



# Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design

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**Abstract:** *The reform of non-legislative acts introduced by Articles 290 and 291 of the Treaty on the Functioning of the European Union was guided by concerns regarding the democratic legitimacy of (lato sensu) implementing acts of the Union. However, it has ignored the centrality of transparency in the Union's democracy and the role of participation as a complementary source of democracy. This article argues that the procedures leading to the adoption of delegated and implementing acts are subject to the treaties' provisions on transparency and participation, and should be shaped by them. It analyses the constitutional choices underlying Articles 290 and 291, with a view to assessing whether and to what extent the material, organic and functional profiles of delegated and implementing acts condition procedural rules on transparency and participation to be followed in their adoption.*

## I Transparency and Participation in Delegated and Implementing Rule Making

The distinction between delegated and implementing acts is built on the seismic fault lines of the division of powers—and the struggle for power—between the EU institutions.<sup>1</sup> It is imbued with the different conceptions on the locus and scope of the executive power in the EU, on the distinction between legislative and executive functions, and on the type of controls that the European Parliament, the Council and the Member States should accordingly have over the adoption of non-legislative acts by the Commission, and of implementing acts that the Council may adopt in specific cases.<sup>2</sup> Moreover, in the two categories lies also the line that separates the

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<sup>1</sup> P. Stancanelli, 'Le système décisionnel de l'Union', in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et Destinée de la Constitution Européenne. Commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Bruylant, 2007), 485–528, at 490–491; J.-P. Jacqué, 'Introduction: Pouvoir législatif et pouvoir exécutif de l'Union Européenne', in J.-B. Auby and J. D. de la Rochère (eds) *Droit Administratif Européen* (Bruylant, 2007), at 25–48, P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press, 2010), at 48–66.

<sup>2</sup> The focus of this article is on delegated and implementing acts. Unless otherwise specified, the term 'non-legislative acts' is used in a narrow sense, excluding acts adopted directly on the basis of the Treaty, the legal basis of which does not require that a legislative procedure be followed. On these, see

non-legislative acts that are the premise of the Union—delegated acts and those adopted directly on the basis of the Treaty—and the non-legislative acts the Union adopts while exercising a competence that primarily belongs to the Member States. For these reasons, the institutional practice based on Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) will decisively contribute to shaping the EU's constitutional form and structure designed in the Lisbon Treaty. Unsurprisingly, the debate on the constitutional meaning and implications of the distinction between delegated and implementing acts has been intense, both before and after the entering into force of the Lisbon Treaty.

Much less prominent has been the discussion on the procedures to be followed for the adoption of delegated and implementing acts beyond their inter-institutional dimension, and in particular on the implications of the Treaty's provisions on transparency and participation to those procedures (Articles 10(3) and 11 TEU, Article 15(1), (3) and 298(1) TFEU).<sup>3</sup> There is no indication that this issue was on the table of the negotiations on the two categories of non-legislative acts that preceded the adoption of the Lisbon Treaty (or of the Treaty establishing a Constitution for Europe before it).<sup>4</sup> Likewise, possibly also for that reason, this subject matter does not seem to have attracted much academic attention.<sup>5</sup>

This article argues that the Treaty provisions on transparency and participation ought to frame the decision-making procedures leading to the adoption of delegated and implementing acts. The political controls envisaged in Articles 290 and 291 TFEU, as well as those developed on their basis, need to be complemented with either formal rules or institutional practices that implement transparency and participation in the procedures that lead to the adoption of delegated and implementing acts (Section 2). Against the background of the current constitutional debates on Articles 290 and 291 TFEU, this article will then assess whether and to what extent the constitutional choices underlying the distinction between delegated and implementing acts condition in any way a possible procedural regime of transparency and participation that would apply to the respective decision-making procedures (Section 3). This issue will be analysed from three analytical perspectives: the material nature of delegated and implementing acts (material profile), the role of the EU institutions in the adoption of the EU legal acts (organic profile), the role of the Member States and the functions that the non-legislative acts perform in the system of EU legal acts (functional profile).

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P. Stancanelli, *Le système décisionnel de l'Union*, n 1 *supra*, at 517–519, and M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', (2008) 45 *Common Market Law Review* 617, at 644–648.

<sup>3</sup> The treaties refer both to openness (Arts 10(3) TEU and 298(1) TFEU) and to transparency (Art 15(3), para 3), apparently interchangeably. Transparency is used in this article to refer to access to information and to the ability to observe decision-making procedures (see Art 15(2) and (3) TFEU), while openness is a broader concept that includes both access to information and access to decision-making procedures (arguably, the meaning of Art 298(1) TFEU). D. Curtin and J. Mendes, 'Transparence et participation: des principes démocratiques pour l'administration de l'Union européenne', (2011) n.° 137–138 *Revue Française d'Administration Publique* 101, at 103 and references therein.

<sup>4</sup> No mention is made in the Final Report of Working Group IX on Simplification (Conv 424/02, WG IX 13, hence forth, 'Final Report'). See also G. J. Brandsma and J. Blom-Hansen, *The Post-Lisbon Battle over Comitology: Another Round of the Politics of Structural Choice*, (2011) EUI Working Paper SPS 2011/03.

<sup>5</sup> S. Peers and M. Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', (2012) 18 *European Law Journal* 427, at 454–455, 459, criticise briefly the transparency of the new system.

## II Beyond Articles 290 and 291 TFEU: The Missing Links

The carving of the new category of delegated acts, as the whole revision of the system of legal acts of the Union, stemmed from concerns regarding the democratic legitimacy and efficiency of EU decision-making processes.<sup>6</sup> Both this rationale and the historical-institutional background of these provisions explain why Articles 290 and 291 focus exclusively on the mechanisms of control that, respectively, the legislator and the Member States have over the adoption of non-legislative acts. From an organic perspective, these Treaty articles are the culmination of the long road of the Parliament towards parity with the Council over the control of implementing acts (as they were before Lisbon), of the Commission's struggle with the comitology controls, of the institutional debates on the role of the Council and the Parliament, acting as legislators, in the adoption of non-legislative acts.<sup>7</sup> In Lisbon, the institutional readjustments stemming from the 'progressive parliamentarisation of the Union' were coupled with a revision of the legal acts.<sup>8</sup> From a sources-based perspective, Articles 290 and 291 represent, together with the introduction of the category of legislative acts, the first structural modification of former Article 249 of the Treaty establishing the European Community (EC).<sup>9</sup> They embody the partial replacement of the non-hierarchical system, which, with nuances, had characterised EU law since the original Article 189 of the Treaty of Rome (later renumbered Article 249 EC). In the new system, the legal acts are distinguished according to the enacting institution, the respective procedure and legitimacy credentials, its imperfections notwithstanding.<sup>10</sup>

Procedural rules pertaining to the relationships between the exercise of public powers and the citizens, to be followed in the adoption of delegated and implementing acts, remained outside the debate on Articles 290 and 291. There is no documented discussion on the procedural implications of the Treaty provisions on transparency and participation regarding the adoption of delegated and implementing acts. Both Articles 290 and 291, and the regimes defined in the Common Understanding and in

<sup>6</sup> The Laeken Declaration on the Future of the European Union linked explicitly the issue of simplification of the Union's instruments to a 'more democratic, more transparent and more efficient' Union (Section II). Final Report, n 4 *supra*, at 2. In detail, Stancanelli, n 1 *supra*, at 490–497, 515–517, 524. On the relative novelty of delegated acts, C. F. Bergström, *Comitology. Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005), at 341, 353–354.

<sup>7</sup> Sufficiently documented in, eg, C. F. Bergström, n 6 *supra*, in particular at 308–363; P. Ponzano, "'Executive" and "delegated" acts: The situation after the Lisbon Treaty', in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), at 135–141; Craig, n 1 *supra*, at 48–57, 260–282; Jacqué, n 1 *supra*; R. Schütze, "'Delegated" Legislation in the (New) European Union: A Constitutional Analysis', (2011) 74 *Modern Law Review* 661, 674–689; C. Blumann, 'Un nouveau départ pour la comitologie. Le règlement n° 182/2011 du 16 février 2011', (2011) 47 *Cahiers de Droit Européen* 23, 23–52.

<sup>8</sup> J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', (2012) 49 *Common Market Law Review* 885, at 885.

<sup>9</sup> eg K. Lenaerts and M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', (2005) 11 *European Law Journal* 744; H. Hofmann, 'Legislation, Delegation and Implementation under the Lisbon Treaty: Typology Meets Reality', (2009) 15 *European Law Journal* 482; J. Bast, 'Legal Instruments and Judicial Protection', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2010), 345–397, at 388–394; Stancanelli, n 1 *supra*.

<sup>10</sup> Eg D. Ritleng, 'Les Actes de l'Union', in V. Constantinesco *et al.* (eds), *Le traité établissant une constitution pour l'Europe: analyses & commentaries* (Presses Universitaires de Strasbourg, 2005), at 203–220; Bast, n 9 *supra*, at 373–388, in particular at 377–382, 391, 393; Schütze, n 7 *supra*, at 671.

the Comitology Regulation, are silent in this respect.<sup>11</sup> Proceduralisation (ie the setting up of procedures) had only an internal dimension: the definition of the relative powers of the institutions and Member States.<sup>12</sup> Given the historical-institutional context of Articles 290 and 291 alluded to above, this is not a surprising outcome. The main focus of the debate—what would the parliamentarisation of the Union mean when it came to controlling non-legislative acts, where lies and ought to lie the executive power of the Union—overshadowed possible concerns on how Articles 10(3), 11 TEU and 15(1) TFEU would be, if at all, reflected in the procedures for the adoption of delegated and implementing acts.

Four reasons would *prima facie* speak in favour of this silence. First, one could argue that there is no need to specify procedural rules that would apply the Treaty provisions on transparency and participation to decision-making procedures of non-legislative acts. The institutions and bodies of the Union need to abide by these provisions, and within the limits of the Treaty and the case-law, they are free to decide which forms of action better comply with them.<sup>13</sup> Second, specific rules on transparency and participation would add another layer of complexity to already intricate procedures. They would need to be reconciled with the rules of Article 290 and with the comitology procedures enshrined in the Comitology Regulation. Third, the meaning of the new rules on the democratic foundations of the Union was, to a large extent, uncertain at the time of the adoption of the Treaty and remains so, more than two years on.<sup>14</sup> Fourth, procedural rules on transparency and participation would need to be carefully thought in order to avoid the potential efficiency costs and imbalances that they could entail. These would likely be difficult to avoid. Overall, one may argue that the EU legal system gives preference to the legislator's oversight of delegated acts and to the Member States' oversight of implementing acts as *the* forms of legitimation of non-legislative acts.<sup>15</sup>

Be that as it may, this interpretation of the Treaty does not preclude the discussion on possible complementary forms of legitimation based on procedural rules of transparency and participation. On the contrary, not only the Treaty system is compatible with rules of procedure that complement the political controls established directly on the basis of Articles 290 and 291, but also the Treaty requires such complementation. Key Treaty provisions on the Union's political system—Articles 9–11 TEU, and 15(1) TFEU—squarely address the relationship between the EU institutions and bodies on the one hand, and its citizens on the other, established both directly (Articles 9 and 11 TEU) and indirectly via representative institutions (Article 10(2) TEU). Furthermore, these provisions explicitly endorse transparency and participation as part of the democratic foundations of the EU political system. Transparency is a necessary condition to the fulfilment of democracy (Articles 10(3) TEU and 15(1) TFEU). Article 11 TEU enshrines participation in decision making beyond representative

<sup>11</sup> Council of the European Union, 'Common Understanding on delegated acts', Brussels, 4 April 2011, 8640/11—PE-L 40, INST 192; Reg No 182/2011, OJ L 55/13, 28.2.2011 (henceforth 'Comitology Regulation').

<sup>12</sup> See Christiansen and Dobbels in this issue.

<sup>13</sup> Art 11(1) TEU explicitly leaves the institutions the freedom to choose the 'appropriate means' to give effect to that provision.

<sup>14</sup> On participation, J. Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Art 11 TEU', (2011) 48 *Common Market Law Review* 1849.

<sup>15</sup> Schütze, n 7 *supra*, at 668, 693, who, however, bases his argument on a comparative analysis.

institutions as a complementary source of democratic legitimacy.<sup>16</sup> Arguably, as enshrined in the treaties, transparency and participation are founding principles of the EU; they constitute an ‘overarching normative frame of reference’ that ought to shape both Union norms and practices.<sup>17</sup>

Both a teleological and a systematic argument justify that transparency and participation ought to be complementary sources of democratic legitimacy of delegated and implementing acts. First, the revision of legal acts of the Union was guided by ‘a concern for democracy’,<sup>18</sup> and in the current constitutional framework the centrality of transparency and the role of participation as complementary sources of democracy cannot be ignored. If ‘the concern for democracy’ justified the parliamentarisation of the Union and of its system of legal acts, this distinctive characteristic of the EU democracy<sup>19</sup> cannot be overshadowed by state-like analogies.<sup>20</sup> Second, given the foundational role of the principles of transparency and participation, the adoption of delegated and implementing acts is within their scope. The Treaty provisions explicitly cover all the activity of the Union,<sup>21</sup> and hence bind also the Commission (and the Council) when adopting delegated and implementing acts. The principles of transparency and participation, and their role as pillars of EU democracy, remain the missing links in the debate on Articles 290 and 291.

Therefore, the silence of Articles 290 and 291, and of the Comitology Regulation, on explicit requirements of procedure for the adoption of delegated and of implementing acts ought not to allow the Commission to conclude that it ‘enjoys a large measure of autonomy in this matter’ on the basis that the Treaty and the Regulation have ‘[nothing] to say about the procedure by which the Commission adopts’ them. The Commission has used this argument regarding delegated acts.<sup>22</sup> Articles 290 and 291 may say nothing about procedural rules that shape the relationships of the institutions with citizens, but the Commission’s margin of autonomy is necessarily limited by the normative standards that emerge from the Treaty provisions on democracy. Decisions need to be taken *as openly as possible* (Article 10(3) TEU and 15(1) TFEU). Openness postulates both the ability to observe decision-making procedures and have access to information (Article 15(2) and (3) TFEU), and access to decision-making procedures (Article 11 TEU). While the concrete procedural implications of these Treaty provisions may not be straightforward, they do have sufficient normative

<sup>16</sup> Mendes, n 14 *supra*, at 1778–1779.

<sup>17</sup> A. von Bogdandy, ‘Founding Principles’, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2010), at 11–54, in particular at 21–23.

<sup>18</sup> Final Report, n 4 *supra*, at 1–2. On the relevance of the Report in the work of the Convention, see Bergström, n 6 *supra*, at 342–343, and the reception of the latter in the Constitutional Treaty, *idem*, at 352.

<sup>19</sup> Distinctive when compared with national systems (von Bogdandy, n 18 *supra*, at 51) and international legal systems alike (A. von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Arts 9–12 EU Treaty for International Organizations’, (2012) 23 *European Journal of International Law* 315, at 319, 323, 329–331).

<sup>20</sup> Even if used with care, such analogies seem to have influenced the design of the system of legal instruments of the Union. Final Report, n 4 *supra*, at 8; Ponzano, n 7 *supra*, at 135; C. Blumann, ‘A la frontière de la fonction législative et de la fonction exécutive: les “nouveaux” actes délégués’, in G. Cohen-Jonathan *et al.* (eds), *Chemins d’Europe: mélanges en l’honneur de Jean-Paul Jacqué* (Daloz, 2010), 127–144, at 127–129.

<sup>21</sup> Arts 9 TEU (‘in all its activities’), 10(3) TEU (‘the democratic life of the Union’), 11(1) TEU (‘in all areas of Union action’), 15(1) TFEU (‘the Union institutions, bodies, offices and agencies’).

<sup>22</sup> Commission Communication, ‘Implementation of Art 290 of the Treaty on the Functioning of the European Union’, COM (2009) 673 final, Brussels, 9.12.2009, at 6.

density to impose specific procedural duties.<sup>23</sup> In this sense, whichever solution is reached regarding, *inter alia*, the temporal sequence and priority given to consultations of national experts, interest representatives<sup>24</sup> or the public, such solution cannot be only the result of institutional bargaining. At least, inter-institutional negotiations cannot ignore the normative framework on the democratic legitimacy of the Union within which they operate. Also, sector-specific rules on transparency and participation, which are set out in legislative acts, need to be both defined and interpreted in the light of the normative framework the treaties define.<sup>25</sup>

Undoubtedly, specific procedural rules will add another layer of complexity to the balance achieved under Articles 290 and 291 TFEU. Yet possible pragmatic hurdles and disadvantages of transparency and participation, however important, do not justify ignoring the normative standards that the treaties define and the question of how they apply to the procedures for the adoption of non-legislative acts.<sup>26</sup> Instead, these normative standards require carefully crafted solutions intended to tackle possible hurdles and disadvantages, which may, if and to the extent needed, limit the scope of rules of transparency and participation. The discussion on the normative implications of the founding principles of transparency and participation for decision-making procedures under Articles 290 and 291, and the finding of solutions that accommodate possible hurdles and disadvantages, are part of the concretisation of those principles. The treaties postulate this concretisation. Without it, the principles it establishes would remain dead letter, in particular because there is a gap between their normative implications and the current legislative and judicial rules that were in force before Lisbon, and have so far remained unchanged.<sup>27</sup>

The next section will assess whether and how the Treaty's configuration of Articles 290 and 291 conditions the application of the rules of transparency and participation to decision-making procedures leading to the adoption of delegated and implementing acts.

### III Articles 290 and 291 TFEU: The Constitutional Dimensions

#### *A Material Profile: The Nature of Delegated and Implementing Acts*

According to its rationale, the distinction between delegated and implementing acts is a distinction between matters that are legislative and non-legislative *in nature*.<sup>28</sup> Indeed, the intention of the Working Group on Simplification in proposing the creation of delegated acts was twofold: ensure the flexibility of legislative acts and the

<sup>23</sup> On participation, Mendes, n 14 *supra*, at 1868. See also draft recommendation of the European Ombudsman concerning his enquiry into complaint 640/2011/AN against the European Commission, 24 November 2011; Draft recommendation of the European Ombudsman in his enquiry into complaint 2558/2009/(TN)DK against the European Commission, 6 June 2012, para 13 and 36.

<sup>24</sup> See Christiansen and Dobbels in this issue.

<sup>25</sup> eg Art 10(3)(c) of Dir 2010/30/EU of the European Parliament and the Council (labelling of energy consumption), OJ L 153/1, 18.6.2010. An analysis of legislative acts adopted between 1 December 2009 and 15 May 2012, based on a Eur-Lex simple search, indicates that the specification of procedural duties incumbent on the Commission when adopting non-legislative acts may be a rare case.

<sup>26</sup> On the difficulties of participation in rule-making procedures, see Mendes n 35 *infra*, 72–76.

<sup>27</sup> See the introduction to this special issue, section 4. On participation, Mendes, n 14 *supra*, at 1858–1863, 1869–1875.

<sup>28</sup> *Formally*, legislative acts are only those adopted following a legislative procedure (Art 289(3) TFEU). Art 290(1) TFEU explicitly classifies delegated acts as non-legislative.

ability of the legislator to retain control over (legislative) delegation.<sup>29</sup> The assumption was that delegated acts would further regulate issues of legislative nature. They would avoid the need to ‘entrust the more technical or detailed aspects to the Commission *as if they were implementing measures*, subject to the control of Member States’.<sup>30</sup> Ultimately, the purpose of creating this new category of legal acts was to ‘guarantee that acts with *the same legal-political force* have the same foundations in terms of democratic legitimacy’.<sup>31</sup> Fulfilling this purpose requires ‘demarcating, as far as possible, matters falling within the legislative area’.<sup>32</sup> Both the Commission and the Parliament endorsed this view. The Commission classified delegated acts as ‘quasi-legislative’ measures, different from the ‘executive’ measures adopted on the basis of Article 291 TFEU.<sup>33</sup> The Parliament stressed that they constitute ‘part of its own power’ delegated to the Commission.<sup>34</sup> For current purposes, this material profile of the distinction between delegated and implementing acts is relevant only insofar as an argument could be made that the procedural rules of transparency and participation could be different in the adoption of delegated acts in view of their legislative (or quasi-legislative) nature.<sup>35</sup>

But is a demarcation of legislative matters indeed possible in EU law, even after Lisbon? In EU law, the reference to ‘the essential elements of an area’ in Article 290 TFEU is what comes closest to demarcating a material preserve of the law.<sup>36</sup> Yet this specification is of little help when seeking to identify matters of legislative nature, in particular if these are to encompass also those that can be regulated by delegated acts. First, the case-law of the Court is rather sibylline.<sup>37</sup> Essential elements are ‘intended to give concrete shape to the fundamental guidelines of Community policy’.<sup>38</sup> They entail ‘political choices falling within the responsibilities of the European Union legislation’ and their delimitation depends on ‘the characteristics and particularities of the

<sup>29</sup> Final Report, n 4 *supra*, at 9.

<sup>30</sup> *Idem*, at 8, emphasis added.

<sup>31</sup> *Idem*, at 2 (by reference from 8), emphasis added.

<sup>32</sup> *Idem*, at 8.

<sup>33</sup> COM (2009) 673 final, n 22 *supra*, at 3. The same expression is used to refer to the acts adopted previously under the regulatory procedure with scrutiny, in the Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Dec 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission 2006/512/EC, OJ C 255/1, 21.10.2006, points 1 and 4.

<sup>34</sup> European Parliament Resolution of 5 May 2010 on the power of legislative delegation 2010/2021(INI), recital B, and the respective Explanatory Statement (in Report on the power of legislative delegation, 2010/2021(INI), Committee on Legal Affairs, A7-0110/2010, 29.3.2010, at 8–9.

<sup>35</sup> The Court has, in the past, grounded the exclusion of participation from legislative acts on the basis of their nature (Case T-122/96, *Federazione Nazionale del Commercio Oleario (Federolio) v Commission* [1997] ECR II-1559, para 75); see J. Mendes, *Participation in EU Rulemaking. A Rights-based Approach* (Oxford University Press, 2011), at 220–222.

<sup>36</sup> Schütze, n 7 *supra*, at 683, n 141.

<sup>37</sup> Schütze, n 7 *supra*, at 683; Rittleng, n 10 *supra*, at 209.

<sup>38</sup> Case C-240/90, *Germany v Commission* [1992] ECR I-5383, para 37. For a useful summary of the case-law that followed the seminal *Koester*, see Opinion of Advocate General Mengozzi, delivered on 17 April 2012, Case C-355/10, *European Parliament v Council* [2012], nyr., para 26–28. The opinion also provides a good illustration on a concrete application of this case-law, and of the difficulties thereof (in particular, para 29–45). See also, eg, Schütze, n 8 *supra*, at 670–671; D. Rittleng, ‘La Délégation du Pouvoir Législatif de l’Union Européenne’, in *Chemins d’Europe*, n 20 *supra*, 559–576 at 566–567.

domain concerned.<sup>39</sup> Second, even if essential elements could contribute to identifying matters with a fair degree of certainty of legislative nature, there is no necessary connection between the matter being regulated and the type of act used. Even ‘the essential elements of an area’ can be defined in a non-legislative act adopted directly on the basis of the Treaty if a given legal basis does not require that a legislative procedure be followed. The Working Group was well aware of the difficulties in delimiting the ‘matters falling within the legislative area’.<sup>40</sup> Accordingly, while here lies the rationale for the new category of delegated acts, the Working Group did not explicitly make this demarcation a condition on which the success of the new typology should rely.

The demarcation of essential elements is, in essence, a political choice left, now as before, to the discretion of the legislator within the limits of the Treaty, and as such subject to judicial review.<sup>41</sup> Nothing prevents the legislator from going beyond the definition of essential elements. As expressly acknowledged by the Commission, the legislator is entitled to ‘enact full and comprehensive regulations governing a particular field of action’.<sup>42</sup> In other words, there is no *réserve de pouvoir exécutif* that would place a limit to what the legislator can directly define.<sup>43</sup> Arguably, provided that the requirements of competence and subsidiarity are complied with, the legislator’s legal limit in exhausting the scope of the matter covered by a legislative act is the Member State’s primary competence to adopt the acts needed for the implementation of EU law under Article 291. Therefore, legislative acts may contain matters that could be classified as executive. Moreover, delegated and implementing acts can define matters that, irrespective of whether they ought to be regulated by an act of a representative institution, significantly impact on the rights and duties of citizens, whether or not in their quality of economic operators.<sup>44</sup>

<sup>39</sup> Case C-355/10, *European Parliament v Commission* [2012], myr., para 65, 68. This judgment is arguably relevant for the interpretation of Art 290 (1) TFEU, even though the facts of the case precede the entering into force of the Lisbon Treaty. See further para 76–78 that specify ‘the characteristics and particularities’ relevant in this case.

<sup>40</sup> Final Report, n 4 *supra*, at 8.

<sup>41</sup> Bergström, n 6 *supra*, at 359–360. Final Report, n 4 *supra*, at 9–10. Bast, n 8 *supra*, at 917, 920–921. Arguably the judgment in Case C-355/10 n 39 *supra* does not counter this assertion (see para 67–68, 76–78).

<sup>42</sup> COM (2009) 673 final, n 23 *supra*, at 4.

<sup>43</sup> Jacqué, n 1 *supra*, at 29; Ritleng, n 38 *supra*, at 567.

<sup>44</sup> Implementing acts may list the criteria to determine the eligibility for a contribution of the European Regional Development Fund, and therefore impact on citizens via Member States’ entitlements (Art 1 and recital 7 of Reg No. 437/2010, of the European Parliament and the Council, amending Art 7(2) of Reg (EC) No 1080/2006, OJ L 132/1, 25.5.2010); list the travel documents that entitle the holder to cross the external borders and that may be endorsed with a visa (Art 2 of Dec 1105/2011/EU of the European Parliament and the Council, OJ L 287/9, 4.11.2011); revise total allowable catches (Art 5(4), (5) of Council Reg (EU) No 44/2012, OJ L 25/55, 27.1.2012); define the method of allocation of quota authorisations on exports (Dec 2012/105/EU of the Council, OJ L 57/1, 29.2.2012). Delegated acts may supplement and amend the information that ought to be provided in food labels and the way such information is provided (Arts 9(3), 12(3), (4), 23(2), 36(4) of Reg No 1169/2011, of the European Parliament and the Council, OJ L 304/18, 22.11.2011); define the conditions under which electrical and electronic equipment may be placed on the market while containing restricted substances (Art 5(1) of Dir 2011/65/EU, of the European Parliament and the Council, OJ L 174/88, 1.7.2011); specify further rules of procedure, beyond the ones established in the legislative act, regarding the imposition of fines or periodic penalty payments applicable in cases of infringement of the rules on credit rating agencies (Art 23e(7) of Reg 513/2011, of the European Parliament and the Council, OJ L 145/30, 31.5.2011); define the conditions under which natural and legal persons can be considered, *inter alia*, to be bound

The affinity of delegated acts with legislative acts can be argued on three grounds. First, delegated acts have the capacity to amend legislative acts.<sup>45</sup> But this argument relies more on the constitutional design, ie on the concrete choices made by the Treaty drafters, than on the nature of the matter to be regulated. This does not necessarily mean that there are no constitutional consequences associated to such choices.<sup>46</sup> The argument made here is that these choices say little regarding the nature of the matters subject to delegated acts. Indeed, legislative acts can include matters that are not legislative in nature. Second, only legislative acts can envisage the adoption of delegated acts. Delegated acts cannot implement acts of general application that are materially of legislative nature but adopted outside the scope of ordinary and special legislative procedures.<sup>47</sup> Yet, again, this characteristic is more the result of constitutional design—namely, from the function assigned to delegated acts of amending and supplementing legislation—than of the nature of the matter that delegated acts can regulate.<sup>48</sup> Third, one could argue that delegated acts are materially of a legislative nature because, by force of Article 290(1), they are necessarily acts of general scope. Generality, however, is not a sufficient condition to demarcate acts of a legislative nature from acts of a non-legislative nature.<sup>49</sup> At least, it would lead to an extremely broad and undifferentiated concept of legislative act, of little use for analytical purposes, that would embrace also most implementing acts.<sup>50</sup>

It follows that, in material terms, whether delegated acts are legislative or executive in nature is a moot point. Even if, in each concrete case, it may be possible to discern the reasons why the legislator considered certain elements essential, others suitable for delegation and others yet as pertaining to the realm of implementation, this is ultimately a political choice stemming from the negotiations among the Commission, the Parliament and the Council albeit subject to judicial review. Moreover, the type of legal controls that are envisaged for one and the other case very likely determine this choice.

From the perspective of the material nature of the acts involved, a delimitation of procedural rules of transparency and participation grounded on the legislative/non-legislative divide is not justified. One could not state with a sufficient degree of legal certainty that delegated acts ought to be subject to more stringent rules of transparency than those applicable to implementing acts, on the basis that they contain general and abstract rules that define the rights, duties and guarantees that natural and legal persons enjoy under EU law. By the same token, one could not argue that participation rights should be restricted to implementing acts because they regulate matters of executive nature capable of adversely affecting the rights and legally protected interests of the persons concerned, while delegated acts, given their legislative nature, do not have that capacity.

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by the duties of transparency imposed by the EU rules on short selling and credit default swaps in financial markets (Art 3(7)(b) of Reg No 236/2012, OJ L 86/1, 24.3.2012).

<sup>45</sup> Jacqué, n 1 *supra*, at 45; Ritleng, n 38 *supra*, at 573.

<sup>46</sup> Schütze, n 7 *supra*, at 683; Bast, n 8 *supra*, at 921–922.

<sup>47</sup> Ritleng, n 38 *supra*, at 572; Schütze, n 7 *supra*, at 684; Peers and Costa, n 5 *supra*, at 441.

<sup>48</sup> See below ‘functional profile’.

<sup>49</sup> See, eg, Case T-18/10, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] nyr, para 45 and 50 (currently under appeal: Case C-583-11 P, OJ C 58/3, 25.2.2012).

<sup>50</sup> On the difficulties of this criterion to solve legal problems, A. Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International, 2006), at 184–185.

### B Constitutional Design: Functional Profile

The above conclusion does not preclude that the different functions the Treaty assigns to delegated and implementing acts could have an influence on the scope of a procedural regime of transparency and participation. The functions of delegated and implementing acts are one important aspect of the constitutional design of Articles 290 and 291, and as such relevant to the present enquiry.

Delegated acts, as noted above, are intended to ensure the flexibility of legislative acts by allowing the Commission to develop or adapt them to changing circumstances—supplementing or amending—as well as to ensure some degree of control of the legislator over the exercise of delegation. Implementing acts are intended to ensure uniform conditions of implementation of legally binding Union acts. Do these different functions determine a different scope of rules of transparency and participation?

When searching for complementary sources of democratic legitimacy of the executive power beyond the political controls determined by Articles 290 and 291, it is immaterial whether the non-legislative act is supplementing, amending or implementing a basic act. There is no convincing argument to sustain that the openness of the procedural regime of delegated and implementing acts should vary depending on the function of the non-legislative act. Such a differentiation is not arguable on the basis of the Treaty provisions on transparency and participation. In addition, it is disputable whether it is possible to distinguish the meaning of ‘supplement or amend’ on the one hand, and of ‘implement’ on the other, following objective criteria.<sup>51</sup> Given the different controls attendant to delegated and implementing acts, if not *a priori*, the EU institutions ought, at least, to be able to establish a practice that will clarify their respective meaning.<sup>52</sup> Yet, hitherto, institutional practice post-Lisbon does not seem to have provided clear objective criteria of differentiation.<sup>53</sup> In the numerous areas of functional overlap among supplementing and implementing a basic act, the choice between one or other type of act institutions depends ultimately on the negotiations between the institutions in the preparation of the legislative acts.<sup>54</sup>

However, these observations do not exhaust the analysis of the possible influence of the functional profile of Articles 290 and 291 on possible procedural rules of transparency and participation. The condition upon which the Union’s exercise of implementing powers depends—‘the need for uniform conditions of implementation’—limits the competence of the Union’s legislator to envisage the adoption of implementing acts under Article 291.<sup>55</sup> In line with previous case-law, the Treaty attributes the Union an executive competence only insofar as implementation requires uniformity.<sup>56</sup> Depending on what such uniformity entails, the Member States’ primary competence of implementation will be limited and pre-empted accordingly.

<sup>51</sup> Eg Bergström, n 6 *supra*, at 356–357, 359–360; L. Azoulay, ‘Pour un droit de l’exécution de l’Union Européenne’, in D. de la Rochère (ed), *L’exécution du droit de l’Union, entre mécanismes communautaires et droits nationaux* (Bruylant, 2009), 1–23, at 7; Craig, n 1 *supra*, at 275–280; Schütze, n 7 *supra*, at 684, 690–691; Bast, n 8 *supra*, at 920–921. Bast, n 8 *supra*, at 922–923.

<sup>52</sup> Stancanelli, n 21 *supra*, at 524; Jacqué, n 1 *supra*, at 46.

<sup>53</sup> Christiansen and Dobbels in this issue.

<sup>54</sup> Bast, n 8 *supra*, 920–921; Craig, n 1 *supra*, at 278.

<sup>55</sup> Azoulay, n 51 *supra*, at 14. See also the contrasting views of Schütze, n 7 *supra*, at 691, and Bast, n 8 *supra*, at 909–910.

<sup>56</sup> Case 205 to 215/82, *Deutsche Milchkontor GmbH and others v Germany* [1983] ECR 2633, para 17.

Does this vertical distribution of powers between the Union and Member States condition the power of the Union to define the rules of transparency and participation in procedures leading to the adoption of implementing acts?

The scheme of Article 291 gives rise to a shared executive competence rather than to a strict division between two different levels of action.<sup>57</sup> Uniform conditions need not—and ought not *a priori*—exhaust the scope of implementation. Implementing a Union legally binding act might require both acts of the Union and acts of the Member States' administrations, beyond the schemes of collaboration that comitology already establishes.<sup>58</sup> The different spheres of competence that coexist in implementation pose limits to the Union's action. In deciding what uniform conditions of implementation are *needed*, the legislator is subject to the principles of subsidiarity and proportionality. Subsidiarity and proportionality may determine the choice of instruments (eg guidelines may be sufficient to ensure the uniformity required in Article 291(2)) and the substantive elements defined in the implementing act (eg it may limit the cases where the Commission is entitled to adopt implementing acts repealing previous implementing decisions of Member States, or bind them to strict conditions).<sup>59</sup>

However, once the scheme of implementation is decided (including the relative national and Union competence spheres), the Union's competence to *define the rules* of transparency and participation that will structure the Commission's (and the Council's) powers to adopt such implementing acts is not limited by the vertical distribution of powers of Article 291. Just like Member States act in accordance with their own procedural rules when implementing legally binding Union acts under Article 291(1) TFEU, within the limits posed by EU law, the Union institutions also act in accordance with their own procedural rules.<sup>60</sup> These can be defined in Treaty norms; they may stem from the general principles of EU law, as developed by the Court, and may also be established in secondary legislation. In any event, only the Union can define the rules of procedure that structure the exercise of its executive competence. The procedural autonomy of the EU in implementing EU law is not limited by the fact that implementing powers are primarily a Member State competence. The EU institutions acting under Article 291(2) are implementing Union law and exercising the executive competence that the Treaty attributes them, within the limits indicated above. The *raison d'être* of the limits of Member States' procedural autonomy is the need to frame their implementation of Union law, which resorts to national law and institutional structures, by the rules and principles of the Union.<sup>61</sup> This obviously does not apply to the exercise of implementing powers by the Union under Article 291(2).

Yet, even if separately defined—and controlled by different jurisdictions<sup>62</sup>—the EU and national procedural spheres interact in the frequent cases where Union and

<sup>57</sup> In this sense, Bast, n 8 *supra*, at 911, although basing his argument on a systemic and historic interpretation of Art 291(2) TFEU. See also J. Ziller, 'Exécution centralisée et exécution partagée: Le fédéralisme d'exécution en droit de l'Union Européenne', in *L'exécution du droit de l'Union*, n 52 *supra*, 111–138, at 114, 118.

<sup>58</sup> On comitology as collaboration, Bergström, n 6 *supra*, at 9.

<sup>59</sup> See, eg, Art 126d(8) of Council Reg No 1234/2007, as amended by Reg No 261/2012 of the European Parliament and of the Council, OJ L 94/38, 30.3.2012.

<sup>60</sup> Ziller, n 57 *supra*, at 127.

<sup>61</sup> Azoulay, n 51, *supra*, at 14–15.

<sup>62</sup> Azoulay, n 51 *supra*, at 15; Ziller, n 57 *supra*, at 131.

national actions concur in implementing EU law. They are intertwined in the cases of composite procedures.<sup>63</sup> In the concrete schemes of implementation defined in EU legislation, the comitology procedures that lead to the adoption of implementing decisions may well be part of composite procedures, partially developed at the national level and partially developed at the Union level.<sup>64</sup> The respective procedural rules are, therefore, not isolated. But how they should be coordinated in order to avoid gaps in the procedural and judicial protection remains problematic in EU law. As Azoulai underlined, the implementation of EU law involves distinct normative segments ‘incapable of being dissolved in a unique and perfectly coherent whole’.<sup>65</sup>

One could argue that such coordination should ensure compliance with the principles of transparency and participation, given their constitutional founding role. They bind the Union institutions by force of the treaties. They ought to frame the Member States’ procedures when implementing EU law. Yet the latter claim is purportedly vague. While it can be normatively upheld as a matter of principle, concrete inferences—operational criteria that could solve possible conflicts—face two important hurdles: the procedural autonomy of Member States and the lack of Union competence to define rules of national administrative procedure.<sup>66</sup> Invoking the principle of primacy to solve conflicts of procedure risks depleting the procedural autonomy of Member States to an unacceptable extent<sup>67</sup> and interferes with fundamental political choices of the Member States. The ‘difficult cohabitation’ between EU and national procedural law requires adjustments<sup>68</sup> that, ultimately, will depend on a mutual understanding of the implications of both EU and national administrative principles. Such a mutual understanding could be achieved through defining rules of transparency and participation applicable to the Union institutions, and intended also to serve as a model that Member States are willing to follow.<sup>69</sup>

### *C Constitutional Design: Organic Profile*

The determinant factor of the distinction established by Articles 290 and 291 is the different controls over the adoption of one and the other category of non-legislative acts. Irrespective of whether it is possible to establish material and functional (supplement, amend, implement) distinctions that underlie these controls, the relative

<sup>63</sup> G. Cananea, ‘The European Union’s Mixed Administrative Proceedings’, (2004) 68 *Law and Contemporary Problems* 197; and H. Hofmann, ‘Composite Decision Making Procedures in EU Administrative Law’, in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law towards an Integrated Administration* (Edward Elgar, 2009), at 168–176.

<sup>64</sup> eg Commission Implementing Dec 2012/288/EU of 1 June 2012 authorising the placing on the market of gamma-cyclodextrin as a novel food ingredient under Reg (EC) No 258/97 of the European Parliament and of the Council, OJ L 144/41, 5.6.2012. On the procedure of authorisation of novel foods, see Mendes, n 35 *supra*, at 334–341. Another example is the Commission Implementing Reg (EU) No 588/2012 of 3 July 2012 entering a name in the register of protected designations of origin and protected geographical indications (Kalocsai fűszerpaprika-örlemény (PDO)), OJ L 175/5, 5.7.2012.

<sup>65</sup> Azoulai, n 51 *supra*, at 16 (author’s translation).

<sup>66</sup> Art 298(2) and Art 197(1) TFEU.

<sup>67</sup> See, however, Ziller, n 57 *supra*, at 128.

<sup>68</sup> Azoulai, n 51 *supra*, at 16.

<sup>69</sup> B. G. Mattarella, ‘The concrete options for a law on administrative procedure bearing on direct EU administration’, European Parliament note, Directorate General for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs—Legal Affairs, 2012 (available at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?language=document=EN&file=73407>), at 8.

powers of the institutions are different under Articles 290 and 291, in particular the role of the Parliament. This reflects the ‘concern for democracy’ that underlies the new classification of non-legislative acts, and the intention that the typology of legal acts established by the Lisbon Treaty will be partially based on the democratic legitimacy of the enacting institution and of the respective decision-making procedure.<sup>70</sup> Should rules of participation and transparency have a different scope depending on the role that each institution can have both in the decision-making procedure followed for the adoption of a legal act under Articles 290 and 291 and in the respective institutional controls? Does that follow in any way from the Treaty?

*a) Transparency*

The Treaty defines a higher threshold of transparency for legislative procedures. First, the European Parliament and the Council need to meet in public—the latter only when deciding on draft legislative acts (Articles 16(8) TEU and 15(2) TFEU). Second, they are required to ensure publication of the *documents relating to the legislative procedures*, in the terms to be defined in regulations on access to documents (Article 15(3), fifth paragraph, TFEU). The first requirement applies to the institutions mentioned (to the Council insofar as it acts as a legislator).<sup>71</sup> Only the second is explicitly restricted to legislative procedures, and hence to legislative acts. What, if any, are the implications of these rules to non-legislative acts, considering the different role of the Parliament in controlling delegated and implementing acts?

*‘Spillover’*

The first requirement of transparency can ‘spillover’ to delegated acts. As it has stronger controls over the adoption of delegated acts than under the comitology procedures followed for the adoption of implementing acts,<sup>72</sup> the procedure for the adoption of delegated acts may become more transparent due to the parliamentary intervention. The meetings of European Parliament committees are normally public—even though the committees may decide to hold meetings in camera—and there is no reason to defend that this would not include the committees involved in the making of delegated acts.<sup>73</sup> To the author’s knowledge, there is no information available on the Parliament’s practices of transparency in this regard. However, this potentially introduces a significant change to the pre-Lisbon rules on transparency for the adoption of non-legislative acts.<sup>74</sup> First, the meetings of the Parliament committees that the Commission may consult during its preparatory work should in principle be public. Second, the deliberations of the Parliament regarding the objection and revocation of

<sup>70</sup> Final report, n 4 *supra*, at 2. Critically, Bast, n 9 *supra*, at 391.

<sup>71</sup> If doubts could remain, the French version of the Treaty confirms that the specification ‘when considering and voting a draft legislative act’ applies only to the Council (‘lorsqu’il délibère et vote’, emphasis added). The German, Italian, Portuguese and Spanish versions are equivalent to the French. See, however, and significantly, Arts 8 and 9 of the Council’s Rules of Procedures (Council Dec No 2009/937/EU of 1 December 2009, OJ L 325/35, 11.12.2009, as amended), defining the cases in which the Council deliberates in public when deciding on non-legislative proposals.

<sup>72</sup> Cf Art 290 TFEU and Arts 10(3), (4) and 11 of Reg 182/2011, n 11 *supra*.

<sup>73</sup> Rules 103, para 3, and 87a of the Parliament’s Rules of Procedure—7th parliamentary term, July 2012 (available at <http://www.europarl.europa.eu/aboutparliament/en/00a4c9dab6/Rules-of-procedure.html>).

<sup>74</sup> On the transparency shortcomings of comitology pre-Lisbon (which embraced the acts now covered by Art 290 TFEU), see G. J. Brandsma, D. Curtin and A. Meijer, ‘How Transparent are EU “Comitology” Committees in Practice?’ (2008) 14 *European Law Journal* 819, at 836.

a delegated act should also be made in public.<sup>75</sup> In this regard, it should be noted that only the possibility to object could have an impact on the transparency of the *decision-making procedure* that leads to the adoption of a given delegated act. The objection applies to a specific procedure and prevents the entering into force of a delegated act.<sup>76</sup> The revocation of the delegation, by contrast, operates prospectively, irrespective of a given procedure, and does not affect the validity of the acts that have already been adopted.<sup>77</sup>

However, the added value of the intervention of the Parliament to the decision-making procedure leading to the adoption of delegated acts is limited. Procedures leading to the adoption of delegated acts are visible only insofar as the Parliament is involved in them. If the meetings of parliamentary committees acting as experts in the making of delegated acts are indeed public, this has a limited impact on the overall transparency of the decision-making procedures leading to the adoption of delegated acts. The public would know the input of the parliamentary committees but not that of other expert committees that the Commission may consult. The limited effect on transparency due to the powers of the Parliament over delegated acts is evident when the Parliament uses its power to object. Its objection (as that of the Council) occurs after notification of the act by the Commission. By then, the content of the act is obviously decided. As mentioned, the objection prevents its entering into force. It does not impact substantively on the decisions made during the adoption of the delegated act, even though the objection might have an impact on the content of a future delegated act.<sup>78</sup>

### *A Distinctive Feature of Legislative Acts?*

From a *de lege ferenda* perspective and using an argument of analogy, one could defend that delegated acts should be subject to the same requirements of transparency that apply to the adoption of legislative acts. Delegated acts interfere with the legislator's substantive choices—they amend and supplement legislation—even if they do so under its control. Given the difficulties of the distinction mentioned above, one could go further and defend that the same argument applies to implementing acts to the extent that they also interfere with the legislator's substantive choices.

However, this argument is not tenable. It would go against the rationale of Articles 16(8) TEU, 15(2) and (3) 5th paragraph TFEU. The underlying rationale of Article 15(2) TFEU—public scrutiny of the legislator—does not apply to the Commission, which is not a representative institution and does not deliberate on legislative acts with final decision-making powers. Article 16(8) TEU explicitly determines the division of the Council's meetings for the purposes of transparency, singling out legislative acts. In this light, the fact that the Treaty does not impose a duty on the Commission to meet in public when deciding on non-legislative acts should not be considered a lacuna (except to the extent that the Commission is indeed involved

<sup>75</sup> On the deliberations of the Parliament in this regard, see Rule 87a of the Parliament's Rules of Procedure (n 73 *supra*).

<sup>76</sup> Eg Art 7a(5) of the Council Dir 2001/112/EC, *idem*, among many others.

<sup>77</sup> Eg Art 7a(3) of the Council Dir 2001/112/EC relating to fruit juices and certain similar products intended for human consumption, as amended by Dir 2012/12/EU of the European Parliament and of the Council of 19 April 2012, OJ L 115/1, 27.4.2012, among many others.

<sup>78</sup> The same applies to the right to scrutiny the Parliament may exercise under Art 11 of Reg 182/2011, n 11 *supra* (see n 92 below).

in legislative deliberations). An argument based on the quasi-legislative character of delegated acts—that should hence have the same legal treatment—would succumb to the wording of Article 289(3) TFEU, read in conjunction with Article 15(2) TFEU, and to an analysis on the material distinction between legislative and executive acts.<sup>79</sup> Nor would the requirement to publish the documents relating to the decision-making procedures that lead to the adoption of delegated acts follow easily from an argument of analogy based on Article 15(3) 5th paragraph TFEU, for the same reason—the rationale of this provision is, precisely, the transparency of *legislative procedures*. From this perspective, enhanced transparency is indeed a distinctive feature of legislative acts under the Lisbon Treaty, and of these acts only.<sup>80</sup> A similar regime of transparency applicable to delegated acts, which could possibly make their procedural regime distinct from the one applicable to implementing acts, finds no basis in the Treaty.

Yet one cannot thence conclude that the principle of transparency as enshrined in the treaties has no implications to decision-making procedures for the adoption of non-legislative acts, beyond those that result from the above interpretation of Article 15(2) TFEU. Two arguments would speak against such conclusion: first, the fundamental character and the scope of the principle of transparency;<sup>81</sup> second, the substantive regulatory effects that non-legislative acts of general scope—delegated and implementing acts alike—may have, including their potential impact on the definition of rights and duties of individuals, as illustrated by the examples indicated above.<sup>82</sup> As enshrined in Articles 10(3) TEU and Article 15(1) TFEU, the principle of transparency applies to *all Union acts* without distinction. Both provisions stress that transparency is a condition of citizens' participation in decision making, whether such participation relies on representative institutions (Article 10(3) TEU) or on direct participation (Articles 11 TEU and 15(1) TFEU). While the democratic quality of the author of a legal act and of the procedures followed for their adoption influences the scope of rules of transparency, one cannot argue that the principle of transparency as enshrined in the treaties is only—or primarily—applicable to legislative acts and to the respective procedures. Transparency is explicitly, by force of the Treaty, a core principle of Union democracy, and as such a fundamental value on which the EU legal order is grounded.

Therefore, not only the legislator but also the Commission when adopting delegated and implementing acts ought to be subject to the principle of transparency. However, contrary to transparency of legislative procedures, the duties that concretise transparency in non-legislative procedures are not explicitly specified in the Treaty. The latter follow from the relevance of transparency in the Union political system as a founding principle of the Union legal order, which is not limited by the rationale of the provisions that concretise its implications with regard to legislative procedures. They follow equally from the link between transparency and participation mentioned above, as well as from the scope and role participation acquired under the current treaties.

<sup>79</sup> Subsection A *supra*.

<sup>80</sup> On the problems resulting from the rather arbitrary nature of the choice to exclude some policy issues from the realm of legislative acts, see Bast, n 9 *supra*, at 393. On the enhanced public scrutiny of legislative acts, Bast, n 8 *supra*, at 893–894.

<sup>81</sup> Section 2 *supra*.

<sup>82</sup> See n 44 *supra*.

From this perspective—the perspective of the legal system and of its founding principles—the absence of a provision equivalent to Article 15(3) 5th paragraph TFEU applicable to documents relating to non-legislative procedures may be considered a lacuna. The forms of participation envisaged in Article 11(1) to (3) TEU occur during decision-making procedures—either at an initial stage of policy definition or at later stage of content specification—before the adoption of the act. Given that meaningful participation is dependent on access to information relating to the procedure, the restriction of Article 15(3) 5th subparagraph TFEU to legislative acts is not justified. This reasoning applies to delegated and implementing acts alike. The Commission is the author of both (as a rule) and the institution that initiates and conducts the respective procedures. From an organic perspective, there is no need to differentiate between the two types of acts. Nor can the fact that implementing acts are under the control of Member States justify a different treatment in terms of transparency. They are exercising a function assigned to them under Union law, and are therefore bound by the principles of the Union legal order.<sup>83</sup>

In sum, the principle of transparency, as enshrined in the treaties, applies also to delegated and implementing acts, even though the Treaty does not specify the duties that derive therefrom. Moreover, it has the same implications for the adoption of both types of non-legislative acts.

#### *b) Participation*

Also the Treaty provisions on participation—Article 11 TEU and Article 15(1) TFEU—apply to all the legal acts of the Union. Participation is one of the foundations of the Union’s democracy, and it would be difficult to argue that it could, as such, be left at the doorstep of the legal regimes of delegated and implementing acts.<sup>84</sup> However, it is perhaps less clear whether the normative consequences of the Treaty norms on participation would not require a differentiated procedural regime for delegated and for implementing acts. Under the new Treaty provisions on democracy, participation and representation are complementary sources of democracy.<sup>85</sup> One may argue that participation is all the more justified the weaker the powers of the European Parliament. In this sense, participation and representation are in an inverse relationship.<sup>86</sup> The opportunities of participation created to give effect to a principle of democracy under Article 11 TEU need to abide to minimum requirements if they are to be considered a complementary source of democratic legitimacy.<sup>87</sup> *Provided that those requirements are fulfilled*, two consequences follow from the inverse relationship mentioned. First, participation by non-institutional actors is the *main source* of democratic legitimacy in decision-making procedures where the Parliament does not have decision-making powers. The decision-making powers of the Parliament may justify different rules of participation applicable to legislative procedures where it co-decides, on the one hand, and to decision-making procedures where it has no or little say during the decision-making procedure (ie non-legislative acts and legislative acts adopted through special legislative procedures where the Parliament may only need to

<sup>83</sup> See, however, n 66–69 *supra*, and accompanying text.

<sup>84</sup> On Art 11, Mendes, n 14 *supra*.

<sup>85</sup> Mendes, n 14 *supra*, at 1858–1859.

<sup>86</sup> Mendes, n 14 *supra*, at 1875. For an early reflection of this idea in EU law, Case T-135/96, *UEAPME v Council* [1998] ECR II-2335, para 88–89.

<sup>87</sup> Mendes, n 14 *supra*, at 1862.

be consulted or give its consent).<sup>88</sup> Second, participation by non-institutional actors is virtually the *only source* of democratic legitimacy in decision-making procedures where the Parliament has weak powers of control over the adoption of Union acts. The stronger powers the Parliament has to control delegated and implementing acts could, therefore, justify differentiated rules on participation for the adoption of these acts.

Yet the degree of parliamentary control exercised under Article 290 TFEU over the discretionary power of the Commission may not be as constraining as that Treaty article may *prima facie* suggest. They are due both to the nature and design of the control powers that the Treaty defines and to the potential difficulties of the Parliament in activating them.<sup>89</sup> First, the *ex ante* controls envisaged in Article 290(1) TFEU are likely not to limit significantly the discretion of the Commission in defining complex regulatory regimes via delegated acts.<sup>90</sup> Such discretion may very well include the definition of the rights and duties of the persons who fall under their scope of application.<sup>91</sup> Second, as noted above, the *ex-post* controls defined in Article 290(2) TFEU do not allow—or allow only to a very limited extent—the Parliament (or the Council) to influence the content of the delegated acts during the decision-making procedure.<sup>92</sup> Third, the power of the Parliament to revoke the delegation and to object to a delegated act is subject to a more demanding voting majority (majority of its component members) than the general rule established in the Treaty for the adoption of legislative acts (majority of the votes cast).<sup>93</sup> Fourth, the Parliament may not be on equal footing with the Council to control delegated acts that implement legislation adopted under a special legislative procedure.<sup>94</sup>

These observations do not ground the claim that the effective role of the Parliament in controlling delegated acts may be not so different in practice from the control it can exercise over implementing acts. The legal rules are quite distinct in this respect.<sup>95</sup> No matter how the envisaged controls play out in practice, it is very unlikely that one would witness a blurring between the two categories in what regards parliamentary controls over non-legislative acts. Nevertheless, a differentiated procedural regime would introduce an element of complexity in an already convoluted classification that may not be justified, depending on how effective the controls of the Parliament may be, and in particular on the degree to which they allow control over the content of the acts.

Adding a new element of procedural differentiation risks exacerbating the likely disputes on whether an act should be classified as delegated or as implementing act. Moreover, the substantive ambiguity of the divide between delegated and implementing acts would be an argument to defend that the form of the act ought not to determine necessarily the scope of application of the rules on participation. One cannot exclude that the Commission would seek to avoid the more demanding

<sup>88</sup> Mendes, n 14 *supra*, at 1872, 1875.

<sup>89</sup> Eg Ritleng, n 39 *supra*, at 572–573; P Craig, *EU Administrative Law* (Oxford University Press, 2nd edn, 2012), at 128–130.

<sup>90</sup> Craig, n 1 *supra*, at 267.

<sup>91</sup> See n 44 *supra*.

<sup>92</sup> Similarly, with regard to implementing acts, see Art 11 of the Comitology Regulation, and Blumann, n 7 *supra*, at 34–35, 38–39.

<sup>93</sup> Art 290(2) TFEU, para 2, and Art 231 TFEU. Lenaerts and Desomer, n 9 *supra*, at 755.

<sup>94</sup> Ritleng, n 38 *supra*, at 572–573; Schütze, n 7 *supra*, at 868, n 150; Peers and Costa, n 5 *supra*, at 444.

<sup>95</sup> Cf Art 290 TFEU and Arts 10(3), (4) and 11 of Reg 182/2011, n 11 *supra*.

requirements of participation by favouring implementing acts over delegated acts in its legislative proposals and respective negotiations, even if this effect could be countered by other factors.<sup>96</sup> Such an effect would further undermine the rationale of the divide introduced by Articles 290 and 291 TFEU.<sup>97</sup> In addition, the Court will possibly not exercise a close scrutiny over potential strategic uses of the new scheme of non-legislative acts, since the decision on whether non-legislative acts falls under Article 290 or 291 TFEU is largely a discretionary choice of the legislator.<sup>98</sup> Therefore, the Court would probably not go beyond a possibly biased classification to enforce a differentiated procedural regime of participation inferred from the different role of the Parliament.

An additional reason speaks in favour of not differentiating the procedural regime of participation applicable to delegated acts on the one hand, and to implementing acts on the other. Participation is multifaceted, and therefore has different rationales. Beyond a democratic rationale,<sup>99</sup> it cannot be excluded that participation will also fulfil other functions in the procedure leading to the adoption of non-legislative acts—namely, the protection of the dignity of the persons affected by giving them an opportunity to defend their rights and legally protected interests, and the achievement of accurate material decisions based on a plural configuration of the act.<sup>100</sup> These rationales of participation are grounded on the rule of law, and from this perspective there is no reason to defend a procedural differentiation of rules of participation applicable to delegated and to implementing acts, at least not one that would depend on the different powers of control the Parliament may exercise in one case and the other. From a rule of law perspective, a procedural differentiation would depend on different factors, namely on the type of power exercised and on the degree of intrusion of the legal act in the legal sphere of persons affected. Depending on the relative weight given to each rationale, the forms of participation chosen may vary. In other words, not all forms of participation will give effect to Article 11 TEU, as much as not all forms of participation will favour the procedural protection of affected interests. Yet the tensions between a rule of law and a democratic rationale of participation do not make them incompatible.<sup>101</sup> The protection of the legal sphere of the person confronted with the exercise of public authority is also a core concern of an ideal of democracy, insofar as it is an important dimension of individual freedom.<sup>102</sup> On the other hand, the participation of those affected, which would be primarily grounded on a rationale of rule of law, may contribute to a better achievement of the public interests the Commission is mandated to pursue by the legislative act it amends, supplements or implements. The different views on the legally protected interests

<sup>96</sup> Namely, the comitology controls. See Brandsma and Blom-Hansen, n 4 *supra*.

<sup>97</sup> Craig, n 89 *supra*, at 136.

<sup>98</sup> See n 41 *supra*. This is expressly stated in the report of the Working Group. The Court has already shown its willingness to resort to the '*travaux préparatoires*' of the Convention to interpret provisions of the Lisbon Treaty (Case T-18/10, *Inuit Tapiritt Kanatami and Others v Parliament and Council* [2011], nyr., para 49).

<sup>99</sup> Mendes, n 14 *supra*, at 1861–1862.

<sup>100</sup> Mendes, n 35 *supra*, at 32–36. The rule-of-law rationales of participation may not be always easily transferable to rule making. For a defence of their applicability to rule making, see Mendes, n 35 *supra*, at 67–70, at 229–240.

<sup>101</sup> On a related argument, see E. Schmidt-Assmann, 'La legitimación de la Administración como concepto jurídico' (*Documentación administrativa*, 1993), n 234, 163–229, in particular, at 185–187, 209, 211–212.

<sup>102</sup> Also in Mendes, n 14 *supra*, at 1864.

potentially affected by a given legal act, both public and private, voiced via participation contribute to shaping regulatory solutions. Provided that the equidistance and independence of decision maker are ensured, these solutions may be more balanced in concretising open-ended legislative norms and more adequate in view of the asset of interests the Commission needs to enforce under the applicable legislation.<sup>103</sup> For this purpose, participation needs to be duly channelled and filtered by rules and practices that ensure sufficient conditions of access and justification. Such rules and practices need not be different for delegated and for implementing acts.

#### IV Proceduralisation: Not Only an Inter-Institutional Matter

The distinction between delegated and implementing acts, as the whole revision of system of legal acts of the Union, stemmed from concerns regarding the democratic legitimacy of EU decision-making processes. The institutional and academic debate has focused both on the impact of the parliamentarisation of the Union in the relative powers of the institutions over the control of non-legislative acts, on the innovations to the typology of legal acts of the Union and on its implications regarding the locus of executive power in the Union. Articles 290 and 291 are silent regarding the procedures for the adoption of delegated and implementing acts, except in their inter-institutional dimension, and so remained the legal acts and institutional practices that have subsequently concretised them.

Yet the debate on the democratic legitimacy of delegated and implementing rule making remains incomplete without the consideration of the role transparency and participation may have as complementary sources thereof. Transparency and participation are distinctive features of EU democracy, and as such one may characterise them as founding principles of the EU legal order.<sup>104</sup> They should frame the decision-making procedures leading to the adoption of non-legislative acts. Moreover, they define normative standards that bind the institutions—the legislator when defining procedural rules for the adoption of non-legislative acts (whether in sector-specific or in general legislation), and the Commission (or the Council) when adopting such acts, irrespective of written rules that specify procedural duties. Therefore, proceduralisation of delegated and implementing rule making cannot only have an internal dimension, pertaining to the definition of the relative powers of the institutions and Member States. By force of the Treaty provisions on democracy, it needs to take into account the external dimensions of the relationship between the institutions and citizens, in particular transparency and participation.

Against this normative background, this article analysed the different profiles of the distinction between delegated and implementing acts, as enshrined in the Treaty. The aim was to identify which, if any, can condition the scope of possible rules of transparency and participation when applied to the respective rule-making procedures, and in particular whether the different constitutional rules could determine that a different procedural regime would apply in each case. It concluded that neither the nature of acts adopted—legislative or executive—nor the function they perform by constitutional specification—supplement or amend legislative acts on the one hand, and implement basic acts on the other—condition the scope of rules of procedure or postulate such differentiation. No categorical distinction can be made between

<sup>103</sup> Schmidt-Assmann, n 101 *supra*.

<sup>104</sup> In the meaning Bogdandy gives to the term (n 17 *supra*).

delegated and implementing acts on the basis of their material nature or, to date, on the basis of their ability to supplement or amend a legislative act on the one hand, and to implement a basic act on the other. Importantly, such distinctions are immaterial for the purposes of ensuring complementary sources of democratic legitimacy of the executive power beyond the political controls determined by Articles 290 and 291. At the same time, the competence of the Union to define procedural rules for the adoption of implementing acts under Article 291 is not conditioned by the fact that the Union shares the function of implementing non-legislative acts with the Member States.

The new typology of legal acts of the Union is partially based on the democratic legitimacy of the enacting institution and of the role each institution can have in the respective decision-making procedures and institutional controls. The analysis of the impact of the organic profile of Articles 290 and 291 on rules of transparency and participation has led to the following conclusions. First, non-legislative rule making needs to be framed by the principle of transparency, given both the fundamental character of this principle (Articles 10(3) and 11 TEU) and the substantive regulatory effects of non-legislative acts of general scope. The fact that enhanced transparency is a distinctive feature of legislative acts, by force of Article 15 (2) and (3) TFEU, does not hinder this conclusion. In this respect, the restriction of the duty to publish documents relating to *legislative* procedures (Article 15(3) 5th paragraph TFEU) may be considered a lacuna. Second, the intervention of the Parliament committees in the making of delegated acts potentially strengthens the transparency of these rule-making procedures, given that the Parliament committees as a rule meet in public. However, this effect is limited by the effective role the Parliament may have in the procedure leading to the adoption of delegated acts: the Commission may consult its committees, and the Parliament's objection to a delegated act may or may not impact on the future definition of the act's content. Third, a differentiation of rules on participation applicable to delegated acts on the one hand, and to implementing acts on the other, could be defended on the basis of the controls the Parliament has in each case. However, two main reasons speak against such differentiation: the enhanced controls of the Parliament under Article 290 do not enable it to control the content of the acts adopted by the Commission; a different procedural regime would introduce a complicating variable based on a criterion that is irrelevant for other functions participation may have in non-legislative rule making.

In sum, this article argued that the Treaty provisions on transparency and participation constrain also the procedural choices the institutions make regarding non-legislative rule making. Moreover, it showed that the constitutional characteristics of delegated and implementing acts should not influence the scope of possible rules of transparency and participation that would apply to the respective rule-making procedures. Linking the two constitutional debates—on the democratic provisions of the treaties and on the non-legislative acts of the Union—opens one important question: how to reconcile transparency and participation with the requirements of Article 290 and with the procedures defined in Regulation 182/2011? This is one important challenge that both institutional and academic debates will need to address.

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