

Legislative Control over Executive Law-making: Delegation of Quasi-legislative Powers to the European Commission*

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Abstract

Most EU legislation consists of executive acts of the European Commission. The Lisbon Treaty introduced a new type of EU executive legislation – delegated acts, which give the European Parliament formal powers of legislative scrutiny equal to those of the EU Council. Thus, the use of delegated acts could reinforce the institutional balance of power and help reduce the EU's democratic deficit. We studied the situations when the Parliament and the Council agreed to grant the Commission the right to adopt delegated acts, considering the preference constellations of legislative and executive actors and legislative complexity. Using a novel dataset on post-Lisbon legislation, we found that delegated acts are more likely in cases of high legislative complexity and when the Council sees the Parliament as an ally vis-à-vis the Commission. However, the European Parliament gets no say over executive measures when doing so could shift policy outcomes away from the Council's preferences, raising doubts about the effectiveness of parliamentary control.

Keywords: delegated acts; comitology; transaction cost theory; delegation models; parliamentary control

Introduction

Over three-quarters of all European Union (EU) legislation is made up of tertiary acts (Junge *et al.*, 2015, p. 788), which the European Commission adopts to specify, update and implement secondary legislation.¹ This places the executive (the Commission) in a powerful position vis-à-vis the legislature (the European Parliament [EP] and the Council of the European Union) to (re-)shape policies, raising concerns about bureaucratization in the EU (König, 2018). However, the Commission is not fully autonomous in exercising its executive powers. Instead, ever since the 1960s member states have exerted control over the adoption of tertiary acts through a comitology system of national experts (Bergström, 2005; Blom-Hansen, 2011; Brandsma and Blom-Hansen, 2012). Parliament has been opposed to comitology as it offers no parliamentary control and thus allows member states and the Commission to decide on politically sensitive topics without considering Parliament's position.²

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¹In our sample of all secondary and tertiary acts from the end of 2009 until 2016 that were adopted, tertiary acts constitute 80 per cent of all legislation.

²With the introduction of the regulatory procedure with scrutiny in 2006, the EP finally got veto powers over Commission acts alongside the EU Council (Bergström and Ritleng, 2016; Bradley, 1997; Brandsma and Blom-Hansen, 2012; Christiansen and Dobbels, 2013a, 2013b; Héritier, 2012). Yet, it still did not obtain the ex-ante control over the content of executive measures that the member states have enjoyed under comitology.

However, the Lisbon Treaty has transformed the entire system of delegation to the Commission. Under the new regime, legislators can grant well-defined quasi-legislative powers to the Commission to adopt delegated acts to amend or supplement non-essential elements of this legislation (Article 290 of the Lisbon Treaty). Notably, this new procedure does not entail any *ex ante* mechanisms of controlling the Commission. Instead, Parliament and the Council share *ex post* power to revoke delegation or to object to the adoption of a specific delegated act within a limited time period (EU, 2016). By contrast, the traditional comitology system of *ex-ante* member state control over tertiary legislation is largely preserved for the so-called *implementing acts*, which specify uniform conditions that member states need to fulfil in implementing EU legislation (Article 291 of the Lisbon Treaty). However, the EP does not have any say in the adoption of such acts. While in legal and technical terms delegated and implementing acts differ, in practice they are functional substitutes with unclear boundaries for implementing EU policy. The different control that the legislative chambers exert over each type of act has led to institutional conflict and law suits over when one or the other should be used (van der Mei, 2016). Crucially, the only directly elected EU institution – the EP – can now exert control over executive policy-making only when delegated acts are used to adapt secondary legislation, instead of implementing acts or using no tertiary acts at all. In the latter case, member states retain all the discretion on how to implement EU legislation.

Thus, it is essential to evaluate whether this tool of parliamentary control is effective in practice. To begin with, the EP and the Council have to reach agreement in secondary legislation to grant the Commission the power to adopt delegated acts. Yet, compared with other forms of executive law-making, delegated acts enhance the EP's formal power of legislative scrutiny and decrease that of the Council. Then, it is puzzling to discern *under which conditions the legislators will consent to delegated acts*. This is an important question because it has substantive implications for the institutional balance of power. Indeed, scholars generally agree that the provision for delegated acts is a contested political matter rather than a purely technical question (Bergström and Ritleng, 2016; Brandsma and Blom-Hansen, 2012, 2016; Christiansen and Dobbels, 2013a, 2013b).

The present study employs transaction cost models of delegation to study under what conditions legislators agree to delegated acts. We argue that this depends on the preference configurations of the legislators and the executive as well as the legislative complexity and, hence, the level of uncertainty about the outcome of tertiary acts. A pioneer analysis by Brandsma and Blom-Hansen (2017) found mixed evidence on how interinstitutional conflict between the EP and the Council as well as policy complexity affect the choice of delegation to the Commission. In this study, we add to their work by offering a novel explanation of how the relative policy preferences of legislative and executive actors shapes decisions on whether to empower the Commission to adopt delegated acts and, thus, on the level of legislative control by the EP.

We test these expectations using an original dataset on all legislative proposals adopted by the EP and the Council under the ordinary legislative procedure in the first 7 years following the entry into force of the Lisbon Treaty in 2009. Our findings show that the Commission is empowered to adopt delegated acts to supplement complex secondary legislation, that is, cases in which the EP faces heightened uncertainty about policy outcomes. Yet the Council agrees to delegated acts when its preferences align closer with the those of the EP than the Commission. In other words, the Council concedes to the

EP's demands for a parliamentary control of executive decisions when it sees the EP as an ally. Conversely, when the Council sides with the Commission rather than with Parliament, the EP is unlikely to be granted formal control over tertiary legislation through the provision of delegated acts. These findings suggest that the new system of delegation to the Commission does not guarantee the equal standing of the EP and the Council of the European Union in tertiary legislation to the same extent as ordinary co-decision procedures do for secondary legislation. In particular, the only EU institution directly representing European citizens is not given a say over executive measures when its preferences depart from those of the Council and the Commission. This finding suggests that the Lisbon Treaty reforms of executive law-making have not helped decrease the democratic deficit of the EU by strengthening parliamentary control.

In the following sections, we offer a review of the general theoretical literature on delegation, and in particular, transaction cost theories, which we apply to our study. Upon formulating our hypotheses on when the Commission is granted the power to adopt delegated acts, we describe our research design, analysis and findings. We conclude with a discussion of the results and their implications for parliamentary control over executive policy-making.

I. Delegation Theories in the EU Literature

Research on delegation originates from theories of relations between the legislature and the executive in US politics that seek to explain the level of discretion granted to agencies in the implementation process (see Epstein and O'Halloran, 1999; Huber and Shipan, 2002). In the European context, studies make a distinction between the delegation of implementing powers to supranational authorities, such as the Commission, and to member states' national authorities (Franchino, 2007; Majone, 2001; Pollack, 2003; Thomson, 2011; Thomson and Torenvlied, 2011). This research finds that member states are generally granted more freedom of manoeuvre in implementing EU outcomes than supranational institutions like the Commission (Franchino, 2004). In other words, member states prefer and succeed in retaining control over the execution of supranational policy objectives. Nevertheless, the Commission is often granted powers to issue rules that supplement or update legislation adopted by the Council and Parliament (Brandma, 2012).

Some of the most prominent explanations for decisions to grant legislative powers to the Commission originate from the transaction costs perspective of policy-making (Epstein and O'Halloran, 1999; Huber and Shipan, 2002; Thomson and Torenvlied, 2011). This perspective stresses three main factors that guide decisions to delegate. Firstly, legislators seek to avoid policy drift, where implementing actors execute decisions that are not in line with the preferences of legislators. As a consequence, legislators are expected to delegate powers to agents with policy preferences that are closest to their own and that are thus most likely to honour the policy-makers' objectives. The literature often refers to this condition as 'the ally principle' (Thomson and Torenvlied, 2011).

Secondly, transaction cost models of delegation recognize that legislators have limited knowledge and time to execute the adopted policies themselves. Therefore, they grant discretion to implementing actors, who generally have more specialized knowledge about policy outcomes. In the EU context, research shows that legislators generally prefer to grant high discretion to national administrations if supranational legislation addresses

highly technical and complex issues (Franchino, 2004). At the same time, based on this research, higher levels of information intensity (i.e., policy complexity) are also associated with granting more discretionary authority to supranational actors like the Commission (Franchino, 2007; Thomson and Torenvlied, 2011).

Finally, studies of delegation expect that the level of conflict between policy-makers could also influence decisions to control executive actors. However, different theoretical models yield different expectations of the relationship between political conflict and delegation. On the one hand, following the transaction cost perspective, Bendor and Meirowitz (2004) predict that both more inclusive rules and political conflict limit the discretion of executive actors because delegation requires the support of coalitions of politicians. In a similar vein, EU scholars expect a negative effect of legislative conflict on delegation because such conflict tends to increase the likelihood of a legislative gridlock (Crombez and Hix, 2015). Furthermore, given a legislative gridlock, the Council and the Parliament may fear they would be unable to agree on new legislation if the Commission deviates from the original purpose of the legislation (Tsebelis and Garrett, 2001), and may thus choose not to confer powers on the Commission. On the other hand, other studies predict a positive relation between legislative conflict and delegation. A high level of disagreement between policy-makers is assumed to exacerbate their ability to adopt detailed rules or ex-ante control measures that constrain the actions of executive actors (Dimitrova and Steunenberg, 2000; Torenvlied, 2000). Moreover, some models assume that when there is a high level of political conflict, policy-makers will be reluctant to inform each other about the policy outcomes that are likely to result from particular measures. Thus, preference heterogeneity between decision-makers is likely to increase information asymmetries between more and less knowledgeable policy-makers because the former may refuse to share their knowledge about the consequences of adopting a policy (Epstein and O'Halloran, 1999). Lack of accurate information and mistrust among legislators increases the need for poorly informed legislators to rely on the expertise of executive actors (Epstein and O'Halloran, 1999). In summary, scholars have competing expectations on whether legislative conflict is associated with more or less delegation to the executive. We add to this debate below by considering how this may be conditioned by the relative positioning of the executive vis-à-vis each legislative chamber.

II. Explaining the Occurrence of Delegated Acts

We apply the delegation theories discussed above to examine what factors shape decisions on granting the Commission the power to adopt quasi-legislative delegated acts as opposed to implementing acts or not granting it any power to adopt tertiary legislation. First, we illustrate the contentious character of these decisions with an example. Then we consider the preferences of Parliament and the EU Council, who have to agree on such decisions when drafting secondary legislation.

Institutional Conflict on the Use of Delegated Acts

The provision for delegated acts is not a purely technical issue but a contested political matter. This is illustrated in the adoption of EU regulation 2012/528 on the use of biocidal products that led to high interinstitutional conflict over whether to use delegated acts

(which the EP wanted) or implementing acts (which the Council insisted on). In this case, the EP conceded to the Council's demands to salvage the policy proposal.³ To quote the EP rapporteur in the concluding parliamentary speech on the final trilogue deal with the Council:

Even now, some issues remain unresolved. For example, the demand for the delegated acts that give Parliament more rights of scrutiny in accordance with the new Treaty of Lisbon. It is certainly the case *that political decisions are often involved in the implementation* [emphasis added], too. It is important that Parliament be involved [...] we have not been granted the involvement that we are entitled to [...]. Democracy requires the participation of elected representatives, in this case the participation of the European Parliament. (European Parliament, 2012b)

So as not to set a precedent for future legislative acts with this concession, the EP added a statement in its legislative resolution stating:

The European Parliament declares that the provisions of this Regulation regarding *delegated and implementing acts are the result of a delicate compromise*, which in some cases *departs from Parliament's position* in first reading. In order to *achieve a second reading agreement*, the European Parliament has therefore *accepted implementing acts instead of delegated acts* in certain specific cases. It underlines, however, that those provisions shall not be taken or used as a precedent for regulating similar situations in future legislative acts. [emphasis added] (European Parliament, 2012a).

This case illustrates the contentious nature of the decision on the usage of delegated acts. It also underscores the contracting preferences of the EP and the Council over which type of executive measure to use, to which we now turn.

Preferences of the EP and the Council over Delegated Acts

From the perspective of the EP, delegated acts grant Parliament equal veto powers with the Council either to prevent an act from being adopted or to revoke the delegation altogether. Conversely, the EP has no influence over the adoption of implementing acts. Similarly, not granting powers to the Commission to adopt any tertiary legislation implies that member states will remain unconstrained and can interpret secondary legislation broadly when implementing it. In both scenarios the EP is powerless. Therefore, we assumed that Parliament generally prefers granting powers to the Commission to adopt delegated acts. In this way, the EP can retain control over subsequent stages of policy-making to avoid policy drift (Brandsma and Blom-Hansen, 2016).

From the Council's perspective, delegated acts leave the Council without any formal possibility of substantively amending Commission legislation in a way that reflects the preferences of member states (Christiansen and Dobbels, 2013a). Furthermore, to veto delegated acts the Council needs to be supported by a relatively large majority (a qualified majority consisting of at least 55 per cent of member states representing a minimum of 65 per cent of the EU's population). The high voting thresholds lead some scholars to

³This decision led the Commission to approach the European Court of Justice (ECJ) to seek clarity. In *Commission v Parliament and Council (Biocides)*, ECJ 16 July 2015, C-427/12, the ECJ ruled that the EU legislature has discretion on what powers to confer to the Commission – to adopt delegated or implementing acts – pursuant to Articles 290(1) and 291(2) Treaty on the Functioning of the European Union.

contend that member states lose influence under the delegated acts system (Kaeding and Stack, 2015). In line with these arguments, Siderius and Brandsma (2016) expected and found that the Commission is more prone to accommodate member states' preferences when drafting implementing acts than in the preparation of delegated acts. Consequently, recent studies have argued and shown that the Council generally supports control over the Commission through implementing acts (Brandsma and Blom-Hansen, 2016; Christiansen and Dobbels, 2013a), in the adoption of which member states normally enjoy both veto and de facto amendment powers. Finally, if the supranational legislators decide not to confer on the Commission powers to adopt tertiary acts, all discretion for implementing the law is left to the member states' administrations. Without any uniform policy conditions, the member states incur transaction costs in having to fill all the policy gaps themselves during the implementation process but do not face a potential policy drift by the Commission.

In summary, the EU legislators hold conflicting preferences on the type of control over executive decision-making (Brandsma and Blom-Hansen, 2017). Delegated acts are generally the EP's preferred choice and the Council's least preferred choice. Yet provisions for delegated acts in secondary legislation do occur and are rather common (42 per cent of the 585 secondary legislative acts adopted between the entry into force of the Lisbon Treaty in 2009 and the end of 2016 granted the Commission the power to adopt delegated acts). The puzzle then is how policy-makers avoid legislative gridlock, given their diametrically different preferences for control. More specifically, under what conditions do the Council and the EP agree to control the Commission through delegated acts? To address this question, we first considered general theories of delegation and their application to the EU case.

The Impact of Institutional Preference Configurations and Information Intensity

Given the preferences of the EU legislators who co-decide on the type of control over executive decision-making, delegation models can help explain their decisions to empower the Commission to adopt quasi-legislative delegated acts in the subsequent policy-making process. Specifically, we consider whether these decisions are driven by political conflict between legislators, the executive's incentives to deviate and information intensity.

We make several theoretical contributions to earlier applications of transaction cost theory to the study of delegation decisions (see Brandsma and Blom-Hansen, 2017). Firstly, we consider simultaneously the preferences of supranational legislators relative to each other but also to the position of the Commission. Secondly, we argue that while the provision of a delegated act may depend on when the EP has strong incentives to demand it (Brandsma and Blom-Hansen, 2017), it may also depend, and potentially more so, on the Council's incentive to concede to such demands. These considerations are crucial because they allow us to gauge the success of the EP in obtaining control over Commission policy-making. They also lead to contrasting predictions on the impact of different preference configurations in the EU on the provision for delegated acts in secondary legislation.

To solve the empirical puzzle of why the Council and the EP agree to control the Commission through delegated acts, we consider in turn when the Council and the EP will be

willing to compromise. Firstly, we examine when the Council has incentives to agree to delegated acts. Delegated acts entail two potential drawbacks for the EU Council: it does not have formal oversight powers over the Commission's work in adopting tertiary acts and the EP has a power of veto, which it can use to construct outcomes closer to its own preferences at the expense of the Council. We argue that the former drawback has few implications in practice, while the latter one is conditional on the positioning of the Council relative to the EP and the Commission.

To begin with, the removal of the comitology procedure and, hence, the loss of formal, *de facto* amendment powers for the Council *vis-à-vis* the Commission under delegated acts may not be consequential. The Council still plays an important role in the new system of delegated acts (Brandsma and Blom-Hansen, 2012) due to informal arrangements allowing the Commission to consult the member states (Hardacre and Kaeding, 2011). The Commission has incentives to carry out informal consultations with member states so as to benefit from their expertise in drafting tertiary acts, to prevent the revocation of its delegated powers and to ensure that member states subsequently comply with the measures adopted (EU, 2016). It is committed to consulting member states (and EP) experts, in terms of a recent interinstitutional 'Common Understanding on Delegated Acts' (EU, 2016). However, informal consultations do not have strict time limits and member states that disagree with the Commission's draft measures are able to delay adopting the delegated acts. Indeed, we found that a relatively low number of delegated acts were adopted (13 decisions, 34 directives and 412 regulations) compared with being implemented (1533 decisions, 51 directives and 5410 regulations) in the post-Lisbon period studied (EUR-Lex database). In other words, member states may still be able to obstruct the adoption of delegated acts informally if they object to them. Thus, it remains unclear whether and how much the Council is actually disadvantaged in the adoption of delegated acts due to its loss of formal amendment powers.

The Council's concerns that the involvement of the EP may go against its preferences may be more substantial. When the Council shares preferences with the Commission but disagrees with the EP, it is unlikely that the former will concede to delegated acts. One reason is that in situations when the EP and the Council disagree, the EP may exercise its right of veto under delegated acts and thus prevent the adoption of tertiary legislation that meets the Council's preferences. However, recent findings show that in practice both EU legislators have used their veto powers very rarely (Kaeding, 2017). Instead, this research suggests that the EP may exercise latent control over the adoption of delegated acts by inducing the Commission to consult MEPs and incorporate the EP's position at the proposal stage. This is because the Commission wants to avoid confrontation with either of the two supranational legislators that could make them override proposals for tertiary acts. The Commission's incentives to seek compromise with the EP may thus lead to tertiary legislation that deviates more from the preferences of the Council when the EP has outlying policy preferences.

Conversely, when the Council and the Parliament hold similar policy preferences that are not shared by the Commission the Council may even benefit from granting veto powers to Parliament. Then the legislators can pull together and exert stronger control over the policy-making activities of a defiant Commission. Thus, from the Council's perspective, we arrived at the following hypothesis about the conditions under which the Commission will be empowered to adopt delegated acts:

H1a : The closer the Council preferences are to the position of the Parliament relative to the position of the Commission, the higher the likelihood is of granting powers to the Commission through delegated acts.

Secondly, we consider when the EP would have incentives to relinquish having a veto over tertiary acts and agree to the omission of provisions for delegated acts in secondary legislation. We argue that when the Council shares the policy objectives of the Parliament and disagrees with the Commission, the Parliament has weaker incentives to demand that it controls the Commission through delegated acts. This is because, under these circumstances, collusion between the Council and the Commission against the EP in the adoption of tertiary legislation is unlikely. Moreover, even if the Commission attempts to deviate from secondary legislation, given its limited resources and time, the EP may even prefer to avoid the costs of overseeing the Commission activities and instead rely on the Council to prevent policy drift (Christiansen and Dobbels, 2013a, p. 1166). Conversely, in situations when the Council's policy preferences are closer to the Commission's than to the Parliament's, the EP is likely to mistrust the Council and fear that member states will insert provisions in tertiary legislation that contradict the policy objectives of Parliament. Under these circumstances, Parliament is more likely to demand delegated acts. Thus, considering the EP's incentives to compromise, we derived a contrasting hypothesis:

H1b : The closer the Council preferences are to the position of the Parliament relative to the position of the Commission, the *lower* the likelihood is of granting powers to the Commission through delegated acts.

In addition to different preference constellations between legislative and executive actors, decisions to delegate may also be motivated by information asymmetries between legislative and executive actors. Delegation models applied to the EU context generally contend that policies differ in their level of information intensity, where more complex issues require more specialized and technical expertise than others. Following existing research, information intensity prompts EU legislators to grant some powers to the Commission to fill in the gaps in the policy adopted, instead of having to design highly detailed legislation themselves (Thomson and Torenvlied, 2011). However, the Council and the Parliament are expected to vary in their incentives to control the Commission in situations of high policy complexity.

From the perspective of the Council, higher levels of information intensity do not create clear incentives to control the Commission activities in subsequent stages of policy-making. While implementing measures formally envision specialized input from member states' committees, national experts are still consulted and informally participate in the design of delegated acts (Brandsma and Blom-Hansen, 2012; Hardacre and Kaeding, 2011; Siderius and Brandsma, 2016). This is especially the case for complex issues, for which the Commission needs additional expertise and is more likely to seek input from national experts.

Conversely, information intensity increases the likelihood that the EP will demand giving powers to the Commission through delegated acts. Higher levels of information intensity imply that secondary legislation covers numerous different policy issues, which

increases the likelihood that at least some of these issues are politically relevant to the Parliament. Recent studies show that both formal and informal consultations in member states' committees and expert groups deal with politically salient issues rather than technical details (Siderius and Brandsma, 2016). Under these circumstances, the Parliament will be reluctant to relinquish legislative control. This is because issue complexity increases the information asymmetries between the legislature and the executive. Hence, it also increases the incentives of the Parliament to demand delegated acts as a way of keeping track of relevant information that may not be shared otherwise. In other words, delegated measures could alleviate the EP's uncertainty on highly complex issues by incentivizing the Commission to share its information with the Parliament. Moreover, recent studies suggest that the EP may be disadvantaged in overseeing executive policy-making due to time and resource constraints (Christiansen and Dobbels, 2013a; Kaeding, 2017). As a result, Parliament is likely to be selective in its involvement in executive decision-making (Brandsma and Blom-Hansen, 2017) and may choose to participate in tertiary legislation when complexity creates more uncertainty about the final policy outcomes.

H2 : The higher the level of legislative information intensity, the *higher* the likelihood of granting powers to the Commission through delegated acts.

III. Research Design

To test our hypotheses, using the EUR-Lex database we compiled a dataset containing all secondary legislation adopted by the Parliament and the Council in the ordinary legislative procedure in the post-Lisbon period between 1 December 2009 and 31 December 2016. We studied acts adopted under the ordinary legislative procedure because only they can grant the Commission the power to adopt delegated measures. This selection criterion resulted in 585 legislative acts – of which 64.8 per cent were EU regulations (379 legislative acts), 26.6 per cent were directives (156 legislative acts) and 8.6 per cent were decisions (50 legislative acts). The measurement of the variables is described below, while Table A1 in the appendix offers descriptive statistics of our variables.

Dependent Variable and Method

The dependent variable indicates whether in secondary legislation the EP and the Council conferred on the EU Commission the power to adopt delegated acts (coded as 1) or the power to adopt only implementing acts or no power to adopt tertiary acts at all (coded as 0).⁴ This information is provided in the recitals preceding the main body of adopted legislative acts.⁵

The binary nature of the dependent variable required the use of a logistic regression as the modelling technique (Long and Freese, 2006). Yet logistic regression does not take

⁴The only other study of the choice of delegated acts of which we are aware, which considers on a sample of legislative acts adopted under the ordinary legislative procedure in the first 3 years after the entry into force of the Lisbon Treaty, focuses on 'delegation situations' in legislative acts (Brandsma and Blom-Hansen, 2017). For the purposes of our study, the legislative act is a more appropriate unit of analysis because our independent variables are measured at the level of secondary legislation and do not vary within legislative acts.

⁵Recitals provide background information about the legislative goals and relevant policy issues addressed by the legislation.

into account the fact that the decision to control the Commission through delegated acts may depend on legislators' decision to confer any powers on the Commission to adopt tertiary legislation in the first place. To alleviate concerns about selection bias, we first employed a Heckman probit selection model to test the assumption for independence. The results indicated that these two decisions were independent and there were no signs of selection bias. This justified our focus on delegated acts relative to other alternatives and, hence, the use of logistic regression below.

Independent Variables

To test the first two hypotheses on the impact of the policy preferences of the Council relative to the positions supported by the Parliament and the Commission, we first computed the preferences of the three supranational actors on the left–right dimension at the time of the adoption of secondary legislation. This simplification is justified based on existing research showing that the left–right dimension exists in roll-call voting in both the Council and the Parliament (Crombez and Hix, 2015, p. 488).⁶ Acknowledging evidence that EU decision-making is multidimensional (see Thomson, 2011), in the appendix we also offer a model with our measurement in two dimensions: left–right and EU, which produces the same substantive results. Unfortunately, it was not feasible to collect information about the policy-specific preferences of law-makers and executive actors at the level of individual acts in our data. Nevertheless, we built on existing research by measuring the substantive preferences of EU institutions rather than relying on indirect proxies (Brandsma and Blom-Hansen, 2017).

To measure policy preferences of supranational actors, we thus used information about party positions on the left–right dimension based on Döring and Manow's ParlGov database (2018). Döring and Manow relied on expert assessment data from numerous sources and estimated the left–right positions of each political party in the EU over time on a scale between 0 and 10.

Based on these party positions, we measured the Council's policy preferences. This choice of measurement is justified by past research showing that coalition formation in the Council is shaped by the composition of political parties in governments (Hagemann and Hoyland, 2008). First, we computed the left–right position of each government in the Council, estimated as the average of the government parties' positions weighted by their share of seats in government (Crombez and Hix, 2015). Then we took the average of all EU governments' positions, weighted by member states' Banzhaf power indices (estimated using states' voting weights in the Council according to the EU treaty in place).⁷ We took the average across member states following evidence that the Council's decisions generally try to incorporate the preferences of all EU member states (Thomson, 2011).

To compute the Commission's policy preferences, we followed the assumption that Commissioners tend to represent the positions of the national parties that selected them in light of their career incentives (Crombez and Hix, 2015, p. 489). We then identified the left–right positions held by the national parties of all Commissioners and measured

⁶In Table A2 in the Appendix we also report results based on institutional preferences on the EU dimension instead of the left–right dimension, which does not alter the substantive results.

⁷Relying on the Shapley–Shubik power indices instead produces the same results.

the Commission's overall policy preferences as the median left–right position. It is commonly assumed that the median member reflects the Commission's stances because the Commission uses simple majority voting.

For the Parliament's policy references, we took the left–right position of the median party in the Parliament. As in the estimation of the Commission's preferences, selecting the median party position to measure the EP's preferences was justified by the predominant use of a simple majority in the Parliament.

The policy preferences for each of the three EU institutions provided the basis for our independent variable on the Council's proximity to the EP relative to its proximity to the Commission. This variable was measured by subtracting the absolute difference between the Council and the Parliament placements from the absolute difference between the Council and the Commission placements on the left–right dimension:

$$\text{Council's proximity to the EP relative to the Commission on the left–right dimension} = (\text{Council left–right} - \text{Commission left–right}) - (\text{Council left–right} - \text{Parliament left–right}).$$

Thus, positive values indicate that the Council holds preferences that are closer to the Parliament's than to those of the Commission. Conversely, negative values mean that the Council's preferences are more closely aligned to the Commission's than to Parliament's. Notably, most variation in this variable was driven by changes of governments in the Council, whereas the EP's and the Commission's preferences changed only slightly following the EP elections and subsequent Commission turnover in 2014.⁸

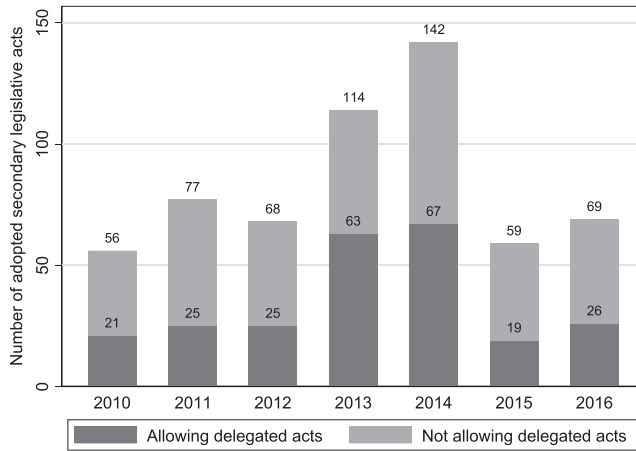
To measure the level of information intensity of the secondary legislation, we employed an index that combines the number of recitals (Thomson and Torenvlied, 2011), the number of articles and the number of words in the legislation. Existing research shows that these legislative characteristics are strongly correlated and represent a single underlying dimension at the level of EU legislation (Steunenberg and Kaeding, 2009). Scores of complexity are determined by a principal component analysis. To facilitate the interpretation of the results, the measure of complexity was normalized on a scale between 0 and 1. In the appendix we also report the estimates when using only the number of recitals because this is a more widely used indicator for complexity.⁹

Finally, the analysis includes a number of control variables. In particular, one could expect that the tendency to grant powers to the Commission through delegated acts increases over time as EU legislators become more accustomed to these new rules. Therefore, we controlled for the number of years that had passed between the adoption of secondary legislation and the Lisbon treaty. Moreover, different types of secondary legislation and legislative acts falling in different EU policy areas may vary in the extent to which legislators grant powers to the Commission through delegated acts. Thus, we also controlled for the type of legislative act (that is, regulation, directive or decision)

⁸As an alternative proxy of interinstitutional conflict, we also considered the duration from the date of the Commission's proposal to the adoption date of a legislative act, following Brandsma and Blom-Hansen (2017). While the effect of this measure is positive and significant, it does not capture the relative preference configuration of the legislative and executive actors and so could not be used to test our hypotheses.

⁹To alleviate concerns that our complexity measure may be endogenous to the legislative process – for instance, the number of recitals may be driven by the choice of executive control rather than the other way round (Brandsma and Blom-Hansen, 2017) – we also employed alternative complexity measures that are unlikely to be shaped by decisions on executive discretion. Yet we reach similar results when considering instead the number of opinion-giving EP committees or the length of the EuroVoc description which lists the policy domains and subdomains that documents cover.

Figure 1: Number of secondary acts empowering the Commission to adopt delegated acts per year since the entry into force of the Lisbon Treaty.



and policy sectors. Controlling for policy sectors also accounts for any unobserved variation that may emerge from the fact that legislative acts are nested in policy areas.¹⁰

IV. Results

Before presenting the results of our regression analysis, we first examine the distribution of our dependent variable over time. Figure 1 displays the number of secondary legislative acts adopted by the EP and the Council using the ordinary legislative procedure in the period studied following the adoption of the Lisbon Treaty. The figure distinguishes between secondary legislation that envisions quasi-legislative delegated acts by the Commission and secondary legislation that does not provide for delegated acts. Clearly, there is no pattern of increasing use of delegated acts. Instead, following 2014 there was a steep drop in the number of secondary acts that provided for delegated acts. The use of delegated acts was not limited to specific policy areas. All policy areas provided for delegated acts (see Figure A2 in the Appendix). In particular, more than half of all legislation falling in the areas of agriculture, economic and monetary affairs, the environment, internal market and transport envisions delegated acts.

Table 1 shows the results of the logistic regression models testing our hypotheses on when the EP and the Council may choose to grant the Commission the right to adopt delegated acts. The variables testing hypotheses H1a, H1b and H2 are included in models 1 and 2, respectively, alongside the control variables, while Model 3 combines all variables.¹¹

In line with H1a, Model 1 indicates that when the Council's preferences align more with the EP's than with the Commission's the probability that the Commission will be

¹⁰Other controls on whether the secondary act is new or amends preexisting legislation as well as whether it codifies, recasts or repeals old legislation, do not have a significant impact on the choice of control procedure and do not alter the remaining results.

¹¹The results testing the hypotheses are stable if we re-estimate models 1 and 2 without the control variables.

Table 1: Logistic regression analyses of the decision of the EP and the Council to grant the Commission the power to adopt delegated acts

	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>
Council's proximity to EP vis-à-vis to COM	0.949*** (0.274)		0.731* (0.295)
Complexity		16.266*** (2.247)	15.927*** (2.253)
Directive	1.870*** (0.511)	1.205* (0.524)	1.312* (0.534)
Regulation	2.253*** (0.493)	1.905*** (0.500)	2.017*** (0.513)
Years since Lisbon	-0.244* (0.097)	-0.015 (0.057)	-0.233* (0.105)
Policy area fixed effects	YES	YES	YES
Constant	-1.931+ (1.093)	-3.151** (1.121)	-2.582* (1.176)
Observations	582	582	582
Pseudo R^2	0.14	0.23	0.24
Percentage correctly predicted by model	67.7	72.7	72.7
Percentage correctly predicted by naive model	57.7	57.7	57.7
Log likelihood	-340.8	-305.3	-302.2

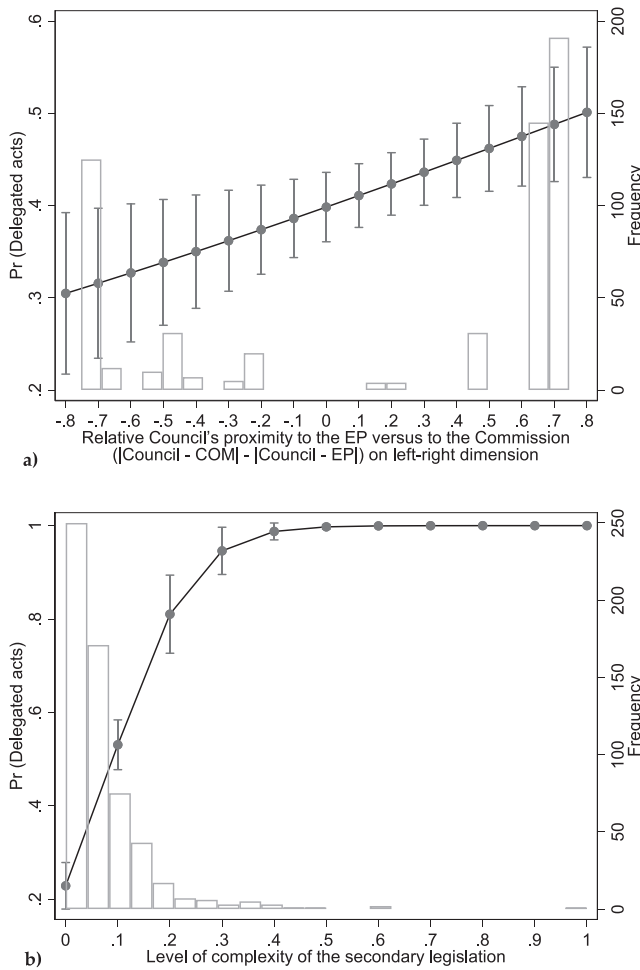
Notes: Standard errors in parentheses; COM = Commission. + $P < 0.10$, * $P < 0.05$, ** $P < 0.01$, *** $P < 0.001$

granted the power to adopt delegated acts increases. As the average marginal effects in Figure 2a show (which also shows that the independent variable does vary across the displayed range), when the Council moves from furthest to closest to the EP relative to the Commission, the probability of delegated acts increases from 0.30 to 0.50 (whereas the baseline probability of delegated acts lies at 0.42). The results suggest that the Council is more likely to agree to delegated acts when it shares the EP's policy preferences and the two legislators can pool their resources to put pressure on an outlying Commission.

Contrary to H1b, this finding also implies that the EP is unable to monitor the adoption of subsequent tertiary acts when the Council and the Commission share preferences that diverge from the EP's policy preferences. In other words, delegated acts are less likely when the Commission and the Council have incentives to deviate from the secondary legislation that the EP and the Council have co-decided on. This finding partially contradicts earlier predictions and findings indicating that higher levels of interinstitutional conflict have a positive effect on the provision of delegated acts (Brandsma and Blom-Hansen, 2017). Instead, we show that the Council is willing to compromise when it rather sees the EP as an ally against an outlying Commission. Conversely, the Council is less likely to agree to parliamentary control of executive measures when the EP holds outlying policy preferences. As we argue, under these circumstances, the Commission's incentive to accommodate both legislative actors' preferences increases the likelihood that tertiary acts will deviate from the Council's preferences.

In line with H2, higher legislative complexity of secondary acts is associated with a higher probability of granting the Commission the right to adopt delegated acts. Based on Figure 2b, as legislative complexity grows from its minimum to its maximum, the probability of delegated acts increases from 0.23 to nearly 1 (even if the maximum

Figure 2: Probability (Pr) of empowering the Commission to adopt delegated acts given a) the proximity of the Council to the Commission relative to the proximity of the Council to the EP on the left-right ideological dimension and b) legislative complexity, both based on Model 3 in Table 1.



complexity represents an outlying case). This finding corroborates the expectation that the EP will demand and acquire veto powers when legislation is complex and there is heightened uncertainty about how tertiary legislation may modify the goals of secondary acts. In such situations, the EP is more prone to obtain an ex-post control over tertiary acts and thus prevent policy drift.

Our full Model 3 predicts correctly in nearly 73 per cent of cases, which is a significant improvement on the 58 per cent that the empty model can explain. Models 2 and 3 are indistinguishable when considering the percentage of correctly predicted cases. This indicates that the level of complexity of secondary acts is a more important predictor of the occurrence of delegated acts than the preference constellations of the EU institutions. One possible reason is the limited time span of this study. Due to the short time period since the Lisbon Treaty was adopted there has been little observed variation in the ideological

preferences of the EU institutions over time. Still, a log-likelihood ratio test indicates that the full Model 3 fits the data significantly better than the more parsimonious Model 2.

Notably, the results support the descriptive statistics in that provisions for delegated acts have not become more common over time. Based on Model 3, the probability of delegated acts was estimated at 0.55 in 2010, which dropped to 0.32 in 2016, keeping all other variables at their observed values. Furthermore, the predicted probability of provisions for delegated acts was higher for legislation with broader scope, namely directives (0.35) and regulations (0.48), than decisions (0.18). Finally, the findings are not driven by policy area differences as all models include policy area fixed effects.

The substantive findings are robust to alternative model specifications (a multilevel with random effects for policy area) and measurement choices (for the preference configuration and complexity variables), as shown in Table A2 in the Appendix.

Conclusions and Discussion

The Lisbon Treaty introduced major changes to legislative control over executive law-making in the EU by formally giving the EU legislators – the EP and the Council of the European Union – equal powers to control the Commission's executive policy-making via delegated acts. The previous comitology procedure (requiring the Commission to coordinate with member states in the adoption of executive measures) has been largely preserved in the case of implementing acts, which now do not entail any say by the EP. Thus, the EP generally prefers the provision of delegated measures to supplement secondary legislation, whereas the Council favours either implementing acts or no tertiary acts at all, in which case EU law interpretation and implementation are left entirely to member states. Given that delegated acts have clearly contrasting effects on the power of legislative scrutiny of each legislator, it is puzzling as to when and why the EP and the EU Council would agree to delegated acts. The answers to these questions could have profound implications for the interinstitutional balance of power in the EU, whose legislation now consists mostly of tertiary acts (Brandsma, 2012, 2016, p. 657, Junge *et al.*, 2015).

Applying general transaction cost theories of delegation, we considered the conditions under which the EP demands and the Council is willing to allow delegated acts. Thus, we built on previous research (Brandsma and Blom-Hansen, 2017) by hypothesizing that legislators' decisions to empower the Commission to adopt delegated acts depend not just on legislative conflict but also on the preference configurations of the Council and the EP relative to the Commission, alongside the complexity of the adopted laws.

We tested these expectations using a novel dataset on all secondary legislation adopted following the Lisbon Treaty between 2009 and 2016. The analysis confirms the hypothesis that the Council agrees to delegated acts when it shares the EP's preferences and if it disagrees with the Commission. In such situations, instead of avoiding an EP veto, the Council can benefit from having the Parliament as an ally to counter the actions of an outlying Commission. In contrast, the Parliament is unlikely to obtain the power of veto in cases when the Council and the Commission share preferences that depart from those of the EP and, thus, have incentives to deviate from the parliamentary position. Thus, the EP is not granted formal powers over the adoption of tertiary acts when it needs them the most; namely, when the EP faces a threat that its policy stances will not be incorporated in the subsequent policy-making process. Nevertheless, our findings suggest that

the EP is more likely to obtain a veto over subsequent tertiary acts when secondary legislation concerns highly complex issues. Under these circumstances, the Parliament faces high uncertainty about policy outcomes and the provision of delegated measures incentivizes the Commission to share its information and expertise with the Parliament.

Overall, our findings show that the choice of delegated acts is a political decision rather than a purely technical issue. The provision of delegated measures is unlikely without the Council's consent, which happens in situations that do not threaten the Council's own policy preferences. Thus, in line with previous assessments on the deficiencies of the system of delegated acts and, in particular, the disadvantaged position of the EP via-à-vis the other institutions due to technical expertise and time constraints (Christiansen and Dobbels, 2013a), our analysis shows that the parliamentary control is impeded right from the design of secondary legislation. Further research is needed to clarify why the EP does not simply veto secondary legislation that does not incorporate its demands for delegated acts. In the example we offered, this is explained by its package deal with the Council. That raises questions about how frequently the EP trades such institutional powers for policy concessions and what the substantive implications of such a practice are.

The findings of our study have substantive implications for EU policy-making. More precisely, whereas the Lisbon Treaty expanded the EP's powers in the adoption of secondary legislation, our results suggest that the EP's control over tertiary legislation has remained limited. Given that tertiary acts clearly prevail in number (Junge *et al.*, 2015), and scholars now speak of EU bureaucratization (König, 2018), this finding casts doubts about the ability of the EP to shape EU policies fully and has broader implications for the debate on EU democracy.

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APPENDICES

Figure A1: Number of adopted secondary and tertiary legislative acts post-Lisbon.

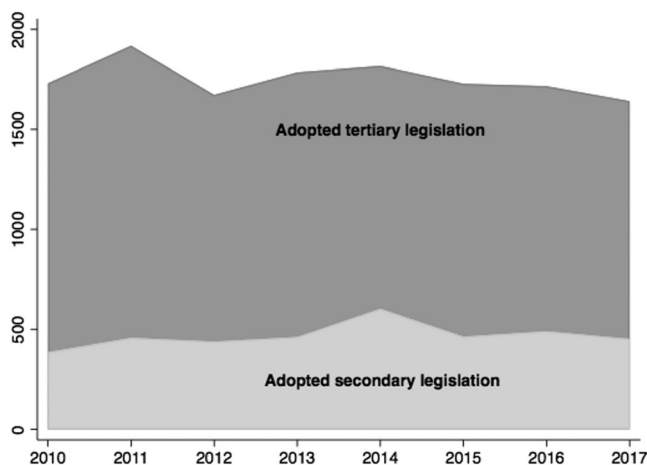
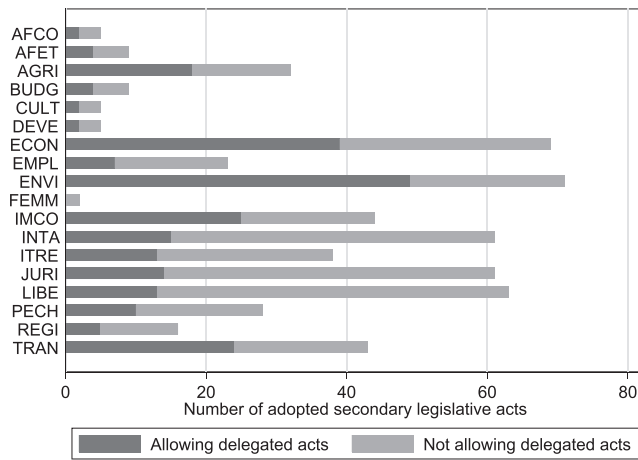


Figure A2: Number of secondary acts empowering the Commission to adopt delegated acts since the entry into force of the Lisbon Treaty (in the period 1 December 2009–31 December 2016) per policy area.



Notes: AFCO: constitutional affairs; AFET: foreign affairs; AGRI: agriculture and rural development; BUDG: budget; CULT: culture and education; DEVE: development; ECON: economic and monetary affairs; EMPL: employment and social affairs; ENVI: environment, public health and food safety; FEMM: women's rights and gender equality; IMCO: internal market and consumer protection; INTA: international trade; ITRE: industry, research and energy; JURI: legal affairs; LIBE: civil liberties, justice and home affairs; PECH: fisheries; REGI: regional development; TRAN: transport and tourism.

Table A1: Descriptive statistics for the main variables in the analysis

<i>Variables</i>	<i>Obs.</i>	<i>Mean</i>	<i>Min</i>	<i>Max</i>	<i>SD</i>
<i>Dependent variable</i>					
Provision of delegated acts	585	0.42	0.00	1.00	0.49
<i>Main independent variables</i>					
Council's proximity to EP vis-à-vis to COM (left-right)	585	0.20	-0.75	0.75	0.64
Complexity	585	0.07	0.00	1.00	0.09
Years since Lisbon	585	4.13	1.00	7.00	1.79
Directive	585	0.27	0.00	1.00	0.44
Regulation	585	0.65	0.00	1.00	0.48
Decision	585	0.09	0.00	1.00	0.28

Table A2: Logistic regression analyses of the decision of the EP and the Council to grant the Commission the power to adopt delegated acts

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Council's proximity to EP vis-à-vis to COM on left-right dimension	0.706* (0.287)					0.782** (0.291)
Absolute Council-EP distance on left-right dimension		-1.031** (0.391)				
Absolute Council-COM distance on left-right dimension			0.996* (0.491)			
Council's proximity to EP vis-à-vis to COM on EU dimension				3.140** (1.201)		
Council's proximity to EP vis-à-vis to COM in two dimensions					1.004** (0.377)	
Complexity	15.627*** (2.172)	15.775*** (2.252)	16.187*** (2.255)	16.115*** (2.270)	15.921*** (2.255)	
Number of recitals						0.037*** (0.005)
Directive	1.254* (0.520)	1.342* (0.536)	1.245* (0.529)	1.315* (0.542)	1.319* (0.537)	1.303* (0.531)
Regulation	1.924*** (0.498)	2.022*** (0.513)	1.959*** (0.506)	1.961*** (0.518)	2.011*** (0.515)	2.106*** (0.507)
Years since Lisbon	-0.227* (0.102)	-0.0576 (0.060)	-0.203+ (0.109)	0.0692 (0.068)	-0.193* (0.0887)	-0.254* (0.104)
Policy area fixed effects	NO	YES	YES	YES	YES	YES
Constant	-2.243*** (0.605)	-2.544* (1.166)	-3.126** (1.147)	-6.304*** (1.705)	-3.342** (1.174)	-2.750* (1.184)
Random intercept	0.632					
Observations	584	582	582	582	582	582
Number of groups	18					
Percentage predicted by model	72.1	72.3	72.7	72.9	72.5	71.5
Percentage predicted by naive model	57.7	57.7	57.7	57.7	57.7	57.7
Log likelihood	-319.0	-301.8	-303.3	-301.6	-301.8	-310.5
Pseudo R^2		0.24	0.24	0.24	0.24	0.21

Notes: Model 1 replicates the main Model 1 from Table 1 in the framework of logistic regression. The remaining models are based on simple logistic regression. Models 2-4 introduce alternative measures of the inter-institutional preference constellation based on the left-right dimension (Models 2-3), the EU dimension (Model 4) or both dimensions (Model 5). Model 6 introduces an alternative measure of policy complexity, i.e. the number of recitals. Standard errors in parentheses. + $P < 0.10$, * $P < 0.05$, ** $P < 0.01$, *** $P < 0.001$.