



ARTICLES

THE LIMPING LEGITIMACY OF EU LAWMAKING: A BARRIER TO INTEGRATION

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ABSTRACT: This paper uses the concepts of output and input legitimacy to examine the formal law-making processes of the European Union. It argues that the traditional distinction between laws, which are legitimated through the democratic concept of representativeness, and subordinate legislation, which is normally justified in terms of output values of efficiency and effectiveness, need to be modified in the European Union. The paper argues that the need for democratic input values requires all formal lawmaking processes to make space for popular access to the policy- and rule-making processes.

KEYWORDS: lawmaking – legitimacy – democracy – output values – input values – citizen access.

I. INTRODUCTION

The subject of this paper is the formal lawmaking processes of the European Union (EU), a central element in European integration. Lawmaking is an attribute of sovereignty, and statehood without plenary lawmaking powers is unimaginable. It follows that the legitimacy of EU lawmaking matters to both sides of the integration argument. For inter-governmentalists, lawmaking legitimacy rests and must always rest with sovereign national legislatures from which the legitimacy of lawmaking at Union level derives; for integrationists, a plenary lawmaking authority is essential for integration and it must be demonstrably legitimate.

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In the early days of the Communities, the inter-governmental view prevailed. The authority of the Community institutions to make formal rules was assumed to be delegated by the Member States, where lawmaking legitimacy was situated. But as the Community began to acquire new competences and rapidly expanded its areas of activity, the need was felt for speedier and more efficient methods of rulemaking. Further delegation of the lawmaking power was permitted. And when the Treaty on European Union (Maastricht Treaty) added freedom, security and justice to the European portfolio, the special and unorthodox rulemaking processes provoked concern about the growth of executive power and secrecy. Yet alongside, a radical integrationist campaign was calling for stronger lawmaking powers, culminating in an attempt during the Convention on the Constitution to install a more orthodox hierarchy of EU laws. These demands were only partially met by the Lisbon Treaty.

Arguments over legitimacy have not gone away; rather they have increased under the strain of economic crisis and an increasingly authoritarian style of governance in the Eurozone. As with the area of freedom, security and justice, rulemaking in the embattled Eurozone has escalated into lawmaking, and powers transferred from the Union to a sub-group of Member States have been further downloaded to a trio of powerful agencies. Mark Dawson draws attention in this context to the contrast between lawmaking that observes the spirit of traditional constitutional concepts such as the rule of law, representative democracy, institutional balance and separation of powers (the classic Community method) and the lawmaking methods to which the EU resorts when it wants to get things done:

“Just as, under prior models of economic governance, the ‘soft’ nature of recommendations was seen as necessitating a limited parliamentary role, [here] the EP carries no formal powers to co-adopt recommendations for EU governance. The political legitimacy of new economic governance in this sense relies heavily on the ‘output’ of its norms (financial and macroeconomic stability), not on their connection to general political processes”.¹

These are the very tactics that have over the years done so much to de-legitimize EU rulemaking.

This is a context in which the legitimacy of the EU lawmaking process demands serious consideration and this paper aims to provide a framework for such discussion. Section one sets out the parameters of the debate by briefly considering the relationship of lawmaking with legitimacy in terms of “input” and “output” legitimacy. “Input le-

¹ M. DAWSON, *The Legal and Political Structure of “Post-Crisis” Economic Governance*, in *Journal of Common Market Studies*, 2013, p. 976 *et seq.*, p. 983. See also S. PIATTONI, *Is the EU a Representative Democracy? The Normative Debate and the Impact of the Euro-Crisis*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart Publishing, 2015.

gitimacy" refers to techniques of legitimation that relate to the wider input functions of government, namely interest representation and articulation, political aggregation and communication;² "output values" on the other hand relate to efficiency and effectiveness. This usage reflects Fritz Scharpf's famous distinction between input legitimacy as "trust in institutional arrangements that are thought to ensure that governing processes are generally responsive to the manifest preferences of the governed", and output legitimacy, which depends on the belief that policies "will generally represent effective solutions to common problems of the governed".³ In the context of lawmaking, effectiveness relates to traditional benefits such as speed and successful implementation but can extend more widely to cover the prerequisites of "Better Regulation". Section two first situates the debate at Union level and moves on to outline steps taken to strengthen the output legitimacy of EU lawmaking through the buying in of scientific and technical expertise and the use of tools and techniques of "Better Regulation". Section three turns to input values, considering the claims of direct democracy to input legitimacy and focusing on steps taken by the institutions to build up civil society as a basis for input legitimacy in EU lawmaking.

II. AN HISTORICAL LEGACY

There are good constitutional reasons for the close links between lawmaking and legitimacy. The rule of law, a fundamental principle of modern constitutionalism, is premised on law and lawmaking. The rule of law requires that law is certain and should take the shape of general and formal "rules", designed to prevent arbitrariness and structure discretion.⁴ Lawmaking is especially central to the formal *Rechtsstaat* ideal, characterized by a written constitution in which government is closely regulated by law. The *Rechtsstaat* is a State that frames its activities with rules, which should be "general, abstract and permanent, non-contradictory, possible, intelligible, certain, public, and not retroactive; and the authority to issue commands in the name of the State must be grounded in a legal rule".⁵ In this essentially positivist view of the State, the constitution establishes a hierarchy of legal norms in which "rules, legally produced, recognized or ratified by the appropriate legislative organs of the [...] are the primary source of the law or superior legal norm".⁶ A State that does not meet these criteria "is not a formal

² D. EASTON, *An Approach to the Analysis of Political Systems*, in *World Politics*, 1957, p. 383 *et seq.*

³ F. SCHARPF, *Problem-solving Effectiveness and Democratic Accountability in the EU*, in *Working Papers*, Cologne: Max Planck Institut für Gesellschaftsforschung (MPIFG), 3 January 2003, p. 4 *et seq.*, www.mpifg.de.

⁴ D. GODEFRIDI, *Critique de l'Utopie Libertarienne*, in *Journal des économistes et des études humaines*, 2003, p. 85 *et seq.*, citing F. HAYEK, *The Constitution of Liberty*, London: Routledge and Kegan Paul, 1960, p. 206; L. FULLER, *The Morality of Law*, New Haven: Yale University Press, 1969, p. 10.

⁵ D. GODEFRIDI, *Critique de l'Utopie Libertarienne*, cit., p. 85 *et seq.*

⁶ *Ibid.*

*Rechtsstaat*⁷ and its legitimacy as a rule of law state would be seriously in issue.

In the various democratic systems of government that characterize the Member States of the European Union, the authority of the established lawmaker to make laws and the place of those laws at the top of the lawmaking hierarchy normally depends on a twofold legitimacy. The first, which stems from the fact that law is made by the authorized lawmaker according to an authorized procedure, can be described as a form of process legitimacy; this is the primary concern of lawyers. Secondly, and at a more abstract level, the lawmaker in a modern democracy should be representative.

It is important to bear in mind that representation in legal and constitutional theory is typically a thin form of legitimacy, in which legitimacy is equated with legality and “representative” may mean nothing more than “duly elected”.⁸ We should take notice too that representation is not the only form of input legitimacy; indeed, in recent years it has come to be questioned on the ground that representative institutions are not in practice sufficiently representative. Other more direct forms of input legitimacy have been gaining favour and the term has been extended to embrace ideas such as “direct”, “participatory” and “responsive” democracy, terminology that reflects a more direct popular input into policymaking. The movement for direct citizen input has given rise to an alternative set of input values by which to measure legitimacy and we need to bear in mind that the two forms of input legitimacy (representative and direct) may sometimes conflict.

Lawmaking in a rule of law state is not necessarily the sole prerogative of a legislature. Indeed, the hallmark of the constitutional *Rechtsstaat* is, according to Michael Stolleis, “the assigning of administrative activity to predictable legal forms”.⁹ Most modern European constitutions are, however, infused by separation of powers theory, which in its dominant triadic form allocates three main functions of government to three separate institutions: legislature, executive and judiciary.¹⁰ This division is not essential. In some governmental systems the executive may possess inherent legislative power, which may simply be carried over (as in England) from an earlier constitutional settlement. In the French model of separation of powers, where the division has always been different, an inherent power of formal executive rulemaking sufficient for the execution

⁷ F. VAN DUN, *Political Liberalism and the Formal Rechtsstaat*, 2004, www.rothbard.be.

⁸ Discussed further in C. HARLOW, *The Concepts and Methods of Reasoning of the New Public Law: A New Legislation?*, in *European Review of Public Law*, 2011, p. 1 *et seq.* And see C. LORD, P. MAGNETTE, *E Pluribus Unum? Creative Disagreement about Legitimacy in the EU*, in *Journal of Common Market Studies*, 2004, p. 183 *et seq.*

⁹ M. STOLLEIS, *A History of Public Law in Germany, 1914-45*, T. Dunlap (translator), Oxford: Oxford University Press, 2004, p. 9 *et seq.*

¹⁰ See generally, M. VILE, *Constitutionalism and Separation of Powers*, Indianapolis: Liberty Fund, 1998. Arguably, today there are more than three governmental functions.

of its core functions exists.¹¹ This is reflected in Arts 37 and 38 of the contemporary French Constitution, which explicitly provides for two forms of lawmaking: decrees enacted by the executive carry the same normative value as legislation, providing them with an intrinsic constitutional legitimacy. This does not exclude, however, specific delegations of regulatory power to the French executive by the legislature.¹²

Separation of powers theory as understood in other governance systems does not of course preclude the executive from lawmaking; it simply renders its legitimacy questionable. Systems where executive legislation – a term that refers throughout this paper to lawmaking by formal process – lacks inherent legitimacy must turn to other legitimating devices. A convenient answer lies in the concept of delegation. Both lawyers and political scientists refer to executive legislation as “delegated”, although they arrive at their conclusion by slightly different routes. Lawyers tend to focus on the concept of “vires” according to which subordinate legislation must not exceed the powers delegated in the governing statute. This conveniently allows courts to function as accountability machinery by deciding when a rulemaking body has outstripped its statutory powers (the *ultra vires* principle). Political scientists tend to rely on principal/agent theory,¹³ a doctrine that views the executive agent as functioning within the parameters of the delegation specified by a lawmaker-principal. In both analyses, however, the lawmaker sets the parameters of executive legislation, though in principal/agent theory, the electorate rather than the lawmaker is the ultimate principal. This difference becomes significant in the context of the EU.

Initially, when questions started to be asked about the legitimacy as opposed to the legality of executive legislation,¹⁴ the justifications were expedient and pragmatic: speed and pressure on parliamentary time together with the need for trivial detail in procedural rules. Flexibility was an added advantage; systems and practices that did not work out could more easily be changed (though today this is explanation more commonly used to justify “soft law” and “soft governance”). Later, delegated legislation was more often justified in terms of technicality and expertise. Thus, the legitimacy of executive legislation lay in delegation theory, but this in turn needed justification in terms of out-

¹¹ M. TROPER, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Paris: Librairie générale de droit et de jurisprudence (LGDJ), 1980.

¹² See generally P. BRUNET, *Les normes législatives et administratives*, and P. GONOD, *L'administration et l'élaboration des normes*, both in P. GONOD, F. MELLERAY, P. YOLKA, *Traité de droit administratif*, vol. 1, Paris: Dalloz, 2011. See also L. FAVOREU, *Le domaine de la loi et du règlement*, Paris: Economica, 1981.

¹³ See for a helpful literature survey, M. POLLACK, *Learning from the Americanists (Again): Theory and Method in the Study of Delegation*, in *West European Politics*, 2002, p. 200 *et seq.*

¹⁴ See, e.g., the discussion in the inter-war (Donoughmore) Committee on Ministers' Powers, Cmnd 4050 (1932), set up in England to “consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law”.

put values of expertise and effectiveness. Thus, like legislation, subordinate legislation came to possess a dual basis for legitimacy: delegation and output values.

There are, however, cogent reasons why delegation is defective as an explanatory force for executive lawmaking. The fact that the legal framework can be wide and general (modern lawmakers often resort to “outline” or “framework” legislation) adds to the potential for “mission creep”. It is hard also to apply the *ultra vires* principle to very widely drafted legislative provisions or to distinguish between “policy” (supposedly reserved for the lawmaker) and “implementation”, which permits delegation. The most technical of issues, such as the siting of a nuclear power station or cultivation of genetically modified crops, can conceal a policy decision on which the general public may have decided views.¹⁵ More important, delegation theory provides no answer for the almost infinite capacity of the agent to overrun the boundaries set by the principal and usurp the latter’s powers (mission creep).

Thus far the argument has proceeded inside the constraining corset of a functional separation of powers framework. This, amongst other deficiencies, entirely overlooks the modern tendency to delegate powers to autonomous and semi-autonomous bodies outside the executive and central administration. It is fair to describe the late twentieth century as the age of regulation and the agency. Agencies have proliferated, many possessing substantial regulatory powers in the generic sense of authority to promulgate “an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules”.¹⁶ In this sense the term “regulation” is wide enough to cover both regulation in the formal technical sense of executive legislation and informal rulemaking in the sense of “soft law” or informal rules, standards or principles (with which this paper does not attempt to deal). Technically, agencies exercise delegated powers bestowed by a specific legislative grant; a more value-laden source of legitimacy lies, however, in their independence and autonomy. This produces the paradox that agency legitimacy is founded on a principal/agent relationship that cannot in practice be fully realized, since interference with agency autonomy undercuts its legitimacy. The resultant problems of oversight, control and accountability happily fall outside the ambit of this paper.¹⁷

Briefly to summarize, the argument so far presented suggests that legitimation for the lawmaking process is of two main kinds: process legitimacy, based on a recognized procedure administered by the lawmaker established by tradition or the constitution; and legitimacy based on the character of the lawmaker as representative, here de-

¹⁵ See M. SHAPIRO, *The Problems of Independent Agencies in the United States and European Union*, in *Journal of European Public Policy*, 1997, p. 276 *et seq.*

¹⁶ R. BALDWIN, C. SCOTT, C. HOOD (eds), *A Reader on Regulation*, Oxford: Oxford University Press, 1998, p. 3.

¹⁷ But see M. BUSUIOC, *European Agencies, Law and Practices of Accountability*, Oxford: Oxford University Press, 2013.

scribed as a strong form of input legitimacy. Executive legislation, on the other hand, is generally legitimated by the principle of delegation. Justification for delegation of this symbolic power of lawmaking is often expressed in terms of output values of efficiency, expertise and technicality, and effectiveness.

Recently, however, these positions have started to merge. We have seen attempts to move the legislative process towards a position of “evidence-based” lawmaking, which forms part of the “Better Regulation” movement. This global ideology of the late twentieth century reflects a profound belief in scientific method, acceptance of “government by experts” and “a heavy reliance on regulatory tools”.¹⁸ Grounded in output legitimacy, the supposedly scientific techniques of “Better Regulation”, such as consultation, impact assessment and post-legislative evaluation, have taken hold and may be beginning to possess a “process legitimacy” of their own. In contrast, in delegated lawmaking – traditionally legitimated in terms of output values – demands for greater access to and participation in the process of non-legislative lawmaking show input legitimacy as weighing increasingly heavy in the legitimation scales. In section four, it will be suggested that output values are being eroded as a benchmark of legitimacy. This may come to undermine the rationale of executive legislation.

III. LAWMAKING IN THE EUROPEAN UNION: A DELEGATED FUNCTION?

Initially, lawmaking in the Communities was loosely based on the two-tier, constitutional model of legitimacy outlined above. Early analysis of the new regime portrayed it in terms of delegation and principal/agent theory with the Member States as principals and the Community institutions as agents.¹⁹ An alternative analysis posited the Community as a regulatory agency in which the European Commission (the Commission) was the implementer of regulatory policies;²⁰ here again rulemaking power was treated as delegated. This analysis was supported by the measure of autonomy and independence reflected in the treaty provision that Commission members were “in the general interest of the Community (to be) completely independent in the performance of their duties” (Art. 213 of the Treaty establishing the European Community). Both analyses

¹⁸ For an introduction to the enormous subject of better regulation, see C. HARLOW, R. RAWLINGS, *Law and Administration*, Cambridge: Cambridge University Press, 2009, p. 251 *et seq.*; and for Europe, C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, p. 55 *et seq.* See also R. HAYTHORNTHWAITE, *Better Regulation in Europe*, in S. WEATHERILL (ed.), *Better Regulation*, London: Bloomsbury, 2007.

¹⁹ See A. STONE SWEET, M. THATCHER (eds), *Special Issue: Theory and Practice of Delegation to Non-majoritarian Institutions*, in *West European Politics*, 2002, p. 1 *et seq.* Compare for a lawyer’s analysis, K. LENAERTS, *Regulating the Regulatory Process: “Delegation of Powers” in the EC*, in *European Law Review*, 1993, p. 23.

²⁰ G. MAJONE (ed.), *Regulating Europe*, London: Macmillan, 1996; G. MAJONE, *The Regulatory State and its Legitimacy Problems*, in *West European Politics*, 1999, p. 1 *et seq.*

imply a single delegated lawmaking process and there is no mention of secondary delegations of power to make subordinate law. Input legitimacy was strictly limited. The Assembly was not directly elected. Participation and consultation were based on a largely corporatist model, conducted through the Economic and Social Committee (hereafter, the ECSC) and the “social partners” (management and labour), again unelected and assumed to be representative. Input legitimacy was not a priority for the Council of the European Union (the Council), which adhered to the closed procedures of diplomatic treaty-making.

III.1. SUB-DELEGATION

In its famous (or infamous) *Meroni* decision,²¹ the Court of Justice (CJEU or Court) severely limited the Union’s power to delegate, ruling that delegation can never exceed the limits of the powers granted by the Treaty to the delegator, while powers (such as rulemaking) that involve “a wide margin of discretion” can never be delegated because they bring about an “actual transfer of responsibility”. Implicit in *Meroni* is an application of the familiar administrative law maxim that a delegate cannot delegate (*delegatus non potest delegare*). Acknowledging the need for a measure of delegation in the light of the work entailed in implementing the Single Market, however, the Court subsequently authorized “implementing regulations” allowing the Council to delegate rulemaking powers to the Commission provided always that it set out in a law “the basic elements of the matter to be dealt with” and authorized the “mode of proceeding”.²² The Court went on to authorize the “so-called management committee procedure, a mechanism which allows the Council to give the Commission an appreciably wide power of implementation whilst reserving where necessary its own right to intervene”.²³ The roots of this ruling in output values is indicated in the further statements that “the transition to the system established by this regulation must be effected as smoothly as possible” and that, as transitional measures may prove necessary at the end of each marketing year, “provision must therefore be made for the possibility of adopting appropriate measures”.²⁴

The Court has never recognized any *inherent* power in the EU and its institutions to make delegated legislation despite pressure from the Council to do so. It has consistently ruled that both rulemaking and decision-making procedures are creatures of the Treaties and are “not at the disposal of the Member States or of the institutions them-

²¹ Court of Justice, judgment of 13 June 1958, case 9/56, *Meroni v. High Authority*.

²² Court of Justice, judgment of 17 December 1970, case 25/70, *Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

²³ Court of Justice, judgment of 30 October 1975, case 23/75, *Rey Soda v. Cassa Conguaglio Zucchero*, paras 12 and 13.

²⁴ *Ivi*, para. 19.

selves”;²⁵ to rule otherwise would “undermine the principle of institutional balance”, a variant on the separation of powers doctrine, which the Court has installed as a fundamental principle of Community constitutional law.²⁶ Delegated as opposed to implementing power to make regulations had therefore to await action by the treaty-makers in Arts 290 and 291 of the Treaty on the Functioning of the European Union (TFEU). Again despite pressure, the Court has consistently refused to overrule the *Meroni* principle, though it has on occasion allowed it to be side-stepped. When the United Kingdom attacked excessive executive discretion in the European Securities and Markets Authority, the CJEU came under pressure to relax the *Meroni* doctrine. The Court side-stepped the issue, declining to overrule the earlier decision but finding that agency regulation of “short selling” was in the instant case sufficiently delineated to be lawful.²⁷ This decision in practice permitted a substantial delegation of discretionary power to an agency, justified perhaps in terms of expertise, perhaps in terms of expediency. Where it leaves the delegation issue in the context of agency rulemaking remains for the time being an open question.²⁸

The Court’s equivocal stance is judicious, however. In the European Union, multiple forms of delegation (using this term loosely) are possible. Member States delegate rulemaking powers to the European Union; the Council delegates to the Commission; it has even tried (unsuccessfully) to delegate to itself.²⁹ Council and Parliament delegate to the Commission, to agencies and committees, which may be given limited rulemaking powers. These very different situations require a differential approach.

III.2. THE TOOLS OF OUTPUT LEGITIMACY: “BETTER REGULATION”

The Commission’s managerial *ethos* emerged in response to the demise of the Santer Commission, charged with incompetence and maladministration. This led the Commission to experiment with the methods of New Public Management (NPM). The “Better Regulation” project, which aimed to improve the quality of legislation in the interests of

²⁵ Court of Justice, judgment of 6 May 2008, case C-133/06, *Parliament v. Council*.

²⁶ *Ibid.* See also K. LENAERTS, *Some Reflections on the Separation of Powers in the European Community*, in *Common Market Law Review*, 1991, p. 11 *et seq.*; K. LENAERTS, A. VERHOEVEN, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance in Europe’s Integrated Market*, Oxford: Oxford University Press, 2002.

²⁷ Court of Justice, judgment of 22 January 2014, case C-270/12, *UK v. Council and Parliament*, paras 27 and 55.

²⁸ P. NICOLAIDES, N. PREZIOSI, *Discretion and Accountability: The ESMA Judgment and the Meroni Doctrine*, in *Bruges European Economic Research (BEER) Papers no. 30*, Bruges: College of Europe, 2014, www.coleurope.eu; M. BUSUIOC, *Rulemaking by the European Financial Supervisory Authorities: Walking a Tight Rope*, in *European Law Journal*, 2013, p. 111 *et seq.*

²⁹ *Parliament v. Council*, cit., noted by P. CRAIG, *Case C-133/06, European Parliament v. Council (Delegation of legislative power)*, judgment of the Grand Chamber of 6 May 2008, in *Common Market Law Review*, 2009, p. 1265 *et seq.*

business, was formally a response to the need expressed at the Edinburgh, Gothenburg and Laeken European Councils to simplify and improve the Community regulatory environment. It is, however, inextricably linked with NPM. As indicated earlier, both reflect a love of the scientific method, both signify acceptance of “government by experts” and both signal a heavy reliance on regulatory tools. Commission policy-making today is replete with managerial jargon: road-maps, performance indicators, impact assessment, pre and post-legislative evaluation and consultation have all taken hold. At the lawmaking stage too, attempts have been made to move the legislative process towards a position of “evidence-based lawmaking”.

The Commission puts much weight on pre-legislative impact assessment (IA) and consultation targeted directly on legislative proposals; increasingly these procedures are being rolled out across the board.³⁰ IA is designed to assist the legislator “by systematically collecting and analysing information on planned interventions and estimating their likely impact”.³¹ Linked inextricably with consultation, IA is an inherent part of a series of processes and procedures that lock up together in a coherent package nominally aimed at legislative simplification (though inclined to produce the reverse).³² Theoretically, consultation also represents output values: it is a tool for information-gathering and learning exercise for the policy-maker, designed to enhance the effectiveness of policy-making. But of all the tools used by the rule-maker in designing rules, consultation is the most ambivalent; we shall return to its use as perhaps the most effective device for interest-representation and citizen participation in rulemaking. It is sufficient here to say that, whether or not they really contribute to effectiveness or merely add unnecessary stages to the lawmaking process, these new (supposedly) scientific techniques of better regulation grounded in output values are here to stay.

III.3. EXPERTISE AND OUTPUT LEGITIMACY

Output values of efficiency and effectiveness were invoked to justify the use of implementing regulation in organizing the common agricultural policy and, around the time of the Single European Act, the single market, areas in which implementing powers were first established and management committees began their life.³³ Today, however, Commission-made rules in the EU deal with a wide range of scientific and technical mat-

³⁰ Communication COM(2015) 216 of the European Commission on the Proposal for an Interinstitutional Agreement on Better Regulation, 19 May 2015. And see A. ALEMANNINO, A. MEUWESE, *Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in “New Comitology”*, in *European Law Journal*, 2013, p. 76 *et seq.*

³¹ European Court of Auditors Special Report No 3, *Impact assessments in the EU institutions: do they support decision-making?*, 2010, p. 6.

³² A. ALEMANNINO, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Wall or the Way Forward?*, in *European Law Journal*, 2009, p. 382 *et seq.*

³³ E. Vos, *The Rise of Committees*, in *European Law Journal*, 1997, p. 210 *et seq.*

ters such as trade standards, the proscription of food additives or toxic chemicals, the technicalities of complex global trade systems or global telecommunications networks; and so on. These areas of risk regulation and technological subject-matter are precisely the type of rulemaking where delegation is validly justified in terms of the output value of expertise. The role of the parliamentarian, largely conceived in terms of representation, was seen to lie in considering broad lines of policy presented by the executive and stamping these with the approval of society, a function for which generalist skills are both sufficient and essential. As suggested earlier, this may often be a misconception. But in scientific or technical regulation, it may be argued, expertise and rationality take precedence over democratic input – hence the approved twentieth-century model of subordinate lawmaking involving delegation of technical matters to scientific experts or regulators.

Scientific expertise can be supplied to lawmakers in various ways: technical advisers, committees, representatives from industry and the private sector, agencies – the EU has used them all. Information-gathering agencies date back to the 1970s when they had no rulemaking powers.³⁴ In the 1990s, further agencies were introduced and the Commission attempted structural rationalization;³⁵ agencies were to operate with a degree of independence but a proper respect for principal/agent relations.³⁶ A clear framework must be established by the legislature; the regulation creating each agency must set out the limits of their activities and powers, their responsibilities and requirements for openness. Agencies could have powers to take individual decisions in the application of regulatory measures but not rulemaking powers. In short, there was executive but no regulatory delegation. No matter. The true value of agencies was their ability to draw on highly technical sectorial know-how and filter it through to the Commission. In the current phase of agencification when there is increasing use of agencies, however, they have begun to acquire some rulemaking and regulatory powers. In defiance of *Meroni*,³⁷ EU agencies are starting to look more like the regulatory agencies found elsewhere in national governance systems.

Standard-setting by private bodies is a further way to introduce technological know-how. It represents a widespread practice of what can best be described as pseudo-

³⁴ See A. KREHER (ed.), *The EC Agencies Between Community Institutions and Constituents: Autonomy, Control and Accountability*, Florence: European University Institute, 1997.

³⁵ See Communication COM(2001) 428 of the Commission, *White Paper on European Governance*, 25 July 2001, p. 24; Communication COM(2002) 718 of the Commission on the operating framework for the European regulatory agencies, 11 December 2002; Communication COM(2008) 135 of the Commission, *The European Agencies: The Way Forward*, 11 March 2008.

³⁶ D. CURTIN, *Delegation to EU Non-majoritarian Agencies and Emerging Practices of Public Accountability*, in D. GERADIN, R. MUNOZ, N. PETIT (eds), *Regulation Through Agencies in the EU: A New Paradigm for European Governance*, Cheltenham: Edward Elgar, 2005.

³⁷ S. GRILLER, A. ORATOR, *Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine*, in *European Law Review*, 2010, p. 3 *et seq.*

delegation, in which standards are set by industry, or industry is simply left to design its own codes of practice, which are then taken into the public sphere. The EU cooperates, for example, with the global standard-setting body on food safety, which produces the *codex alimentarius*. The European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) and European emissions trading scheme (ETS) are semi-public EU bodies authorized to set standards in highly technical areas. These can then be adopted – in practice rubber-stamped – by the EU lawmakers. There are no overall standards of representativeness for rulemaking by these disparate bodies, though in practice they often work openly and arrange their own consultation procedures.

In all these situations, there are of course controls. The EU legislator may refuse to approve standards. Delegations may be rescinded. Courts can impose limits on public bodies through judicial review and the *ultra vires* doctrine.³⁸ The CJEU has intervened decisively to defend the interests of stakeholders by promoting due process rights to access information and make representations to the rule-maker; these rights are, however, characteristically individual and individuated.³⁹ Where risk assessment or the validity of scientific evidence is in issue, the Court measures the administrative process against standards of rationality, defined in terms of reason-giving and independent analysis. The case law holds, for example, that the Commission must consult and take note of the best scientific evidence available⁴⁰ and the Court will verify that this has been done.⁴¹ Expertise is the core requirement in cases of risk assessment. There is little talk of citizen input or democracy.

III.4. LAWMAKING BY COMMITTEE

Committees represent the traditional answer to problems of expertise, coming into use in very early days. Advisory committees were, as their name suggests, purely consultative, although, under comitology procedure, the Commission was required to take “the utmost account” of committee opinions. Management committees had, as already indicated, been validated by the CJEU in *Köster*, where the Court easily accepted that the Council need do no more than “establish the basic elements” of its policies and was not

³⁸ See M. SHAPIRO, *The Giving Reasons Requirement*, in M. SHAPIRO, A. STONE SWEET, *On Law, Political and Judicialization*, Oxford: Oxford University Press, 2002.

³⁹ F. BIGNAMI, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, in *Harvard International Law Journal*, 1999, p. 451 *et seq.*; and, F. BIGNAMI, *Three Generations of Participation Rights before the European Commission*, in *Law and Contemporary Problems*, 2004, p. 61 *et seq.* See C. ANDERSON, *Contrasting Models of EU Administration in Judicial Review of Risk Regulation*, in *Common Market Law Review*, 2014, p. 1 *et seq.*

⁴⁰ Tribunal, judgment of 11 September 2002, case T-13/99, *Pfizer Animal Health SA v. Council of the European Union*.

⁴¹ Tribunal, judgment of 11 July 2007, case T-229/04, *Sweden v. Commission*.

required by the Treaties to do otherwise. Management committee machinery enabled the Council “without distorting the Community structure and the institutional balance” to “delegate” to the Commission “an implementing power of appreciable scope, subject to its power to take the decision itself if necessary”.⁴²

Afraid of the implications, the Council moved to regulate comitology procedure with a series of Decisions providing for different degrees of control.⁴³ Comitology committees were not representative of output values; they were agents of Council control with specified veto powers. To a limited extent they were representative of the Council⁴⁴ but this did not mean that they were agents of democracy; indeed, there was much concern over input values, notably over the lack of transparency in the committees, which published only minimal agendas and skeletal minutes.⁴⁵

As the hydra-headed comitology evolved over the years, however, different institutional attitudes became discernible. The Council viewed comitology from the perspective of international relations practice, which many of its advisers would have experienced. Theoretically, Council/comitology represented a principal/agent partnership in which committees acted as a means of controlling the Commission in the context of a broadly negotiatory lawmaking process.⁴⁶ For the Commission, the importance of comitology lay in expertise: the committees were either composed of experts who gave essential technical advice, or of national public servants who advised on difficulties that might arise in the process of implementation. Advisory committees, which had no veto powers, were naturally preferable to management and regulatory committees, with the complex procedures required by the comitology decisions. The European Parliament (EP) professed to be the guardian of input values. It was jealous of the comitology, treating it as a non-representative rival to representative lawmaking in a governmental structure where the elected Parliament was neither the sole nor even the primary lawmaker. Thus the comitology became a battlefield on which the EP gradually gained

⁴² *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co*, cit., paras 6 and 9.

⁴³ The comitology was regulated by three Council decisions laying down the procedures for the exercise of implementing powers conferred on the Commission, respectively Council Decision 87/373/EEC laying down the procedures for the exercise of implementing powers conferred on the Commission, Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, and Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁴⁴ For further details, see E. Vos, *50 Years of European Integration, 45 Years of Comitology*, in *Maas-tricht University Faculty of Law Working Papers*, Maastricht: University of Maastricht, 18 February 2009, www.ssrn.com.

⁴⁵ G. BRANDSMA, *Backstage Europe, Comitology, Accountability, and Democracy in the European Union*, Utrecht: University Press, 2010; G. BRANDSMA, D. CURTIN, A. MEIJER, *How Transparent are EU “Comitology” Committees in Practice?*, in *European Law Journal*, 2008, p. 819 *et seq.*; M. BUSUIOC, *European Agencies, Law and Practices of Accountability*, cit.

⁴⁶ See further F. BERGSTRÖM, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press, 2005.

ground.⁴⁷ Undoubtedly unwelcome to the Commission, the resultant dose of input values added to the complexity of the various procedures and fuelled Commission antipathy to the whole process.

III.5. THE LISBON REFORMS

The reforms of executive legislation introduced by the Lisbon Treaty moved delegated legislation towards a more traditional pattern. Art. 290 TFEU bestows on the Commission a true power to make delegated legislation closely based on principal/agent theory. Following a somewhat old-fashioned format, the Article provides that delegation must be by a “legislative act” for the purpose of supplementing or amending “non-essential elements” of the legislative act. The objectives, content, scope and duration of the delegation of power must be explicitly defined. Significantly, control is shared between the Council and EP as joint principals, each of which may be empowered by the governing legislation to revoke the delegation; alternatively, the governing legislation can provide for the delegated act to come into force only if no objection has been expressed by either the EP or the Council within a given period.

Art. 291 TFEU retains the category of implementing regulation but within closely defined parameters. It empowers the EU legislator to confer implementing powers on the Commission where “uniform conditions for implementing legally binding Union acts are needed” but – in a novel provision – transfers the general powers of implementation and control to the Member States, subject to the important proviso that the EU legislator “shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”. A post-Lisbon Regulation became necessary to re-organize the comitology.⁴⁸ This rolled up management and regulatory committees into a new “examination procedure” and introduced a new appeal committee to decide in cases where the committee vetoed a Commission draft. No doubt the Commission hopes to restrict this relatively cumbersome procedure to important policy areas (agriculture, fisheries, environment, health, trade and taxation are singled out) and rely instead on the simpler advisory procedure, where the Commission needs only to “take the utmost account” of the committee’s opinion, adopted by simple majority of those voting. It is too early to say how these provisions will play out in practice, though we can say that they add nothing to input legitimacy. They are not intended to. This is, after all, delegated legislation.

⁴⁷ See K.ST.C. BRADLEY, *The European Parliament and Comitology: On the Road to Nowhere?*, in *European Law Journal*, 1997, p. 230 *et seq.*; and K.ST.C. BRADLEY, *Delegated Legislation and Parliamentary Supervision in the European Community*, in A. EPINEY *et al.* (eds), *Challenging Boundaries*, Baden-Baden: Nomos, 2007.

⁴⁸ Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, p. 13.

IV. PUSHING FOR DEMOCRATIC INPUT

There are several reasons why, in the modern world, delegation might no longer suffice as a ground for the legitimation of executive lawmaking. In general, the power is greatly over-used by modern governments, bringing the realization that law is no longer made or sufficiently supervised by legislatures. Power and authority is being leached from Parliaments to the profit of government and administrators. In the EU, the trend has been accentuated by the constant addition of new competences and new areas of activity demanding Union-level regulation, while general failure on the part of Union institutions to respect the crucial subsidiarity principle – according to which power should be exercised at the lowest possible level – has further accentuated the feeling of stealthy integration. A surreptitious transfer is taking place, draining power and authority from Member States and from their Parliaments.⁴⁹ Indeed, the integrative nature of Union lawmaking seems to be reducing national lawmakers from principals to agents obliged to implement texts promulgated by the EU lawmaker. If, as Neil Walker claims,⁵⁰ the legitimacy of a delegate depends on the continuing control of the principal and clarity of the mandate, then the Union lawmaking process is now doubly defective. The clarity of the mandate is threatened by the “expansionary dynamic of the Union” and the Union lawmaking process is remote. Legitimacy founded on delegation is “ever less plausible in a supranational polity attenuated from national control, with an ever broader and deeper policy agenda”.⁵¹ Moreover, legitimacy in the EU depends heavily on output values, as Scharpf⁵² and Majone⁵³ realized.

At a stage when the output of the Community legislator was (or was thought to be) a rather “technical-regulatory expert type of legislation”, delegation and output values sufficed for its legitimation. Later, when the “expansionary dynamic of the Union” brought greater political saliency and visibility, the democratic legitimacy of regulation came into question. And concern for the democratic character of the EU was undoubtedly heightened by the tendency of those in power to circumvent the regular lawmaking processes, as with the justice and home affairs (JHA) at Maastricht and more recently in the Eurozone. “With every revision of the founding treaties”, András Jakab contends, “non-political arguments for legitimacy were weakened”.⁵⁴ Again, output legiti-

⁴⁹ G. BERMANN, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, in *Columbia Law Review*, 1994, p. 331.

⁵⁰ N. WALKER, *Justice In and Out of the European Union*, in D. KOCHOR, G. DE BÜRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford and Portland Oregon: Hart Publishing, 2015, p. 251 *et seq.*

⁵¹ *Ibid.*

⁵² F. SCHARPF, *Governing in Europe. Effective and Democratic?*, Oxford: Oxford University Press, 1999.

⁵³ G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014.

⁵⁴ A. JAKAB, *Full Parliamentarisation of the EU without Changing the Treaties: Why We Should Aim for It and How Easily It Can be Achieved*, in *Jean Monnet Working Paper*, 2012, p. 55.

macy, rooted in expertise, efficiency and effectiveness, is peculiarly vulnerable to crisis, as we saw in Greece and Italy when austerity measures were announced and in the collapse of solidarity amongst the Schengen partners during the present immigrant crisis. In contrast, Jakab argues, democratic governance induces loyalty. By giving members of a community a voice in what is happening, it promotes ownership and solidarity. In the EU where the basis of lawmaking legitimacy lay in delegation and the ultimate principals, the Member State electorates, were remote from the final lawmaking process and hope of further integration clearly depended on the ability of the Union to make space in the regulatory process for its citizens.

IV.1. LAWMAKING AND REPRESENTATION

1979, when the European Parliament emerged as a directly elected parliamentary body, marked a significant step in the direction of input legitimacy for EU law. The claim could be made – though not necessarily accepted – that the EU lawmaker was now “representative” with one indirectly elected chamber, the Council of Ministers, whose members were at least notionally accountable at national level and a directly elected Parliament. This might be enough to satisfy lawyers, who are normally satisfied by a thin notion of representation but even for lawyers the European Parliament still lacked an important constituent for legitimacy: it was not the plenary lawmaker. In several areas its role was – and still is – reduced to consultation; and it had no jurisdiction at all in the new “Third Pillar” added at Maastricht, raising the question whether the common positions, decisions and framework decisions made by the Council in terms of Art. 34 of the Treaty on European Union (TEU) could be deemed to amount to lawmaking in the proper sense of the term or was merely a form of soft law. Political scientists homed in on the alleged “democratic deficit”, variously analysed as due to the absence of an elected government, the failure of the young EP to establish itself at the centre of the European political system, and persistent apathy at European elections.⁵⁵ Alongside, as already noted, representative democracy had come under attack from the variant values of direct and participatory democracy.⁵⁶

A crucial opportunity for plenary legislative authority was lost with the failure of the Constitutional Treaty (CT), which would have provided specifically that the Constitution and “law adopted by the Union’s Institutions in exercising competences conferred on it” should have primacy over the law of the Member States. This would have given the CT

⁵⁵ See, e.g., S. ANDERSEN, K. ELIASSEN (eds), *The European Union: How Democratic Is It?*, London: Sage, 1996; A. FOLLESDAL, S. HIX, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, in *Journal of Common Market Studies*, 2006, p. 533 *et seq.*; S. HIX, B. HØYLAND, *Empowerment of the European Parliament*, in *Annual Review of Political Science*, 2013, p. 171 *et seq.*

⁵⁶ A debate initiated in the EU by J. COHEN, C. SABEL, *Directly Deliberative Polyarchy*, in *European Law Journal*, 1997, p. 313 *et seq.*, but see now B. KOHLER-KOCH, B. RITTEBERGER (eds), *Debating the Democratic Legitimacy of the European Union*, Lanham: Rowman & Littlefield, 2007.

very much the look of a federal constitution with a dual legislative system and might have settled the delegation question once and for all. The CT would also have settled the hierarchy of norms by changing the nomenclature of “regulation” and “directive” to EU “laws” and “framework laws” (Art. 10 TEU). However, the proposals did not survive in the Lisbon Treaty.

The notion of delegation persists in Art. 5, para. 2, TEU with the concepts of conferal, defined to mean that the Union should act only “within the limits of the competences conferred upon it by the Member States” and of subsidiarity, which allows the EU to act “only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States”. Crucially, the Lisbon Treaty strengthened the position of the European Parliament, which was now an equal partner in what was now termed the “ordinary” EU lawmaking procedure (Art. 289 TFEU). For the first time, a directly representative body was virtually an equal partner in lawmaking.

IV.2. TRANSPARENCY AS A TIN-OPENER

Procedurally, however, things were rather different. Input legitimacy was not a priority for the Council, which continued to adhere to the closed procedures of diplomatic treaty-making. In a series of important cases brought by proponents of open government, however, the Court of Justice pushed for greater transparency in the lawmaking process. Its progressive judgments were based on the Preamble to Regulation 1049/2001, the current EU access to information legislation,⁵⁷ which states in recital 6 that “wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers”. In addition, recital 2 of the Preamble asserts:

“Openness enables citizens to participate more fully in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system. Openness contributes to strengthening the principles of democracy [...]”.

Whether these provisions should be read as an affirmation of input values or rather treat openness and accountability as a source of output legitimacy is not entirely clear. From an input perspective, however, *Sweden and Turco*⁵⁸ was a breakthrough case. Turco had asked for access to an opinion from the Council’s Legal Service concerning the potential validity of a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council denied

⁵⁷ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission Documents.

⁵⁸ Court of Justice, judgment of 1 July 2008, joined cases C-39/05 and C-52/05, *Sweden and Turco v. Council*.

access, standing on a mandatory exception to disclosure in Art. 4, para. 2, of Regulation No 1049/2001 for “court proceedings and legal advice” unless an “an overriding public interest in disclosure” could be shown. The Council argued for output legitimacy. The advice of its legal service deserved “particular protection” because it was an important instrument enabling the Council to be sure of the compatibility of its acts with Community law and enabled it “to move forward the discussion of the legal aspects at issue”; further, disclosure could create uncertainty regarding the legality of legislative acts adopted, “thus jeopardizing the legal certainty and stability of the Community legal order”. On the point of overriding public interest, the Council argued that the general interest of increasing transparency and openness of the decision-making process could not stand on its own as a justification for release as this would make it virtually impossible for the institutions to claim privilege for advice on legal questions arising in debate on legislative initiatives.

The Court rejected all these arguments, basing its reasoning on the Preamble:

“Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.⁵⁹

Prioritizing input values, the Court advised the Council that it was not secrecy but openness that would contribute to:

“conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole”.⁶⁰

To ram the message home, the Court reminded the Council of its obligation under Art. 207, para. 3, of the Treaty establishing the European Community (EC) “to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases”.

It was not long, however, before the General Court had to return to the subject in a case involving attempts by Access Info, a campaign group, to find out which Member States were opposing reform of the contested Regulation No 1049/2001 in the Council.⁶¹ The Council presented its long-standing view of the EU legislative procedure as es-

⁵⁹ *Ivi*, para. 46.

⁶⁰ *Ivi*, para. 59.

⁶¹ Tribunal, judgment of 22 March 2011, case T-233/09, *Access Info Europe v. Council*, confirmed in Court of Justice, judgment of 17 October 2013, case C-280/11 P, *Council v. Access Info Europe*.

essentially a diplomatic process, arguing that disclosure would inhibit delegates room for *manœuvre* during preliminary discussions:

“If written contributions were made fully accessible to the public in an ongoing legislative procedure, this would lead positions of the delegations to become entrenched, since those delegations would lose some of their ability to modify their positions in the course of discussions and to justify before their public a compromise solution, which may differ from their initial position, seriously affecting the chances of finding a compromise”.⁶²

It was the turn of the General Court to speak up for democratic legitimacy:

“If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The identification of the Member State delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently”.⁶³

There could hardly be a clearer statement of input values.

Perhaps we should not dismiss Council arguments for “space to negotiate” too readily, however. We should not underrate the potential for a genuine mismatch between input and output values in a transnational governance system where policy-making depends on the agreement or at least acquiescence of 28 sovereign States. Thus Emily O’Reilly, the recently appointed European Ombudsman (EO), walked on to slippery ground when she opened an Own-Initiative Investigation (OII) into the so-called “trialogue” procedure.⁶⁴ Trialogue is a stage in co-decision procedure whereby around twenty representatives of the Council and Parliament meet in committee under the watchful eye of the Commission to broker agreement on a legislative text prior to second reading in the Parliament. This highly secretive process not only excludes the wider public from participation but also limits input from representatives since, as Tony Bunyan once put it, parliamentarians “are not allowed to change a ‘dot or comma’ of the ‘compromise’ position agreed in triologue meetings”.⁶⁵ Yet triologue is widely used in

⁶² *Access Info Europe v. Council*, cit., para. 43.

⁶³ *Ivi*, para. 69.

⁶⁴ European Ombudsman, Own-initiative inquiry OI/8/2015/FOR concerning transparency of trialogues, 26 May 2015.

⁶⁵ T. BUNYAN, *European Parliament: Abolish 1st [and 2nd] Reading Secret Deals: Bring Back Democracy “Warts and All”*, in *Statewatch News Online*, September 2009, www.statewatch.org. See also J. GARMAN,

politically controversial and sensitive areas: *Statewatch* has recorded, for example, that all eight of the controversial immigration and asylum measures passed in 2006 were negotiated and agreed in secret trialogue meetings.⁶⁶

Reflecting on trialogue in a press interview, Emily O'Reilly put her finger on the potential for conflict between input and output values. Trialogue was efficient: "They get the work done. One doesn't want to be responsible for suggesting a mechanism that would lengthen the process". On the other hand, the procedure was hardly transparent: "There are no minutes that come out afterwards. It's never quite clear when the meetings are on or how the decision making is carried out".⁶⁷ In the central section of a law-making process, little or no attention is paid to input values.⁶⁸

IV.3. CITIZEN INPUT AND PARTICIPATION

Earlier, lawmaking authority was depicted as underpinned in nation States by a twofold legitimacy of process and representation. We noted too that representative legitimacy had come under attack in recent years from the variant values of direct and participatory democracy. This debate over the nature and forms of democracy has tended to flourish in systems of transnational governance where representative institutions are young or weak, of which the European Union is one.⁶⁹ Commission interest in citizen participation was first expressed in the White Paper on European Governance (WPEG).⁷⁰ Interest was partly pragmatic; there was an imperative need to reform the Commission in the fallout from the devastating parliamentary investigation of 1999.⁷¹ Partly, however, the Commission was anxious over the negative attitude of the European public sparked by the Danish No vote in the Maastricht referendum. To put this in academic terms, there was a perceived need after Maastricht to construct a European *demos* as a basis for integration.⁷²

L. HILDITCH, *Behind the Scenes: an Examination of the Importance of Informal Processes at Work in Conciliation*, in *Journal of European Public Policy*, 1998, p. 271 *et seq.*

⁶⁶ T. BUNYAN, *Secret Trialogues and the Democratic Deficit*, in *Statewatch Journal* (vol. 16), 5-6 September 2007, www.statewatch.org.

⁶⁷ Euractiv, *Secretive "Trialogue" Talks to Agree EU Law Face Investigation*, 21 April 2015, www.euractiv.com.

⁶⁸ There is now an inter-institutional agreement brokered by the Commission under negotiation: see Communication COM(2015) 216, *Proposal for an Interinstitutional Agreement on Better Regulation*, 19 May 2015.

⁶⁹ See footnote 57 above.

⁷⁰ Communication COM(2001) 428, *cit.*, p. 1.

⁷¹ Committee of Independent Experts, *Second Report on Reform of the Commission*, Brussels, 1999.

⁷² A debate closely associated with the work of Joseph Weiler: see J. WEILER, *To Be a European Citizen: Eros and Civilisation*, in *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, ch. 10; and, J. WEILER, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision?*, in *European Law Journal*, 1995, p. 219 *et seq.*

The Commission response was to plan a “Citizen’s Europe” to be constructed under its paternal eye. But as Beate Kohler-Koch has observed in her penetrating scrutiny of Commission relationships with civil society, input values were neither the Commission’s priority nor its first thought.⁷³ The primary motive of those who drafted the White Paper on European Governance was to promote “a reasoned discourse between experts and laypeople to support the effectiveness and legitimacy of policy-making”. In this passage, redolent of output values, “civil society engagement became linked to a more down-to-earth approach looking for ‘better regulation’ and more efficient consultation”.⁷⁴

The many techniques employed today by the Commission actively to involve citizens – consultation exercises, online debates, citizen consensus conferences, the “Your Voice in Europe” website, and so on – are aimed overtly at “the expression of an informed citizen’s perspective”. Yet arguably, from the perspective of input legitimacy, the Commission has taken a seriously wrong turning by focusing too much on *organised* society;⁷⁵ the ECSC, which it supports as a bridge with European civil society and the civil society organizations (CSOs) that claim to represent civil society.⁷⁶ Its insistence on the “representativeness” of bodies with which it has relationships also has a distinctly undemocratic ring.⁷⁷ In a vibrant political community, interest representation does not demand representativeness unless a body claims to speak for its members or a particular section of the community. The public space is open to anyone and everyone to express their views and communicate them to policy-makers; such relationships are unregulated and informal and increasingly conducted on both sides through email, tweet and twitter. The Commission Transparency Register in contrast, has a forbidding and bureaucratic character;⁷⁸ it is a tool for interest representation and lobbyists rather

⁷³ B. KOHLER-KOCH, *Civil Society and EU democracy: “Astroturf” Representation*, in *Journal of European Public Policy*, 2010, p. 100 *et seq.*

⁷⁴ *Ibid.*, citing L. LEBELLIS, J. PATERSON, *Developing New Modes of Governance*, in *Forward Studies Unit Working Paper*, Luxembourg: European Commission, 2000, p. 27 *et seq.*

⁷⁵ See Communication COM(2002) 277 of the Commission, *General Principles and Minimum Standards for Consulting Non-institutional Interested Parties*, 5 June 2002; Communication COM(2002) 704 of the Commission, *Towards a Reinforced Culture of Consultation and Dialogue-General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, 11 December 2002; Communication COM(2008) 323 of the Commission, *European Transparency Initiative: A Framework for Relations with Interest Representatives by the Commission (Register and Code of Conduct)*, 27 May 2008. The Register is available on the Commission website.

⁷⁶ This argument is taken further in C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, *cit.*

⁷⁷ N. PEREZ-SOLORZANO BORRAGAN, S. SMISMANS, *Representativeness: A Tool to Structure Interest Intermediation in the European Union?*, in *Journal of Common Market Studies*, 2012, p. 403 *et seq.*

⁷⁸ See D. OBRADOVIC, J. ALONSO VIZCARINO, *Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations*, in *Common Market Law Review*, 2006, p. 1049 *et seq.*

than for citizen participation.⁷⁹ Moreover, the Commission sets higher standards for civil society than it observes in its own relationships. Research confirms a distinct bias in both the Commission and its partner, the ECSC, towards relationships with business and market-related organizations. Interest-representation is, to reiterate, an input value and possible source of input legitimacy; it is, however, a narrow form of input and a pale shadow of democracy.⁸⁰

The strongest move towards entrenching input values in EU lawmaking comes with Art. 11 TEU inserted at Lisbon. This is a robust expression of input values, which places a wide general obligation on the institutions to “maintain an open, transparent and regular dialogue with representative associations and civil society”; to give “citizens and representative associations” an opportunity to exchange views publicly; and to “carry out broad consultations with parties concerned” in all policy areas. The word “broad” here may be significant. By generating a new input function for consultation and dialogue, the Lisbon Treaty seems to promise something more than the carefully controlled consultation that was the Commission norm.

Citizen participation can serve two main purposes: to encourage active citizen participation in the policymaking process represents an effort to “reinvigorate European democracy”,⁸¹ an objective for which Art. 11 seems to be designed. For EU policymakers and institutions on the other hand, it represents “a listening exercise”. Which of these two objectives does the Commission prioritise? Many protestations of commitment to input legitimacy have been made by the EU institutions and enshrined in the Treaties. In response, the Commission has made rather bureaucratic attempts to create space for European civil society. But it is hard to see relationships that are so rigorously corseted by the Commission either as truly democratic or as adding, or being likely to add, legitimacy to the EU lawmaking process. Indeed, the outcome of the many reforms may be rather to undercut output legitimacy by removing the claims of executive legislation to speed and effectiveness than to substantiate the claims of direct democracy to increase input legitimacy.

The same bureaucratic propensities mark the “Citizens’ Initiative” procedure introduced by Art. 11, para. 4, TEU. This purports to create a specific space for individual citizens to participate in lawmaking – a clear expression of input values. The process is, however, cumbersome; it requires not less than one million signatures from citizens who are nationals of a significant number of Member States and who come together to

⁷⁹ B. KOHLER-KOCH, B. FINKE, *The Institutional Shaping of EU-Society Relations: A Contribution to Democracy via Participation?*, in *Journal of Civil Society*, 2007, p. 35 *et seq.*

⁸⁰ *Ibid.* See also S. SMISMANS, *An Economic and Social Committee for the Citizen, or a Citizen for the Economic and Social Committee?*, in *European Public Law*, 1999, p. 557 *et seq.*

⁸¹ C. MARXSEN, *Participatory Democracy in Europe*, in F. FABRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Governance for the European Union and the Eurozone*, Oxford: Hart Publishing, 2015, p. 156 *et seq.*

“invite” the Commission to take action by submitting an “appropriate proposal” on a matter that falls within EU competence. In practice, this is an opportunity likely to be available mainly for interest representation and used by trade unions, which organized the first successful European citizens’ initiative (ECI) against the privatization of water authorities, or well-entrenched pressure and protest groups, like the organizers of “One of Us”, petitioning against the use of human embryos in research or “stop Vivisection”.⁸² Of the handful of initiatives so far submitted, 11 are currently listed as obsolete or withdrawn, while the organizers of the three initiatives that have so far crawled through the complex procedural hoops are all in receipt of a bureaucratic communication explaining at great length why the Commission believes no further legislative action is necessary or appropriate.⁸³

V. TOWARDS LEGITIMATION?

All the Member States of the European Union are democracies and have confirmed, in the words of the TEU, “their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”. Some of the democracies are old-established and unwilling lightly to surrender their cultural inheritance; others have recent experience of authoritarian government and, equally, are unwilling to see it reintroduced. An open and democratic lawmaking process stands as a core value at the heart of democracy. This is implicit in the increasing significance attached in contemporary society to the principles of transparency, participation and accountability, fundamental values of contemporary democracy. The significance of these values has been recognized many times by the Treaty-makers: in the Preamble to the TEU, where they appear several times; in Declaration 17 attached to the TEU at Maastricht, which states that “Transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration”; in the provisions of Art. 11 TEU, which are set out above. At a lower level in the hierarchy, the Commission was thinking along the right lines when it committed itself in the WPEG “to work in a more open manner”, to “actively communicate about what the EU does and the decisions it takes” and to “use language that is accessible and understandable for the general public”.⁸⁴ This, the drafters noted, “is of particular importance in order to improve the confidence in complex institutions”. As this paper has attempt-

⁸² See for a critical evaluation, M. DOUGAN, *What Are We to Make of the Citizens’ Initiative?*, in *Common Market Law Review*, 2011, p. 1807 *et seq.*

⁸³ Respectively Communication COM(2014) 355 of the Commission on the European Citizens’ Initiative “One of us”, 28 May 2014; Communication C(2015) 3773 of the Commission on the European Citizens’ Initiative “Stop Vivisection”, 3 June 2015; Communication COM(2014) 177 of the Commission on the European Citizens’ Initiative “Water and sanitation are a human right! Water is a public good, not a commodity!”, 19 March 2014. Initiatives are all registered on the Commission Website under Citizens’ Initiative.

⁸⁴ Communication COM(2001) 428, *cit.*, p. 10.

ed to show, this desideratum has not yet been attained.

Measured against the benchmark of the two-stage model that – broadly speaking – represents our constitutional legacy, the EU lawmaking processes score badly. For inter-governmentalists, the deficiencies provide a strong argument against integration – a strong argument indeed for a general claw-back of power by the Member States, where lawmaking legitimacy is seen to lie. Integrationists by way of contrast are faced with a possibly insoluble dilemma. At every level of Union lawmaking, greater input legitimacy is essential if the EU is to flourish as a democratic polity. The changes that this entails, however, must not be allowed too greatly to undercut the output legitimacy necessary for the EU's important regulatory functions.

In the field of executive legislation, some improvements can be made relatively easily. More space can be made for public participation in policy-making with procedural underpinning. The objective of those who have worked on the Research Network on EU Administrative Law project (ReNEUAL) to prepare a code of administrative lawmaking procedure is to ensure “a higher degree of legitimacy of rulemaking activities, in accordance with Art. 11, para. 1, TEU”. The focus throughout is on input values: transparency as a pathway to public debate and deliberation and enhanced opportunities for expression. It is certainly the group's hope that by setting in place a set of participatory procedures, public participation will be fostered as well as underpinned. The group may also believe that the introduction of protective procedures will generate a degree of “process legitimacy”, based on the citizen's expectation of good governance and the right to good administration protected by Art. 41 of the Charter of Fundamental Rights of the European Union. Procedural rectitude will operate, in other words, to reinforce the legitimacy of executive lawmaking.⁸⁵

But would this necessarily be the outcome? The ReNEUAL team has elaborated a five-volume set of model rules for EU administrative procedure, Volume II of which covers formal rulemaking procedures. These would apply to all non-legislative government acts of general application by all EU institutions and other bodies, offices and agencies.⁸⁶ But experience of the Citizens' Initiative reminds us that process legitimacy is easily undercut by a slide into bureaucratic proceduralism. The outcome is not only damage to input legitimacy through disappointed expectations⁸⁷ but also to output legitimacy through delay and inefficiency. If citizen input is to become more than “Astroturf Representation”,⁸⁸ it is a change of heart and genuine commitment to input values

⁸⁵ See V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput*, in *Political Studies*, 2013, p. 2 *et seq.*

⁸⁶ ReNEUAL, *Administrative Rulemaking*, Book 2, p. 41, www.reneual.eu.

⁸⁷ On which see S. ARNSTEIN, *A Ladder of Citizen Participation*, in *Journal of the American Institute of Planners*, 1969, p. 136 *et seq.*

⁸⁸ B. KOHLER-KOCH, *Civil Society and EU democracy: “Astroturf” Representation*, in *Journal of European Public Policy*, 2010, p. 100 *et seq.*

that is necessary on the part of the Commission rather than further proceduralisation.

This is in any event merely to tinker at the edges of the EU legitimacy problem. The real need is to install a true sense of representative legitimacy at Union level. Here again there is room for tinkering at the edges; further space could, for example, be made for regional representation through the Committee of the Regions. A more fundamental remedy would be to buy in legitimacy from national parliaments. Experiments are already under way to strengthen the hand of national parliaments with the so-called “yellow” and “orange card” procedures introduced by the Lisbon Treaty, which (briefly) afford reinforcement for the under-valued subsidiarity principle by providing for Reasoned Opinions from national Parliaments or their chambers that can force the Commission to “review” a draft proposal. This is of course a stop order rather than a policy-making facility or even a veto and the procedures would retain their essentially negative character even if they were converted into a delaying power requiring the Commission to reconsider its proposal, which would resemble the Art. 290 TFEU procedure in respect of delegated legislation.

More positive would be a new “green card” procedure, recommended in an initiative from Member State Parliaments. This would enable Member State Parliaments to make proposals to the Commission, thereby influencing the direction of EU policy.⁸⁹ The first green card from 16 national Parliaments concerned food waste. It received a fairly typical response from the Commission, thanking the Parliaments for their interest and promising to pay particular attention to their suggestions when preparing its action plan, while at the same time declining to show them the content of the package of broader proposals that it was preparing.⁹⁰ Such a power could of course be strengthened and converted to a “triggering” mechanism by placing the Commission under a “loyal duty” to respond by bringing forward a proposal for legislation (though this might require Treaty change). These procedures, which would at least put national Parliaments on an even footing with the organizers of a Citizens’ Initiative, are likely to be too cumbersome to be useful as they involve the cooperation of up to 30 elephantine bodies. They are moreover peripheral and, if they were not, would be dangerous. To drag national Parliaments into EU policymaking may look like a positive gain for integration; it is to the contrary a dangerous incursion into the autonomy of national constitutions. It is a step that is far more likely to destabilize relationships between national govern-

⁸⁹ See British House of Lords, EU Committee HL 151, *The role of National Parliaments in the European Union*, 2014; Dutch Tweede Kamer, *Democratic Legitimacy in the EU and the Role of National Parliaments*, November 2013; Danish Folketing, European Affairs Committee, *Twenty-Three Recommendations to Strengthen the Role of National Parliaments in a Changing European Governance*, January 2014.

⁹⁰ See British House of Lords, EU Committee, *Food Waste: a Proposal by National Parliaments to the European Commission*, 22 July 2015, www.parliament.uk; and Commission C(2015) 7982 final, Commission Response to the Green Card, 17 November 2015.

ments and legislatures and weaken national accountability arrangements than greatly to enhance the input legitimacy of Union legislation.

It is clear then that the EU in general, and more specifically its lawmaking process, faces something of a legitimacy crisis. Legitimacy from delegation based on output values is fading. This may be because EU policies are less successful. It may be because, in line with a general trend in contemporary popular democracy, input values weigh increasingly highly in the legitimacy scales. Most likely, it is because of the EU's ever-deepening policy agenda: from the trade and technology of the Single Market regulator the EU has assumed responsibility for primary economic regulation and taken on the human rights remit of a national government. In a speech to the EP, the EO, Emily O'Reilly, remarked that "the demands now being made by citizens, demands made ever louder, more direct and more pervasive, by the megaphone of social and other kinds of interactive new media, makes the creation of more transparent and accountable structures and processes an everyday business imperative".⁹¹ At every level of government, in every modality of governance, every type of public authority from governments and legislatures to agencies and administrators will need to learn how to respond.

There is no room any longer for legitimacy based on a purely formal process of delegation or for the notional input that the European Commission has been promoting. Where this leaves us is uncertain. At the end of the day, it has to be admitted that legitimacy lies in the eye of the beholder, who may be a politician, judge, administrator or merely a baffled ordinary citizen who takes an interest in EU affairs. It is hard to define legitimacy, to distinguish its ingredients or decide where it is located. Significantly in the context of this paper, the views of a staunch integrationist on these matters are likely to differ sharply from those of an inter-governmentalist and more sharply still from those of a wholehearted Eurosceptic. Like democracy itself, legitimacy largely depends, on what Jakab calls "its capability to induce loyalty".⁹² And loyalty seems increasingly to depend on the ability of the prevailing governance system to respond by giving a voice to that loyalty. Unfortunately for integration, these are uncertain qualities that are not easily bought.

⁹¹ European Ombudsman, Joint Hearing with the European Parliament, *Towards a High Degree of Accountability, Transparency & Integrity in the EU Institutions*, 26 March 2015.

⁹² A. JAKAB, *Full Parliamentarisation of the EU without Changing the Treaties*, cit.