical of comitology because it provides control positions only for the member states, not the Parliament (Bergström 2005; Blom-Hansen 2011; Bradley 1997; Brandsma 2013; Héritier *et al.* 2012).

However, the Lisbon Treaty, entering into effect in 2009, changed the way control of delegation works in the EU. It introduced a new type of legal acts adopted by the Commission (delegated acts) for which both the European Parliament and the Council of Ministers enjoy full rights of objection and revocation. In addition, it involved a reform of the old comitology system which controls the adoption of Commission implementing acts (Brandsma and Blom-Hansen 2012; Christiansen and Dobbels 2013). This system relies on control by member state civil servants.

The purpose of this article is to investigate how the post-Lisbon control system works in daily legislative practice. For each situation where the Commission will enjoy discretion, the legislative institutions need to choose by what means it will be controlled. What are the institutional preferences of the Council of Ministers, the European Parliament and the Commission in the new system? Now that delegated acts have been introduced as a new mode of delegating power to the Commission, do control positions continue to be contested when delegation situations are negotiated? Existing evidence on these questions all predates the Lisbon reforms (Blom-Hansen 2014; Dogan 1997; Franchino 2007: 282–5; Héritier *et al.* 2012).

The contributions of this article are twofold. First, to our knowledge it represents the first investigation of institutional contestation in legislative delegation in the post-Lisbon EU. Second, it utilizes better data to investigate institutional preferences than previous studies. Sincere preferences are difficult to uncover because the actors strategically anticipate each other’s positions. This is the problem of backwards induction known from the game-theoretic literature (Tsebelis 2002: 259–65). As widely acknowledged, preferences should therefore be measured at the earliest stages in the legislative process where actors have not yet exchanged information. However, in practical EU research this has

proven difficult, especially for the Council of Ministers. We have obtained access to data for a large number of cases that uncover the control preferences of all actors, including the Council, before the first trilogue meeting on 64 codecision files including 266 delegation situations in the period 2010–13.

The article is structured as follows. We start by an account of how delegation to the Commission has evolved over time, followed by an explanation of how delegated powers in the EU are controlled at present. We then present our theoretical argument. Based on the rational delegation literature and existing studies on the EU institutions' preferences regarding delegation (e.g., Bendor *et al.* 2001; Franchino 2007; Héritier *et al.* 2012; Krause 2010; McCubbins *et al.* 1987), we argue that the individual EU institutions are likely to prefer structures enabling control of delegated powers. We then explain our data in some detail before moving on to the empirical analysis. Our findings show clear evidence of the theoretically expected preference divergence between the Council and the European Parliament, while the findings on the Commission are more mixed. They suggest that the institutional battle over the control of delegated rule-making is far from over.

CONTROLLING DELEGATED POWERS IN THE EU: TRENDS AND PATTERNS

Controlling delegated powers in the EU became a political issue in the early 1960s when the common agricultural policy was established. The management of the agricultural markets was left to the Commission, but several member states were reluctant to grant it discretionary powers. It was therefore decided that the Commission would consult committees of member state representatives before adopting executive acts. If the committees rejected proposed executive measures by a qualified majority, the matter would be referred to the Council. This committee system is known as 'comitology', and it quickly proved to be a convenient way for the member states to delegate executive powers to the Commission without losing control (Bergström 2005: 43–57; Blom-Hansen 2011: 53–72).

Comitology made the member states less reluctant to delegate rule-making powers, and in the following decades the Commission developed into the most important rule-maker in the EU, at least in a quantitative sense. This development is documented in Figure 1, which shows the number of directives, regulations and decisions adopted by each EU institution over the years 1971–2013. It also shows how many of the Commission's acts were subject to comitology control. Two things stand out: first, the dramatic rise of the Commission as a rule-maker; the Commission was a particularly active rule-maker in the late 1990s, when the internal market was implemented; second, a parallel rise of comitology as a control instrument took place.

The European Parliament was left as a bystander in this process. From the very outset, it complained that comitology undermined its role of holding the Commission to account. It also feared that the member states and the

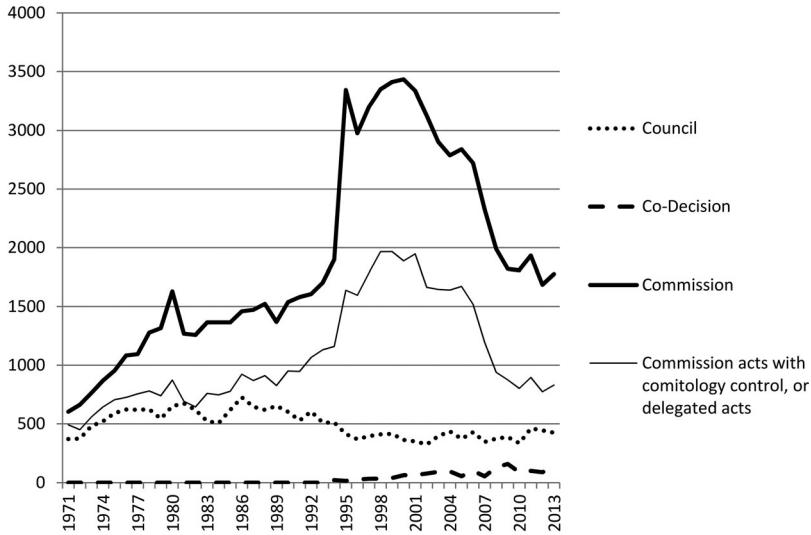


Figure 1 The production of secondary acts in the EU, 1971–2013

Note: The figure shows the absolute number of Decisions, Directives and Regulations that were adopted in a given year by the specified institutions. The development in the figure has been traced by downloading contents of the EUR-Lex database for this period ($N = 105,145$). EUR-Lex contains all acts published in the Official Journal – except for a subset of agricultural routine measures that are valid for a limited time only, as well as a subset of decisions addressed to specific recipients. The name of the institution that adopted each of the acts was automatically extracted, as well as any recital referring to a committee opinion. The extracted recitals were then checked manually for comitology involvement. A number of 20,115 Commission acts were only available in a data format that does not support automatic text extraction. These acts were checked individually for comitology involvement.

Source: EUR-Lex, $N = 105,145$. Data extraction tool built by Sietse Ringers.

Commission would be able to transfer sensitive matters from the legislative to the executive arena and thus bypass the Parliament (Bradley 1997: 231–5).

When the European Parliament achieved real legislative powers with the introduction of the codecision procedure, its fight against comitology gained momentum. It systematically objected to equipping comitology committees with strong formal powers (Bergström 2005; Héritier *et al.* 2012: 88–108). One type of executive act was a particular thorn in the flesh of the Parliament: amendments of annexes to existing legislation. The Parliament strongly opposed that parts of legislation it had adopted as a co-legislator could only be amended by the Commission under control of a committee of member state representatives without parliamentary involvement.

After the failure of the Constitutional Treaty, the Lisbon Treaty sought to finally end this controversy by introducing delegated acts as a new class of legal acts. For these acts the European Parliament and the Council enjoy the same powers of direct control without any involvement of comitology

committees (Brandsma and Blom-Hansen 2012). While this was an important victory for the Parliament, it also complicated matters. Before the Lisbon Treaty, control was exercised by comitology committees in accordance with Council Decision 1999/468/EC, which lists a fixed set of procedures equipping the committees with different degrees of power. Now, the Lisbon Treaty distinguishes between two types of Commission acts – delegated acts and implementing acts – with different control mechanisms.

According to Article 290 of the Treaty, delegated acts ‘supplement or amend certain non-essential elements of the legislative act’ and are directly controlled by the Council and the European Parliament by new rights of objection and revocation. According to Treaty Article 291, the other type of Commission acts, implementing acts, are defined as uniform conditions for implementing Union acts by the member states. These acts are controlled by comitology committees, albeit with revised voting rules again ranging from permissive to strict procedures as specified in European Parliament and Council Regulation 182/2011/EU. The two types of acts and their accompanying control procedures are summarized in Table 1.

In short, the Lisbon Treaty attempted to solve controversies over the control of executive rule-making by empowering the European Parliament. The price was an increase in complexity since the legislators now must not only choose between various committee procedures for implementing acts, they also need to agree in the first place whether delegated or implementing acts should be used.

THEORIZING INSTITUTIONAL CONTROL PREFERENCES

Our theoretical starting point is in the rational delegation literature (Bendor *et al.* 2001; Krause 2010), which assumes that the legislators make an active choice of how to control the executive. This choice involves a selection between alternative control structures that empower actors to different degrees. This again is likely to have policy consequences down the line. Since legislators have preferences regarding these consequences, they have preferences regarding control structures. They want structures that enable them to control policy decisions to be made in the future (McCubbins *et al.* 1987; Moe 1990). This approach to the politics of delegation has its origins in the study of American politics, but it is increasingly imported to the European scene and used as a lens through which to study delegation in the EU system (Franchino 2007; Heritier *et al.* 2012; Pollack 2003; Thomson and Torenvlied 2010).

In this article we focus on legislative acts delegating powers to the Commission, decided under the ordinary legislative procedure. This procedure involves the Commission as initiator of proposals, and the Council and the European Parliament as decision-makers. As specified above and summarized in Table 1, these three actors are constrained by three sets of rules when delegating policy powers. First, as specified by the Treaty, the legislators need to define the policy powers delegated to the Commission. Second, the legislator needs to choose whether the Commission needs to adopt the measures resulting from

Table 1 Control mechanisms in the post-Lisbon EU

Control mechanism	Formal application	Control powers		
		European Parliament	Council of Ministers	Member state officials
Delegated acts	Amending or supplementing non-essential elements of legislation	Veto powers and revocation of delegated power (both: by absolute majority in plenary)	Veto powers and revocation of delegated power (both: by QMV)	Non-binding advice to the Commission through expert groups
Implementing acts	Uniform conditions for implementing legally Union acts by the Member States			
... without comitology		None	None	None
... comitology, advisory procedure		No binding powers	No binding powers	Non-binding advice to the Commission
... comitology, examination procedure		No binding powers	No binding powers	Veto powers (simple or qualified majority against)
... comitology, variation to examination procedure		No binding powers	No binding powers	Veto powers (blocking minority against)
... comitology, safeguard procedure	Removed from the horizontal committee provisions in 2011. Allowed individual member state experts to refer matters to the Council. Has always been rarely applied (Brandsma 2013).			

Source: Based on Treaty Articles 290 and 291, Council and European Parliament Regulation 182/2011/EU.

those policy powers as delegated acts or implementing acts, each type of act being accompanied with specific control mechanisms for the legislators. Third, in case of delegating powers to issue implementing acts, the comitology regulation specifies that legislators must also decide the voting rules used in the committees. This implies that the choice of a control procedure affects the Commission's discretion, but it does not *per se* affect its policy powers, since these are defined *ex ante* by the legislator. Except for amending annexes to legislation which requires delegated acts to be used, the legislators have almost

complete freedom in their choice of applying either the delegated acts or the implementing acts regime (*cf.* European Court of Justice 2014)

Based on the rational delegation literature, we contend that the Commission, the Council and the European Parliament all prefer a position in the control structure providing them with strong control over delegated powers, but which entails weak control positions for their opponents so as to maximize their own individual control. This will be their guiding principle when choosing from the list of control mechanisms specified by the Treaty and the comitology regulation. This contention is in line with the findings of previous studies of delegation under the pre-Lisbon comitology system (*cf.* below). However, the Lisbon Treaty implicates that the EU institutions first need to agree on whether delegated or implementing acts should be used. Only if they decide to use implementing acts do they need to consider which comitology procedure to apply. Under our theoretical assumptions of rationality and institutional power maximization, we expect that existing institutional conflict patterns on the application of comitology rules also spreads to the choice between delegated and implementing acts.

We expect that *the Commission* behaves like most executives and seeks autonomy in order to function. It is a basic requirement to survive and maintain the organization, and it is likely to dominate other preferences (Ellinas and Suleiman 2012; Wilson 1989: 179–95). However, we do not want to portray the Commission as a naïve autonomy maximizer. Rational executive organs may sometimes be sceptical towards increased autonomy for several reasons: because they operate in complex fields where efficient policy solutions are hard to find; because policies are highly salient and the risk of policy blame is high; or because they face limited funds to lift delegated responsibilities (Krause 2003). We believe that these reasons for reluctance are also relevant for the Commission. However, we contend that, on average, the Commission favours executive autonomy to a higher degree than the Council and the Parliament. This means that, viewed across a large number of cases, it will on average prefer permissive control structures over stronger ones. More precisely, we assume the following preference ordering:

Commission: implementing acts, no committees > implementing acts, advisory procedure > delegated acts > implementing acts, examination procedure > implementing acts, variant to examination procedure

We expect that *the Council*, representing the member states which are ultimately responsible for the implementation of Union policies, prefers to be in a position to closely monitor the Commission. Traditionally, the comitology system has served this purpose because, first, it is staffed by their own people and, second, it conveniently does not involve the Parliament and therefore makes control of delegated powers a member state privilege. Furthermore, it relies on member state experts rather than Council staff, thus maximizing member state control. We therefore assume the Council to prefer strong control procedures over weaker ones. This gives a preference ordering opposite to that of the Commission:

Council: implementing acts, variant to examination procedure > implementing acts, examination procedure > delegated acts > implementing acts, advisory procedure > implementing acts, no committees.

The Lisbon Treaty represented a remarkable victory for the *European Parliament* because it introduced delegated acts with parliamentary rights of objection and revocation that can be used as alternatives to member state control via comitology. The Parliament is therefore likely to prefer delegated acts over implementing acts. If this cannot be achieved, it is likely to resist strong comitology procedures because they would tilt the balance of control towards the member states, reducing the Commission's discretion. Since the Parliament can always adopt resolutions that put political pressure on the Commission, reduced discretion for the Commission as a result of strong member state control is not in the Parliament's interest (Brandsma 2013: 65–6). We therefore assume the following preference ordering:

European Parliament: delegated acts > implementing acts, no committees > implementing acts, advisory procedure > implementing acts, examination procedure > implementing acts, variant to examination procedure

Having explicated the institutional preferences of the Commission, the Council and the Parliament, we now derive more specific hypotheses:

Hypothesis 1: The European Parliament prefers delegated acts to a greater extent than the Council and the Commission.

Hypothesis 2: The Council prefers strict comitology procedures to a greater extent than the Commission and the European Parliament.

Hypothesis 3: The Commission and the European Parliament prefer permissive comitology procedures to a greater extent than the Council.

Our hypotheses are supported by studies of control preferences from the pre-Lisbon period. Dogan (1997, 2000) found that in the years 1987–95 the Council preferred stricter control procedures than the Parliament and the Commission. Franchino (2007: 282–5) investigated the Parliament's comitology preferences in codecision acts and found that it prefers more permissive procedures than the Commission. Blom-Hansen (2014) analysed comitology preferences in daily legislation in the period 1999–2006 and found that the Council prefers stricter control than both the Commission and the Parliament. These studies provide important stepping stones for our analysis. However, they are all based on data from the pre-Lisbon period. How control preferences are affected by this Treaty's introduction of new parliamentary control mechanisms remains unstudied.

In addition, these studies all face a data problem: they rely on stated preferences. This raises a methodological challenge because stated preferences may not accurately measure true preferences. Actors are likely to take the strategic situation within which they operate into consideration when formulating their official preferences. Their stated preferences thus incorporate both their true

preferences and their strategic response to the setting they face (Frieden 1999). This point is particularly relevant for our study. Several observers (e.g., Héritier *et al.* 2012) have noted that a considerable degree of strategic manoeuvring takes place when control structures are decided: the Commission often accommodates the comitology preferences of the Council in order to secure more delegation. Therefore, stated preferences in this field should be used with caution as indicators of sincere preferences. In particular, it has proven difficult to uncover the true preferences of the Council whose deliberations are relatively secret.

We do not entirely solve this data problem, but our approach represents an important step forward. We have obtained access to data for a large number of cases that uncover the preferences of all actors, including the Council, at a very early stage of the decision-making process. Below we explain in more detail how this more effectively addresses the problem of relying on stated preferences.

DATA AND METHODS

Using daily legislation to investigate our hypotheses raises two methodological challenges. The first is that such a research design only makes sense if the legislators can choose relatively freely between not only delegated and implementing acts, but also between the different comitology procedures, when delegating rule-making powers to the Commission. We believe that this is a fair assumption. But it may be questioned, first, because the Treaty formally defines different spheres of application for delegated and implementing acts, and, second, because the comitology regulation provides guidelines for the choice of exact comitology procedure to use in a given delegation situation.

Delegated and implementing acts are, legally speaking, mutually exclusive: either one or the other type of act should be used, not both. However, the selection criteria leave room for interpretation (Craig 2011; Peers and Costa 2012). When delegating powers to change legislative annexes, the choice is clear: annexes are non-essential elements of the legislative act, and therefore delegated acts must be used. But in many other situations the choice is not self-evident. Uniform conditions for implementation also supplement the legislative act by definition, because they flesh out further details. The same is true for acts that are implemented at the EU level, without member state involvement, but which do not supplement or amend legislation either. In both cases, an argument could be made for using either type of act. Also, the question of what specific elements to include in a legislative annex, or even having a legislative annex to begin with, is a matter of political choice. In short, there is a significant grey zone where the choice between delegated and implementing acts is debatable. The Court of Justice confirms the discretion enjoyed by the Council and the European Parliament when making their choice (European Court of Justice 2014).

As to the choice of comitology procedure to control implementing acts, the comitology regulation specifies guidelines for the application of the advisory and examination procedures. However, the choice is relatively free, and they

even leave open the option not to install a comitology procedure at all. The comitology regulation also provides guidelines on the choice between the strict and the normal version of the examination procedure, but again the guidelines are flexible. This state of affairs is no coincidence. When the comitology regulation was introduced, the Commission proposed relatively strict guidelines, but this was rejected by the Council, which preferred more flexibility in the legislative process (Brandsma and Blom-Hansen 2012).

The second methodological challenge is to identify the actors' control preferences.¹ The problem is that the actors may be familiar with each other's preferences and take them into account when stating their own. Several observers have noted that there is a strategic element in the actors' positioning. The Commission in particular appears to anticipate the Council's preferences and carefully tailor its proposals to suit them (Heritier *et al.* 2012: 88–108; Hix and Høyland 2011: 38–9; Pollack 2003: 133).

Anticipated reactions constitute a well-known problem from studies of the EU legislative process. The general insight is that they drastically reduce the level of open conflict. In fact, if actors were completely informed about each other's preferences, there would be no open conflict at all. All objections from the Council and the Parliament that are likely to succeed would be anticipated by the Commission. If they are acceptable to the Commission, they would be included in its proposal. If not, they would never be raised because the Commission would use its right of initiative and not make a proposal, and the Council and the Parliament would realize the futility of voicing objections. Consequently, under complete information, all actors will accept the Commission's proposal, and there are no objections. This is the logic of backwards induction, featuring in a number of complete information models of the EU legislative process (Crombez 1996; Moser 1997; Tsebelis 2002: 259–65).

The main point here is that apparent consensus may be deceiving. Beneath the surface may lie profound, but suppressed, conflict. Complete information models are, of course, far from the mark as a prediction of real world EU legislative processes, since the process abounds with objections and amendments. A number of reasons have been offered why (e.g., Moser 1997), but the most likely reason is – as emphasized by Tsebelis (2002: 259–60) – that information is not complete in the beginning of the process, but only later when the actors have exchanged information. In the early stages of the process, the actors may not precisely know each other's preferences and, hence, preferences stated early are closer to the actors' true preferences.

Although persuasive, Tsebelis's arguments do not eliminate the problem of anticipated reactions. Even if information is incomplete, it is not absent. Many objections may still not reach the surface because they are anticipated and incorporated into the Commission's proposal, or because the Council and the Parliament realize the futility of raising them. The actual number of objections is therefore likely to be lower than if actors sincerely expressed their preferences. There is thus a problem of observational equivalence as agreement may indicate

either sincere consensus or strategic behaviour. However, if there is open disagreement – that is, when objections are voiced – this is more likely to reveal true preferences. No matter whether objections are owing to incomplete information or, say, strategic bargaining, there is no reason to expect actors to systematically raise objections that contradict their interests.

Studies of institutional control preferences in daily legislation in the pre-Lisbon period suggest that apparent consensus owing to anticipated reactions is a real problem for researchers. In the period just after the introduction of standardized comitology procedures in 1987, there was apparent consensus in about 50 per cent of all cases and systematic conflict in the remaining cases (Dogan 1997: Figure 8). In the period around the turn of the millennium, when the actors had become much more familiar with each other's preferences, apparent agreement was much more prevalent and characterized about 90 per cent of all cases. But in the remaining 10 per cent of the cases, where disagreement was found, it had a systematic character (Blom-Hansen 2014: Table 2). As we will demonstrate below, in the post-Lisbon situation there are still many situations where the legislators apparently agree, but the level of open conflict is relatively high.

In order to alleviate the problem of anticipated reactions as much as possible, we have measured the institutions' preferences as early as possible in the ordinary legislative procedure. Our data set includes legislative files proposed after the entry into force of the Lisbon Treaty, but before 31 December 2012, and enacted before 28 October 2013.² A number of 178 files match these criteria.

Mapping the control preferences proved to be easier for some of the institutions than for others. Ideally, Commission documents produced very early in the decision process are preferable – e.g., 'non-papers' outlining some of the main elements of the proposal-to-be – but such documents are not systematically available and tend to be incomplete. Therefore, the Commission's preferences are measured in the first formal Commission proposal.

For the European Parliament, the final reports adopted in plenary on legislative proposals are not ideal. They are mostly produced after a political agreement has been struck with the Council, so that it can be rubberstamped in the Parliament's plenary (*cf.* Reh *et al.* 2013: 1127). Therefore, we used earlier documents indicating the Parliament's position, namely the first draft report prepared by the rapporteur, presented to and approved by his parliamentary committee. These draft reports list all the rapporteur's amendments to the Commission's proposal, and serve as a mandate for negotiations with the Council after the parliamentary committee's approval.

Mapping the preferences of the Council is notoriously difficult, since no documents are directly and systematically available apart from the Council's common position and the final act. This is not ideal, as both documents are produced after negotiations have taken place. We have therefore turned to so-called 'four-column documents', which are standard summaries of the Commission's, the Council's and the Parliament's positions made before trilogue meetings. The first column in the document simply repeats the Commission's proposal, while the second column adds the Parliament's desired amendments as indicated by

the relevant parliamentary committee's draft report. The third column explains the Council's provisional position as agreed by the Permanent Representatives Committee (COREPER). Finally, the fourth column suggests a compromise, or includes remarks. For the purposes of this article, the third column is crucial, since it represents an early measurement of the Council's preferences.

Unfortunately, four-column documents are not directly available. For each of the 178 files, we asked the Council's General Secretariat for help in retrieving the first four-column document produced in the negotiation process. This soon proved to be a mammoth task, and we had to lower our ambitions.³ We decided to randomly select 83 legislative files out of the population of 178. We were granted access to the four-column documents in all cases, except for one owing to a pending court case. However, in 17 cases disagreement between the institutions was so minor that no four-column documents were made, and one case was excluded as an outlier.⁴ Hence, our dataset is based on 64 legislative files representing 36 per cent of the population.

Our units of analysis are not legislative files, but *delegation situations*. We define such situations as instances in the acts where at least one of the legislators wants to grant the Commission powers to issue either delegated or implementing acts. An individual act may contain no such instances, or several. In total, our dataset includes 266 delegation situations in the 64 legislative files, that is, on average, four delegation situations per file. Two examples of delegation situations are provided in [Table 2](#).

Table 2 Delegation situations in regulation no. 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts

Delegation situation	Control of delegated powers
Article 3: 'The Commission shall be empowered to adopt delegated acts, where necessary to take account of environmental, economic and technical developments ... (a) to provide methodological guidance; and (b) to update the Annexes referred to in paragraph 1 as regards the information referred to in paragraph 2(c) to (e).'	Rights of objection and revocation for the Council and the European Parliament
Article 6: 'The data shall be transmitted in an appropriate technical format, which is to be laid down by the Commission by means of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 11(2).'	Comitology committee: normal examination procedure (specified in Article 11(2))

We believe that this dataset is unique. It measures the institutions' preferences for a large number of cases at an earlier stage of the legislative process than any study so far. We do not claim that we can identify true preferences in an absolute sense, but we do think that we can trace the true ordering of the actors' preferences. If, for example, the Council systematically prefers stricter control than the Commission and the Parliament, our data should reveal it.

EMPIRICAL ANALYSIS

Table 3 demonstrates how the Commission, the European Parliament and the Council prefer to control powers delegated to the Commission in the post-Lisbon period. The first row shows the institutions' preference for using delegated acts and thus controlling the Commission by means of objection and revocation; that is, the new control mechanisms introduced by the Lisbon Treaty. The table reveals that the Commission proposed this control mechanism in 42 per cent of the 266 delegation situations in our dataset. The European Parliament preferred these control mechanisms somewhat more frequently, while the Council was less favourable and only preferred them in 34 per cent of the cases. The pattern is as expected by our first hypothesis.

Turning to implementing acts, Table 3 also shows the institutions' preference for the various decision procedures with which comitology committees can be equipped. The most lenient procedure, besides not installing a committee at all, is the advisory procedure where the committee has no formal influence on the Commission. The strictest procedure is the variation to the examination

Table 3 Institutional preferences for controlling delegation

	Commission	European Parliament	Council
Delegated acts	113 (42%)	125 (47%)	90 (34%)
Implementing acts	85 (32%)	83 (31%)	119 (45%)
of which:			
... no committee	14 (5%)	14 (5%)	7 (3%)
... advisory committee	23 (9%)	31 (12%)	25 (9%)
... examination committee	31 (12%)	29 (11%)	36 (14%)
... variation to examination committee	17 (6%)	9 (3%)	49 (18%)
... safeguard procedure	0 (0%)	0 (0%)	2 (1%)
Delegation, neither delegated nor implementing acts	0 (0%)	1 (0%)	0 (0%)
Situation mentioned, no delegation to Commission	2 (1%)	6 (2%)	7 (3%)
Provision not proposed or deleted	66 (25%)	51 (19%)	50 (19%)
Total	266 (100%)	266 (100%)	266 (100%)

procedure where a blocking minority of member states can stop the Commission; *cf.* the explanation of the procedures in Table 1. As is evident from Table 3, the Commission and the Parliament are relatively favourable to the lenient procedures, while the Council clearly is more in favour of the stricter procedures. The differences are broadly in line with our second and third hypothesis.

Finally, it is worth noting the last row in Table 3, which shows the extent to which the institutions disagreed about whether delegation should take place at all.

While the differences among the institutions' preferences in Table 3 exhibit the pattern expected by our hypotheses, assessments of their magnitude may be debatable. Actually, one might argue that the most striking result in Table 3 is how consensual the choice of control mechanisms appears to be. However, owing to the problem of anticipated reactions discussed above, apparent agreement may be misleading. It may indicate genuine agreement, but it may also result from the actors anticipating each other's preferences and realizing the futility of airing disagreement. There is a problem of observational equivalence: agreement may indicate sincere consensus or strategic manoeuvring. Therefore, disagreement cases are more useful as data to investigate systematic preferences as an indicator of true preferences. If disagreement occurs, it is more likely to reveal true preferences, since there is no reason to expect actors to systematically make proposals that contradict their interests. We do not argue that disagreement reveals true preferences in an absolute sense, only that actors use disagreement to try to pull outcomes closer to their preferences. Disagreement cases thus allow an investigation of the preference ordering among the actors.

In Table 4 we therefore provide a stronger test of our hypotheses. In the first column of this table, we test whether the differences in institutional preferences identified in Table 3 are statistically significant. In the second column, we provide a separate test of disagreement cases. We define disagreement as a delegation situation in which at least one of the institutions states a preference that differs from the other institutions. Note that the number of cases drops from 266 to 136. This may seem dramatic, but previous studies found even less open disagreement (e.g., Blom-Hansen 2014: Table 2). The relatively high degree of disagreement in our cases is probably owing to the actors' lack of experience with negotiation of the new control mechanisms introduced by the Lisbon Treaty, as well as to the fact that our data measure preferences at an earlier stage than previous studies.

Table 4, Panel A, focuses on the institutions' preferences for delegated acts over implementing acts. The first column tests whether the differences identified in the first row in Table 3 are statistically significant. For instance, the lower left cell shows that the difference in proportions between the Parliament's and the Council's preference for delegated acts is 0.13. This is the 13 per cent difference from Table 3 between the Parliament's and the Council's preference for delegated acts. Table 4 now demonstrates that this difference is statistically significant. It turns out that the difference between the Commission and the Council

Table 4 Test for difference of proportions in preference for control mechanisms

A. Delegated acts	All cases (N = 266)	Disagreement cases (N = 136)
Commission v. Council (no expected difference)		
Difference in proportions (z-value)	0.09** (2.05)	0.17*** (3.34)
Commission v. EP (expected difference: -)		
Difference in proportions (z-value)	-0.05 (-1.05)	-0.09 (-1.52)
EP v. Council (expected difference: +)		
Difference in proportions (z-value)	0.13*** (3.09)	0.26*** (4.79)
B. Strict comitology (examination procedure and variation to examination procedure)		
Commission v. Council (expected difference: -)		
Difference in proportions (z-value)	-0.14** (-3.70)	-0.27*** (-4.78)
Commission v. EP (no expected difference)		
Difference in proportions (z-value)	0.04 (1.18)	0.07* (1.68)
EP v. Council (expected difference: -)		
Difference in proportions (z-value)	-0.18*** (-4.83)	-0.35*** (-6.28)
C. Permissive comitology (no comitology control and advisory procedure)		
Commission v. Council (expected difference: +)		
Difference in proportions (z-value)	0.02 (0.65)	0.04 (1.14)
Commission v. EP (no expected difference)		
Difference in proportions (z-value)	-0.03 (-0.96)	-0.06 (-1.47)
EP v. Council (expected difference: +)		
Difference in proportions (z-value)	0.05 (1.60)	0.10** (2.55)

Note: *p < 0.1; **p < 0.05; ***p < 0.01.

is also statistically significant, while the small difference between the Commission and the Parliament is not. The second column in Panel A confirms this picture. When focusing only on disagreement cases, the differences become

larger and statistically stronger, except the difference between the Commission and the Parliament which is still insignificant. This difference between the Parliament and the Council is as expected by our hypothesis 1. But the lack of a difference between the Commission and the Parliament is unexpected.

Panel B in Table 4 examines the institutions' preferences for strict comitology. Again, the first column tests whether the differences from Table 3 are statistically significant, while the second column focuses on disagreement cases. As expected by our hypothesis 2, the Council prefers strict comitology to a higher extent than both the Commission and the Parliament. But the significant difference between the Commission and the Parliament is unexpected.

Finally, Panel C in Table 4 analyses preferences for permissive comitology. And again, the first column tests whether the differences from Table 3 are statistically significant, while the second column focuses on disagreement cases. The difference between the Parliament and the Council is as expected by our hypothesis 3. But it is unexpected that there is no significant difference between the Commission and the Council.

In sum, we have found evidence in favour of our hypotheses, but also patterns that are unexpected. As expected, the Council is relatively favourable towards strict comitology, and less favourable towards delegated acts and permissive comitology. And as expected, the Parliament is relatively favourable towards delegated acts and permissive comitology, but relatively sceptical towards strict comitology. The unexpected results concern the Commission, which prefers delegated acts more than expected and permissive comitology less than expected.

We speculate that there may be two reasons for this unexpected result. This first is that our measures may still contain some strategic elements, even though we measure very early in the process. But the Commission may strategically propose delegated acts instead of following its true preference for permissive comitology because it realizes that both the Council and the Parliament prefer delegated acts to permissive comitology. The second reason is that our hypothesis on the Commission may not be precise enough. It may not value executive autonomy to the degree we argue. In the theory section we argued that there are reasons for executives to sometimes oppose autonomy. These reasons may be more relevant for the Commission than we realized. Investigating these thoughts, however, requires other data than we have used in this article. So we leave it to future research.

CONCLUSION

This article presents a new approach to measuring the EU institutions' preferences on control over the Commission. For a large number of delegation situations within legislative files, we traced the first stated preference of the Commission, the European Parliament and the Council. For the Council, we made use of four-column documents, which we retrieved on an individual basis. We consider the use of the latter data source an important step

forward, as four-column documents allow us to tap into Council preferences earlier in the process than previous studies.

There is a discussion in the literature on how best to understand the mechanisms that control the Commission's delegated powers. Two approaches can be distinguished: one relying on rational choice institutionalism which emphasizes strategic bargaining inside comitology committees as well as strategic political choice in selecting control regimes, and one on constructivism focusing in particular on deliberative practices inside committees (*cf.* Blom-Hansen 2011; Brandsma 2013; Dehousse *et al.* 2014; Héritier *et al.* 2012; Joerges and Neyer 1997). Although we found some mixed evidence, our findings mostly support the rationalist argument, at least as far as legislative choices on control procedures are concerned. The distribution of control preferences under the implementing acts scheme continues to have the structure identified in studies of the pre-Lisbon era; the preferences of each EU institution are biased to securing control positions (Blom-Hansen 2011; 2014; Dogan 1997, 2000; Franchino 2007; Héritier *et al.* 2012). This also applies to the newly instituted choice between delegated and implementing acts. While the Commission and the European Parliament generally favour delegated acts, the Council generally prefers implementing acts.

In other words, pre-Lisbon lines of conflict over control positions have not been eased by the entry into force of the Lisbon Treaty. On the contrary, conflicts have now expanded to include the choice between delegated and implementing acts. In a significant amount of cases, the choice between these two options is far from obvious. And the imprecise wording of Treaty Articles 290 and 291 leaves room for interpretation, which each institution seems to happily use to pursue its own control preferences.

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NOTES

1 The following discussion builds on Blom-Hansen (2014).

- 2 This means that some acts were proposed before the comitology regulation was adopted in 2011. We have recoded the control procedures under the old comitology regime to suit the new regime in the following way: the old advisory procedure = the new advisory procedure; the old management procedure = the new standard examination procedure; the old regulatory procedure = the new variant to the standard examination procedure.
- 3 Retrieving the documents involved a considerable workload for the Council Secretariat. The formal document numbers of the four-column documents were unknown to us, and the relevant documents are managed by different units within the Council's services, so the General Secretariat had to trace each document individually and decide for every document whether access could be granted. This was a laborious exercise for the Secretariat, so we agreed to make formal access-to-documents requests for the first four-column documents relating to sets of about 20 legislative files. Even so, retrieving each 20-file package took several months.
- 4 The outlier is Regulation 966/2012 on the financial rules applicable to the general budget of the Union. This file includes no less than 115 delegation situations. In its original proposal, the Commission specified 36 instances of delegation, all involving delegated acts, but formulated in very broad terms. The European Parliament and the Council sought to curtail the Commission by specifying delegated powers in more detail, replacing 36 broad powers by 115 specific ones. It is the only file in the dataset relating to the general EU budget.

REFERENCES

- Bendor, J., Glazer, A. and Hammond, T. (2001) 'Theories of delegation', *Annual Review of Political Science* 4: 235–69.
- Bergström, C.F. (2005) *Comitology. Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press.
- Blom-Hansen, J. (2011) *The EU Comitology System in Theory and Practice: Keeping an Eye on the Commission?* Houndmills: Palgrave Macmillan.
- Blom-Hansen, J. (2014) 'Comitology choices in the EU legislative process: contested or consensual decisions?', *Public Administration* 92: 55–70.
- Bradley, K. (1997) 'The European Parliament and comitology: on the road to nowhere?', *European Law Journal* 3: 230–54.
- Brandsma, G.J. (2013) *Controlling Comitology. Accountability in a Multi-Level System*, Houndmills: Palgrave MacMillan.
- Brandsma, G.J. and Blom-Hansen, J. (2012) 'Negotiating the post-Lisbon comitology system: institutional battles over delegated decision-making', *Journal of Common Market Studies* 50: 939–57.
- Christiansen, T. and Dobbels, M. (2013) 'Non-legislative rule making after the Lisbon Treaty: implementing the new system of comitology and delegated acts', *European Law Journal* 19: 42–56.
- Craig, P. (2011) 'Delegated acts, implementing acts and the new comitology regulation', *European Law Review* 36: 671–87.
- Crombez, C. (1996) 'Legislative procedures in the European Community', *British Journal of Political Science* 26: 199–228.
- Dehousse, R., Fernandez Pasarín, A. and Plaza, J. (2014) 'How consensual is comitology?', *Journal of European Public Policy* 21: 842–59.
- Dogan, R. (1997) 'Comitology: little procedures with big implications', *West European Politics* 20: 31–60.
- Dogan, R. (2000) 'A cross-sectoral view of comitology: incidence, issues and implications', in T. Christiansen and E. Kirchner (eds), *Committee Governance in the European Union*, Manchester: Manchester University Press, pp. 45–61.

- Ellinas, A. and Suleiman, E. (2012) *The European Commission and Bureaucratic Autonomy. Europe's Custodians*, Oxford: Oxford University Press.
- Epstein, D. and O'Halloran, S. (1999) *Delegating Powers. A Transaction Cost Politics Approach to Policy Making under Separate Powers*, Cambridge: Cambridge University Press.
- European Court of Justice (2014) Case C-427/12 *Commission v. European Parliament and Council*, 18 March 2014.
- Franchino, F. (2007) *The Powers of the Union. Delegation in the EU*, Cambridge: Cambridge University Press.
- Frieden, J. (1999) 'Actors and preferences in international relations', in D. Lake and R. Powell (eds), *Strategic Choice and International Relations*, Princeton: Princeton University Press, pp. 39–76.
- Heritier, A., Moury, C., Bischoff, C. and Bergström, C.F. (2012) *Changing Rules of Delegation. A Contest for Power in Comitology*, Oxford: Oxford University Press.
- Hix, S. and Høyland, B. (2011) *The Political System of the European Union*, Houndmills: Palgrave.
- Joerges, C. and Neyer, J. (1997) 'Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector', *Journal of European Public Policy* 4: 609–25.
- Kassim, H., Peterson, J., Bauer, M., Connolly, S., Dehousse, R., Hooghe, L. and Thompson, A. (2013) *The European Commission of the Twenty-First Century*, Oxford: Oxford University Press.
- Krause, G. (2003) 'Agency risk propensities involving the demand for bureaucratic discretion', in G. Krause and K. Meier (eds), *Politics, Policy, and Organizations. Frontiers in the Scientific Study of Bureaucracy*, Ann Arbor, MI: University of Michigan Press, pp. 41–72.
- Krause, G. (2010) 'Legislative delegation of authority to bureaucratic agencies', in R. Durant (ed.), *The Oxford Handbook of American Bureaucracy*, Oxford: Oxford University Press, pp. 521–45.
- McCubbins, M., Noll, R. and Weingast, B. (1987) 'Administrative procedures as instruments of political control', *Journal of Law, Economics, and Organization* 3: 243–77.
- Moe, T. (1990) 'Political institutions: the neglected side of the story', *Journal of Law, Economics, and Organization* 6: 213–53.
- Moser, P. (1997) 'A theory of the conditional influence of the European Parliament in the cooperation procedure', *Public Choice* 91: 333–50.
- Page, E. (2012) *Policy without Politicians. Bureaucratic Influence in Comparative Perspective*, Oxford: Oxford University Press.
- Peers, S. and Costa, M. (2012) 'Accountability for delegated and implementing acts after the Treaty of Lisbon', *European Law Journal* 18: 427–60.
- Pollack, M. (2003) *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU*, Oxford: Oxford University Press.
- Reh, C., Héritier, A., Bressanelli, E. and Koop, C. (2013) 'The informal politics of legislation: explaining secluded decision-making in the European Union', *Comparative Political Studies* 46: 1112–42.
- Thomson, R. and Torenvlied, R. (2010) 'Information, commitment and consensus: a comparison of three perspectives on delegation in the European Union', *British Journal of Political Science* 14: 139–59.
- Tsebelis, G. (2002) *Veto Players. How Political Institutions Work*, Princeton, NJ: Princeton University Press.
- Wille, A. (2013) *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive*, Oxford: Oxford University Press.
- Wilson, J. (1989) *Bureaucracy. What Government Agencies Do and Why They Do It*, New York: Basic Books.