The Future of EU Executive Rulemaking

Wolfgang Weiss*

German University of Administrative Sciences Speyer

Abstract

The European Commission presented, in its White Paper on the Future of Europe, scenarios on the future of the EU in 2025, which prompt the question as to their meaning for the future of EU administrative law. This article explores the implications of the scenarios for the future of EU executive rulemaking and its constitutional consequences. As some scenarios imply a more powerful political role of the Commission, and almost all expand the scope and usage of executive rulemaking, the executive power gains induce the need for more distinct constitutional guidelines for executive rulemaking and for strengthened parliamentary control, to preserve the institutional power balance between legislative and executive rulemaking. The analysis develops proposals insofar and demands respect for constitutional barriers already enshrined in EU Primary law but not sufficiently addressed yet in institutional practice.

Introduction

The European Commission presented, in its White Paper on the Future of Europe,[1] five partly overlapping scenarios on the future of the EU in 2025, which represent a frame of reference[2] for the ongoing discussion on its reform. In September 2017, President Juncker, in his State of the Union speech,[3] added a 6th scenario that was denoted "more ambitious, more forward-looking"[4] as it is intended to make full use of the potential of the Lisbon Treaty.

* Professor of Public Law, European Law and Public International Law. The research leading to this paper has received funding from the German Research Foundation DFG, project WE 2653/3-1. I owe thanks to the reviewers for valuable comments.

[1] Commission, "White paper on the future of Europe−Reflections and scenarios for the EU 27 by 2025", COM (2017) 2025 final.

[2] C. Calliess, "Bausteine einer erneuerten Europäischen Union" (2018) 1-2 Neue Zeitschrift für Verwaltungsrecht 1,9.

[3] http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

[4] See J.-C. Juncker´s Letter of Intent to President Antonio Tajani and to Prime Minister Jüri Ratas, 13 September 2017, p.3.

The scenarios about the future of the EU prompt the question as to their meaning for the future of EU administrative law. This article researches the future of EU executive rulemaking considering the White Paper scenarios. It explores the possible developments of EU executive rulemaking, the highlighted policy areas and their ideas of the EU. This exploration requires, first of all, determining the criteria for assessing the future of executive rulemaking. The discussion will identify the determinants at the legisprudential and constitutional levels. The paper, therefore, explores the functions and rationale of executive rulemaking and problematizes its constitutional prerequisites and conceptualisations. This article also will demonstrate that in EU law and institutional practice, the legisprudential and constitutional rationales of executive rulemaking common to the traditional ideas of the roles and responsibilities of the legislative versus the administrative prevail, which distinguish legislating on basic, essential, and hence political issues from simplified, depoliticized and rather technocratic executive rulemaking. This distinction, however, is not underpinned by a material conception of legislation, executive rulemaking or political issues. Consequently, the constitutional limitations to the delegation of executive rulemaking come to the fore (procedural requirements for delegation; legislative control powers). An analysis of the scenarios, therefore, has to consider their implications for the political finality of the EU, as changes insofar could require recalibrating the institutional balance in the EU.

Thereafter, this piece will analyse the scenarios from both the legisprudential and the constitutional perspective with a view to scrutinize their implications for the future of executive rulemaking and its constitutional consequences, in light of the constitutional underpinnings of the scenarios as well. The analysis will demonstrate that some scenarios imply a more powerful political role of the Commission, and almost all expand the scope and usage of executive rulemaking. The executive power gains induce

the need for more distinct constitutional guidelines for executive rulemaking and for strengthened European Parliament control over the Commission, to preserve the institutional power balance between legislative and executive rulemaking. The expansion of executive rulemaking, which may be welcomed from an executive perspective, raises profound concerns about the legitimacy of executive rulemaking. Therefore, this article will develop proposals that strengthen parliamentary control over executive rulemaking, and reinforce respect for their constitutional barriers, which are already enshrined in the Treaty but have not been sufficiently addressed in institutional practice.

Before starting, the scenarios mentioned above and the notion of executive rulemaking, central to this paper, shall be set out briefly.

The White Paper Scenarios, and the Notion of Executive Rulemaking

The Scenarios

The White Paper sketches out five scenarios which symbolize different ways in which the EU could develop by 2025, and these ways reflect their titles. Scenario 1 (Carrying On) presents the scenario where the EU27 sticks to its course and focuses on implementing its current reform agenda as set out in the Bratislava Declaration agreed by all 27 Member States in 2016.[5] Scenario 2 (Nothing but the Single Market) is a considerably restraining vision of the EU. The focus is on deepening certain key aspects of the single market. The EU no longer intensifies its work in most policy areas. The considerable setback in the depth of the integration expresses itself already in the terminology employed, as scenario 2 does not use the term internal market (as applied

[5] See https://www.consilium.europa.eu/en/press/press-releases/2016/09/16/bratislava-declaration-and-roadmap/

in EU law since its incorporation by the SEA)[6] nor common market (introduced by the Maastricht Treaty).

Scenario 3 (Those who want more do more) provides for an EU which allows the willing Member States to work together more closely in specific areas. Diverse groups of Member States agree on specific legal and budgetary arrangements to deepen their cooperation in chosen domains like defence, taxation or social matters. Scenario 4 (Doing less more efficiently) portrays an EU which focuses on delivering more and faster in selected policy areas while doing less elsewhere. To better address certain priorities together, the EU concentrates its attention and resources on certain areas like migration, trade, security and innovation. Scenarios 5 (Doing much more together) finally projects an EU that gains more powers and resources and thereby expands its decision-making across the board. This vision would be built on a consensus among the Member States that neither the EU as it currently exists nor its Member States on their own, are well-equipped enough to face the present challenges.

As the intent of the White Paper was not to be an agenda for future reform of the constitutional underpinnings of the EU, the White Paper drew up these scenarios without any account for institutional or competence issues.[7] Hence they do not spell out what type of changes to the EU Treaties might be necessary for putting them into practice. Nevertheless, the scenarios imply to some degree differing imaginations of the political salience of the EU, as will be shown in more detail below.

In contrast, Scenario 6 was introduced in Juncker´s 2017 State of the Union speech and was deliberately developed within the framework of the Lisbon Treaty so that its implementation would not require reform. The scenario was drafted with a view to

[6] Single European Act [1987] OJ L 169, 29.6.1987, pp.1-28; see in particular its art.13, introducing a new art.8a EECT.
[7] White Paper, p.15: "form will follow the function".

"making full use of the untapped potential of the Lisbon Treaty".[8] Scenario 6 comprises elements of the White Paper scenarios. It introduces actions and initiatives to be presented or even completed until March 2019, in accordance with the already established 2014 Political Guidelines[9] and, thus, in line with scenario 1. In addition, it adds more ambitious and forward-looking initiatives which will shape the EU by 2025 and reflect parts of scenarios 3 to 5.[10] Scenario 6 is the most progressive one in terms of strengthening EU powers and institutions.[11] Scenario 2, the vision of restraining the EU to the "single market", therefore, was not embraced in Scenario 6. The detailed measures and priorities of the 6th Scenario are set out in the Roadmap for a More United, Stronger and More Democratic Union.[12]

The notion of executive rulemaking

Executive rulemaking is a broad concept; therefore, it must be clarified here to give some clearer contour to the scope of this paper: The notion of executive rulemaking refers to the adoption of abstract, general binding rules by administrative institutions of the EU, in the words of the ReNEUAL model rules: "legally binding non-legislative acts of general application".[13] Hence, there are two components: non-legislative (i.e. secondary or tertiary[14]) rulemaking and the executive. Rulemaking means the adoption

[8] Juncker´s Letter of Intent, p.3.
[9] J.-C. Juncker "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change", 15 July 2014.
[10] See Juncker´s Letter of Intent, p.3.
[11] See C. Fasone/D. Fromage, "The Commission and the challenges of differentiation post-Brexit: its role and the new inter-institutional balance", ISL Working Paper 2018:1, p.9.
[12] Set out in Juncker´s Letter of Intent, p.4-11.
[13] See art.II-1 of the ReNEUAL Model Rules on EU Administrative Procedure. Measures of general scope are those which 'are addressed in abstract terms to undefined classes of persons and apply to objectively determined situations', see CJEU, *Jégo-Quéré* (C-263/02) EU:C:2004:210 at [43].
[14] A word on terminology: While in EU parlance, the distinction between primary and secondary law is commonly accepted (secondary law being any rule adopted on the basis of primary law, i.e. EU Treaties), in common law terminology, secondary law is referred to as the body of rules enacted on the basis of legislation, i.e. statutes (P. Craig, in Bergström/Ritleng (eds), *Rulemaking by the European Commission: the new system for delegation of powers*, (New York: Oxford University Press, 2016), pp.173,174). Hence, secondary law in the latter sense addresses those rules that are based on legislative acts, whereas secondary law in the

of abstract rules based on legislative mandates which empower executive institutions with rulemaking having an external effect,[15] under the control of the legislative. This definition excludes EU individual decision-making and in principle also EU soft law from the scope of this paper.[16] Regarding executive institutions, this notion relates to all institutions of the EU executive, i.e. EU authorities in the sense of art.II-1 ReNEUAL Rules: predominantly, of course, the Commission (which is defined as an executive and management institution (art.17 (1) TEU), hence, in essence, the Commission is not a political body to the same degree as the Council and the European Parliament),[17] but also agencies and other bodies. The notion of executive rulemaking is also closely related to centralized, as opposed to the decentralized domestic implementation of EU law. Thus, executive rulemaking means the adoption of abstract rules by the Commission, agencies and other EU bodies in the application or implementation of EU legislative rules. The (non-conclusive) constitutional basis for executive rulemaking can be found in arts 290 and 291 TFEU on delegated and implementing acts. The Lisbon treaty introduced the distinction between legislative (see art.289 (3) TFEU) and "sub-legislative" acts,[18] and also prior to this EU law distinguished legal acts based directly

former meaning would only relate to the enabling legal acts adopted in legislative procedures (art.289 TFEU), so that the corps of derived rules adopted on the basis of a mandate enshrined in a legislative act would rather be termed "tertiary law". For the term "tertiary legislation" see Commission "Annual Report on Better Regulation: Completing the Better Regulation Agenda", COM (2017) 651 final, p.6.

[15] There is also the category of genuine, internal executive rulemaking which gives interpretive guidelines and is binding on commission staff only, like recommendations or guidelines in particular in the area of EU competition law. For such administrative rules in the narrow sense see H. Hofmann/G. Rowe/A. Türk, *Administrative Law and Policy of the EU*, (New York: Oxford University Press, 2011), p.97

[16] With regard to soft law, agency rulemaking may formally be adopted in soft law instruments like guidelines, but in substance be of legal effect. Hence, such type of "soft" rulemaking will be included in the scope of this paper.

[17] The Commission, of course, exercises important political functions, e.g. by its agenda setting and almost monopoly of drafting competence in EU law making. In particular the Juncker Commission has augmented the political agenda and self-conception of the Commission as a political actor. The lead candidates "Spitzenkandidaten" process in the last European Parliament election, whose repetition the Commission proposes, in addition paves the way for a substantively increased political understanding of the Commission´s role (see COM (2018) 95, pp.3,4), which however may not fulfil its promise, see M. Goldoni, "Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale" (2016) E.L.J. 279-295.

[18] H. Hofmann/G. Rowe/A. Türk, *Administrative Law and Policy of the EU*, 2011, p.97.

on EU primary law from legal acts that are derived from other EU legal acts that form their legal basis.[19] Additionally, art.114 TFEU serves as the constitutional basis for the conferral of rulemaking authority to EU agencies.[20] Agencies play a pivotal role in EU executive rulemaking, either by being involved in the Commission´s rulemaking under arts 290/291 TFEU or by exercising genuine rulemaking powers (e.g. to adopt binding guidelines) delegated to them by the EU legislative branch.[21]

Determinants for assessing the future role of EU executive rulemaking

Assessing the future of executive rulemaking requires identifying the factors which steer the legislative use of executive rulemaking by way of delegation[22], or which determine the constitutional conditions which impact its use. Thus, there are two levels which have to be analysed, the rather practical, legisprudential level and the constitutional level. On the former, the motivations of the legislator for the use of executive rulemaking, and the role and functions of executive rulemaking become relevant, whereas on the latter, the deeper systemic (and therefore: constitutional) reasons and conditions for the use of executive rulemaking and the surrounding framework conditions for the delegation of powers have to be explored. This effort requires a close look at the constitutional ideas

[19] See already CJEU *Köster* (C-25/70) EU:C:1970:115 at [6].
[20] CJEU *United Kingdom v European Parliament, Council of the EU* (C-270/12) EU:C:2014:18. For a critical analysis E. Fahey, "Does the Emperor Have Financial Crises Clothes? Reflection on the Legal Basis of the European Banking Authority" (2011) 74 Modern Law Review 581,586-592. The European Parliament Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the EU, P8_T (2017) 0048, para. 80, calls for a new specific "legal basis with a view to establishing Union agencies that may carry out specific executive and implementing functions conferred upon them" by the EU legislative.
[21] For more detail on the role of agencies in executive rulemaking in the EU see M. Chamon, "EU agencies between Meroni and Romano or the devil and the deep blue sea" (2011) 48 C.M.L.Rev. 1055; W. Weiß, "Dezentrale Agenturen in der EU-Rechtsetzung" (2016) 6 Europarecht 631.
[22] The term is used here in a broad, functional sense (meaning conferral of powers by the legislative to an executive institution) and not limited to, but comprising, the form of delegation in the sense of art.290 TFEU.

and underpinnings of what the future EU should look like, which are behind the different scenarios of the White Paper. The constitutional identity of the EU carries weight in the conditions for making use of executive rulemaking.

Both levels of the parameters for the use of executive rulemaking are affected in the different scenarios of the White Paper.

With regard to the legisprudential level, some scenarios in the White Paper are based on the promise of more efficient EU regulation and "greater enforcement powers"[23] on EU level (scenario 4 and also scenario 5). Some scenarios do not directly suggest improved or more efficient EU implementation, but they imply it by promising progress in policy areas particularly linked to the use of executive rulemaking, like financial markets regulations[24] (see scenario 1[25] or priority 4 of scenario 6 that includes a Capital Markets Union package),[26] or by proposing an expanded role of agencies (see scenario 6, priority 2).[27]

As regards the constitutional level of framework conditions for executive rulemaking, the constitutional conceptions ascribed to the EU that stand behind the different scenarios differ to a certain extent (more on this topic below). Scenario 5, at any rate, belongs to a completely different category than scenario 2: Scenario 5 aims at increasing shared "power, resources and decision-making across the board" and at augmenting

[23] COM (2017) 2025, p.22.
[24] Insofar see E. Chiti, "In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum" (2015) 17 Cambridge Yearbook of ELS 311,313-318.
[25] COM (2017) 2025, p.16: "Further steps are taken to strengthen financial supervision".
[26] It provides for "the revision and reinforcement of the tasks, governance and financing of the EU Financial Supervisory Authorities; concrete steps towards a single European Capital Markets Supervisor and adjustments to the European Systemic Risk Board". Furthermore, a revised framework for investment firms, an action plan on sustainable finance with regulatory measures, an initiative on FinTechs and other regulatory initiatives are foreseen, see Letter of Intent, p.7.
[27] Which announces "a proposal to strengthen the Agency for Network and Information Security (ENISA); an implementation toolkit for the Network and Information Security Directive", see Letter of Intent, p.4. Juncker also mentions a Cyber Security Agency in his State of the Union speech 2017.

faster decision-making and enforcement[28] at the EU level, which in effect will mean expanding the EU competences and improving its supranational institutional structures. In contrast, scenario 2 will reduce the level of integration in the EU, which may turn the EU into something like a "Customs Union plus", i.e. a transnational EU dealing with economic policy matters only, instead of "an ever closer union among the peoples of Europe" (art.1 (2) TEU). Whereas, scenario 5 might require the EU to be brought forward to a new stage in the creation of an ever closer Union, and hence be developed into an entity again a bit closer to a federal state, scenario 2 comes down more or less to turning the EU into a supranational international organization (merely) for increased trade cooperation. As mentioned, the terminology in scenario 2 already expresses the involution in European integration. Furthermore, it appears incompatible with the EU´s current objectives of a working internal market and of a social market economy in art.3 TEU.[29] As submitted by *Hesse*, scenario 2 might have been added to disqualify the visions the UK Government might have with regard to the EU.[30]

The legisprudential level: the functions and rationale of executive rulemaking

The delegation of legislative power to executive or administrative institutions with the aim of empowering them to adopt subordinate rules of binding force is a concept well-known in modern constitutionalism even though there is no common conception about its prerequisites, scope, and constraints.[31] The basic idea anyway is to ease the burden of the legislator in adopting legislation and to simplify rulemaking. Profound

[28] See COM (2017) 2025, p.24.
[29] C. Calliess, "Bausteine einer erneuerten Europäischen Union" (2018) 1-2 Neue Zeitschrift für Verwaltungsrecht 1,5; a functioning single market implies harmonization of a broader set of policies, see Editorial Comments, "The EU-27 Quest for Unity", (2017) 54 C.M.L.Rev. 681,690.
[30] J. J. Hesse, "Abschied von der *ever closer Union*" (2017) Zeitschrift für Staats- und Europawissenschaft 173,192.
[31] See B. Iancu, *Legislative Delegation*, (Berlin, Heidelberg: Springer-Verlag, 2012), p.3.

technological and societal developments of the 19th and 20th century prompted the need for propagated regulation which Parliaments no longer were able to supply,[32] and this need has increased since the advent of privatization, globalization and digitization.

Hence, the concept developed that the legislator is supposed to make the foundational, essential decisions and leave the rest to the administration by empowering it to regulate the technical details and the necessary procedural or substantive rules for the sound application and implementation of the legislation. This basic concept of delegation is also reflected in the EU legal order,[33] most prominently in arts 290 and 291 TFEU (even though they do not establish an exhaustive system of delegation of rulemaking in EU law): Under art.290, legislative acts may bestow the Commission with the authority to adopt delegated acts of general application that amend or supplement legislative acts (and hence may be seen as quasi-legislative[34]), whereas under art.291 (2) the Commission may be entrusted with the power to adopt (individual or general) implementing acts, in continuation of the long-established Comitology system.[35] Common to these variations of delegation is the requirement of a basic enabling legal act that establishes the mandate of the delegatee. The object of delegation is rather broad: Under art.290, the delegatee may supplement or amend the enabling act in its substance, including its annexes.[36] Thus, the Commission is entitled to expand on

[32] On the origins of delegation see B. Iancu, *Legislative Delegation*, 2012, p.7-10; M. Pecaric, "An old absolutist amending clause as the 'new' instrument of delegated legislation" (2016) 4 Theory and Practice of Legislation 1,3-6.
[33] See P. Craig, *The Lisbon Treaty*, 2nd edn (New York: Oxford University Press, 2013), p.48-55.
[34] Cf. J. Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 C.M.L.Rev. 885, 917; P. Craig, *The Lisbon Treaty*, 2013, p.264; D. Curtin, *Executive Power of the EU*, (New York: Oxford University Press 2009), p.122.
[35] For the development of Comitology see C. Bergström, *Comitology: Delegation of Powers in the EU and the Committee System*, (New York: Oxford University Press, 2005); for its reform under the Lisbon treaty see C. Bergström/D. Ritleng (eds), *Rulemaking by the European Commission*, 2016.
[36] See Commission, "Communication from the Commission to the European Parliament and the Council-Implementation of Article 290 of the TFEU", COM (2009) 673 final, p.4.

elements of the legislative act that work out the details and specifics of the legislation.[37] Under art.291, the Commission may implement the empowering act (not necessarily a legislative one) by applying it to individual cases in situational contexts or by adopting general rules that add more detail so that the basic Act can be applied to individual cases. Hence, both mechanisms of conferring rulemaking power to the executive may be used to make broadly drafted stipulations of the basic act applicable. Even though delegation could be perceived as a violation of the allocation/separation of powers,[38] one can also propose the reading that delegation transposes the very idea of allocating powers to institutions rightly, commensurate with their branch-specific constitutional functions. In this view, the delegation of rulemaking powers reflects a division of labour between institutions according to their institutional design and function, and is, therefore, fully compliant with the principle of separation of powers and institutional balance.[39] Whereas the legislator is responsible for legislation that sets the fundamental rules in a policy field in a legislative procedure, it is the executive that has to play the regulatory role, which means that regulation in a strict sense is not the domain of the legislator. The legislator is called to set the basic principles and guiding rules, but it is not supposed to interfere with details of implementation and application. In line with this conceptualisation, art.290 TFEU precludes the delegation of the essential elements of an area (more on this concept follows).

The above-mentioned rationale of executive rulemaking is also reflected in the position of the EU institutions on the use of delegated and implementing rulemaking. The EU Interinstitutional Agreement (IIA) on Better Law-Making adopted in 2016 aims at facilitating the transposition and practical application of EU legislation, and therefore

[37] D. Curtin, *Executive Power of the EU*, 2009, p.122.
[38] H. Hofmann/G. Rowe/A. Türk, *Administrative Law and Policy of the EU*, 2011, p.223.
[39] See B. Iancu, *Legislative Delegation*, 2012, p.4-5; M. Pecaric, "An old absolutist amending clause as the 'new' instrument of delegated legislation" (2016) 4 Theory and Practice of Legislation 1.

integrates rules on the use of delegated and implementing acts as "integral tool[s] for Better Law-Making, contributing to simple up-to-date legislation and its efficient, swift implementation".[40] Executive rulemaking hence is used to simplify rulemaking, to speed up the process of amending the regulatory framework (particularly required to react to unexpected incidents) with a view to improve the efficiency of an EU policy,[41] and to impart issue-specific technical and/or scientific knowledge to the rulemaking.[42] Legislative procedures are time-consuming, intricate and unpredictable in their outcomes; they are the wrong place to deal with technocratic issues as the Members of the co-legislative institutions (Members of the European Parliament and National Representatives in the Council) rather represent general policy perceptions and orientations which enables them to decide about the lasting guidelines to be followed in the pursuit of the common good, but they are ill-equipped for deciding about technical details of implementation and application of the law. Empowering the executive to adopt the necessary details allows for their expeditious adoption so that overall the regulatory framework in a policy field still can quickly be held up to date. Furthermore, executive rulemaking permits implementing the use of the specific administrative expertise of the executive necessary for the practical implementation of policies. Closely related is the rationale of depoliticization: Whereas, the political is to be determined and arranged by the legislative (as its institutions are political in nature, more or less directly related to the people/citizens), executive rulemaking is supposed to apply to specific, rather technical issues that are better regulated outside political fora, to a certain degree autonomous from the political process. There are rather technical or

[40] See Rule 26 of the IIA Better Law-Making, [2016] OJ L 123/1, usually called IIA on Better Regulation.
[41] For this rationale of delegation see CJEU, *Council of the European Union v European Commission* (C-409/13) EU:C:2015:217 at [91].
[42] See also Committee of Legal Affairs, "On the Power of Legislative Delegation", 2010/2021 (INI), Rapporteur J. Sjazer, recital H: "delegation can be seen as a tool for better law-making, the objective of which is to ensure that legislation can at the same time remain simple and be completed and updated without needing to have recourse to repeated legislative procedures".

scientific issues which have to be entrusted to specialized expertise and should not be hammered out by politicians. Admittedly, the distinction between the purely political and merely technical aspect of a policy field is not easy to draw. The European Parliament (EP) recently clarified "that the delegation of power to the Commission is not merely a technical issue, but can involve questions of political sensitivity which are of considerable importance to EU citizens, consumers and businesses". Insofar, it recalled that politically significant elements, such as Union lists or registers of products and substances should remain an integral part of a basic act", i.e. legislative act, "and should therefore only be amended by means of delegated acts" in the sense of art.290 TFEU.[43] Hence, an act of delegation under art.290 TFEU can transfer some limited political leeway. The rationale of bringing-in technical expertise and of depoliticization may not apply to all types of executive rulemaking to the same degree.

The depoliticization rationale backs the independence of central banks since monetary policy is a very sensitive field, which for different reasons is better placed in the hands of experts in this field and not handed over to politicians who could be tempted to tailor financial policy measures according to short-sighted needs for electoral campaigning or their political subservience to economic policy objectives. A similar rationale supports the ubiquitous agencification in European administrative law: Agencies are the means of choice to address regulatory needs, and they are therefore objects of delegation. Agencies were created by the EU in order to strengthen the continuity, credibility, transparency and legitimacy of EU regulatory actions.[44] The efficiency of regulation

[43] EP Resolution of 30 May 2018 on the Interpretation and Implementation of the IIA on Better Law-Making, 2016/2018(INI) paras 47,53.

[44] W. Weiß, in Hofmann/Weaver (eds), *Transatlantic Perspectives on Administrative Law*, (Brussels: Bruylant, 2011), pp.221,232-235; H. Hofmann/A. Morini, "Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'" (2012) 37 E.L.Rev. 419,421-423; H. Hofmann, in Bignami/Zaring (eds), *Comparative Law and Regulation*, (Cheltenham, Northampton: Edward Elgar Publishing, 2016), p.519,527. More generally G. Majone, in L. Leisering (eds) *The New Regulatory State. Transformations of the State* (London: Palgrave Macmillan, 2010), pp.7-8.

depends on the regulatory consistency and credibility for the stakeholders concerned. Rulemaking powers are conferred upon them for reasons of the need for technical expertise for fact-finding, factual analyses, risk-assessment and risk-management in the adoption of rules that govern markets, and such proficiency is perceived to add to the legitimacy, quality and functionality of (better) regulation. As the CJEU stated with regard to the ESMA´s mandate for externally binding decision-making,[45] these are "powers in an area which requires the *deployment of specific technical and professional expertise*". Regulatory agencies "must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions in order to prevent an uncontrolled fall in the price of those instruments. Those bodies have a *high degree of professional expertise"*.[46] Yet, it is subject to fierce controversy whether the powers granted to the agencies really do relate only to the purely technical implementation or whether they amount to policy-making and quasi-legislating.[47]

In EU law, there are also other rationales for opting for delegation, such as a shift in blame for unpopular decisions,[48] or a common attempt by Council and Commission to circumvent the increasing Parliamentary involvement by conferring implementation

[45] Art.9 (5) of the ESMA Regulation 1095/2010 determines the type of action delegated to ESMA (insofar see also CJEU, *United Kingdom v European Parliament, Council of the EU* (C-270/12), EU:C:2014:18 at[49]): ESMA "may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts". Hence, not only single case decision-making is covered but also decisions of general application, which amounts to rulemaking. A "decision" in art.288 TFEU refers to both a single-case decision addressed to certain addressees or a general rulemaking act addressed to an undefined multitude of addressees ("rule making decision", K. Bradley, Legislating in the EU, in C. Barnard/S. Peers (eds), *European Union Law*, (New York: Oxford University Press, 2014), pp.97,101, see also D. Chalmers/G. Davies/G. Monti, *European Union Law*, 3rd edn (Cambridge: Cambridge University Press, 2014), p.112.

[46] *United Kingdom v European Parliament, Council of the EU* (C-270/12) EU:C:2014:18, at [82, 85] (emphasis by author). This judgment, of course, has been subject to fierce criticism, see M. Ruffert, in E. Fahey (ed), *The Actors of Postnational Rulemaking*, (Oxon: Routledge, 2016), pp.47,59-62.

[47] R. van Gestel, "Primacy of the European legislature: Delegated rule-making and the decline of the 'transmission belt' theory" (2014) 27 Theory and Practice of Legislation 33,39; H. Hofmann, in Bignami/Zaring (eds), *Comparative Law and Regulation*, 2016, p.519,528.

[48] Hofmann/Rowe/Türk, *Administrative Law and Policy of the EU*, 2011, p.51.

powers to the Commission,[49] which may, however, no longer be prevalent to the same degree as before. With the Lisbon Treaty, the EP has become a true co-legislator and actively participates in deciding on making use of delegation to the Commission or to EU agencies, whose mandates must be laid down in legislative acts.[50] Therefore, these rationales are not the focus of this paper.

In conclusion, we can state that EU law and institutional practice clearly reflect the traditional views on the justification for the use of executive rulemaking. Executive rulemaking is used for simplified, depoliticized and rather technocratic executive rulemaking.

The constitutional level: democratic prerequisites and constitutional conceptualisations for executive rulemaking

Identifying the practical rationales for executive rulemaking in the EU is not sufficient for a comprehensive analysis of its future role under the White Paper scenarios. Executive rulemaking depends on certain constitutional precedents and conditions, e.g. the idea of delegation and its constraints, or the conceptualisation of the legislative versus the executive. The traditional perspective on justifying the use of executive rulemaking raises the question of the distinction between the realm of the legislative and that of the executive. The meaningfulness of the prevailing view is fiercely criticized as an "illusion that the primary legislation captures all issues of principle,

[49] R. van Gestel, "Primacy of the European legislature: Delegated rule-making and the decline of the 'transmission belt' theory" 27 Theory and Practice of Legislation 33, 39; A. Héritier/C. Moury/C. Bischoff/C. F. Bergström, *Changing Rules of Delegation*, (Oxford: Oxford University Press, 2013), pp.128,129: "almost co-equal role with the Council under delegation".
[50] See art.290 TFEU; conferring implementation powers under art.291 TFEU does not require the mandate to be contained in a legislative act, but many implementing mandates are enshrined in legislative acts. See also IIA on Better Law-Making, [2016] OJ L 123/1, para.26: "it is the competence of the legislator to decide whether and to what extent to use delegated or implementing acts"

while secondary norms address insignificant points of detail".[51] Therefore, one has to look at the distinction between legislation and executive rulemaking, as currently present in the EU, before one can address the question of how this distinction might be affected by the scenarios.

The idea of legislation and the notion of "essential elements": Decision-making on political issues

The delegation of rulemaking powers to executive actors raises very fundamental constitutional questions as to their constitutional base and legal constraints. It has been held already more than 80 years ago that the practice of delegation is a litmus test for the genuine state of constitutional order and an important symptom for its overall development.[52] Any attempts in distinguishing executive rulemaking from legislation raise the fundamental question for the notion of legislative acts. If in a constitutional order the notion of what a legislative act (a statute) actually means and how it is classified is distinct, then the limitations to delegation and its essence can be clearly determined. Conversely, the rules and practice on delegation shape the notion of a legislative act (in distinction from an executive act), the allocation of powers among the different branches of government and hence the overall constitutional order.[53] Thus, an attempt in assessing the future of executive rulemaking in the EU must consider the repercussions the use of executive rulemaking has on its constitutional shape.

In a democratic legal order, legislation being the highest form of rulemaking of general application is the domain of the legislative, as it is *the* branch of government that usually

[51] P. Craig, *The Lisbon Treaty*, 2013, p. 49.
[52] See C. Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)" (1936) 6 ZaÖRV 252,253.
[53] See C. Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)" (1936) 6 ZaÖRV 252,253, 254,267,268.

enjoys the highest legitimacy due to its direct link to the *demos* by virtue of general elections. Consequently, legislation is the task of the legislative, i.e. the parliament being the directly elected majoritarian institution, and delegation of legislative powers by the legislative to the executive is the exception in need of justification. The delegation has to respect certain limits and is subject to procedures allowing for control and scrutiny. These procedures and limitations have to bring about the democratic legitimacy of the executive rulemaking.

These fundamental constitutional considerations are reflected in the EU Treaties since Lisbon. Art.290 TFEU precludes the delegation of the essential elements of an area and contains further limitations to the delegation. Under art.290 (1) subpara. 2, the essential is to be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. In other words: transferring rulemaking on fundamental issues, i.e. the basic elements of a matter, to other branches of government outside the legislative is unconstitutional under the EU legal order. As the CJEU rightly observed, the essential must be reserved to the EU legislature because of their political nature as they comprise political or strategic decisions on the fundamental orientation of EU policy. Such decisions require immediate democratic legitimation as they imply wide discretion, in particular, the need for political choices and value judgments that weigh conflicting policy aims and interests.[54] Likewise, the objectives, content, scope and duration of the delegation shall be explicitly defined in the legislative acts which give expression to the obligation that delegation may not be unspecified but shall determine and circumscribe

[54] CJEU, *European Parliament v Council of the EU*, (C-355/10) EU:C:2012:516 at [64-67,76,78]; *Germany v Commission of the EC* (C-240/90) EU:C:1992:408 at [37]; see also AG Jääskinen, Opinion in *United Kingdom v European Parliament and Council of the EU* (C-270/12), para. 93. Not entirely negligible interferences with fundamental rights amount to essential elements of a policy as well, CJEU, *European Parliament v Council of the EU* (C-355/10) EU:C:2012:516 at [77];*European Parliament v Council of the EU* (C-363/14) EU:C:2015:579 at [53]. See also D. Curtin/T. Manucharyan, in Arnull/Chalmers (eds), *The Oxford Handbook of EU Law*, (New York: Oxford University Press, 2015), p.103,112.

precisely the powers of the delegatee.[55] The fundamental idea behind these stipulations on executive rulemaking is the insight that such limitations for the delegation of rulemaking to the executive "ensure that certain choices are made by an institution with a superior democratic pedigree… [They are a] contemporary incarnation of the founding effort to link protection of individual rights, and other important interests, with appropriate institutional design".[56]

Absence of a material notion of legislation and executive rulemaking

Even though the CJEU, under art.290, determined the realm of the legislative as being one of decision-making on the political, essential issues, a material notion of a legislative act hardly is reflected in the rest of the EU Treaty rules. A clear conceptualization of the notion of legislation at the EU constitutional level is lacking. The Draft Treaty establishing a Constitution for Europe[57] intended to establish the notion of European laws (statutes) and European framework laws and thereby to introduce the distinction between legislative acts in contrast to non-legislative acts (see art.I-33). The terminology of "law" or "framework law" was not transferred to the Lisbon Treaty. The term "legislative act", however, has been adopted and legislative procedures have been introduced by the Lisbon Treaty. Interestingly, the category of non-legislative acts used in art.I-33 Constitution Treaty was not transferred to Lisbon with similar categorical rigour: arts 290 I and 297 II TFEU mention the category of non-legislative acts only on two occasions, whereas arts I-33, I-34 and I-35 of the Constitution Treaty introduced the category of non-legislative acts in distinction from

[55] See J. Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 C.M.L.Rev. 885,914; CJEU, *Smoke Flavourings: United Kingdom v European Parliament and Council of the EU* (C-66/04) EU:C:2005:743 at [49,62]

[56] C. Sunstein, Nondelegation principles, in R. Baumann/T. Kahana (eds), *The Least Examined Branch – The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006), p.139,140.

[57] [2004] OJ C 310/1.

that of legislative acts, in a categorical distinctive manner. Thus, the Lisbon Treaty appears to have diminished the conceptual content of the category of "non-legislative acts" even though a distinction between legislative and non-legislative acts still exists and has been portrayed as one of the fundamental changes brought about by the Lisbon Treaty.

Nevertheless, one has to deplore that EU law after Lisbon still lacks a clear substantive rationale behind the distinction between "legislative" versus "non-legislative acts" when looking at the prescriptions in TEU/TFEU according to which legislative versus non-legislative procedures have to be employed. Legislative procedures apply only when the EU Treaties explicitly provide for the use of a legislative procedure (thereby distinguishing between "ordinary" and "special legislative procedure"), but the distinction between legislative procedures, legislation and hence legislative acts, on the one hand, and other (non-legislative) legal acts, on the other hand, is not supported by any well-defined clear rationale or substantive reason.[58] Furthermore, there is no discernible system in the TFEU under which legislative procedures are categorized as either ordinary or special legislative procedures, thus no substantive constitutive significance can be allocated to this classification in the TFEU.[59] Hence, there is no substantive EU concept of legislation besides a merely formal one that relates to the use of legislative procedures, including the then inherent higher level of transparency and hence enhanced public scrutiny,[60] as the factor distinguishing them from other (i.e. non-legislative) legal acts (see art.289 (3) TFEU).[61] Thus, only art.290´s stipulation that the

[58] Compare J. Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 C.M.L.Rev. 885, 895-899; M. Dougan, "The Treaty of Lisbon 2007: Winning minds, not hearts" (2008) 45 C.M.L.Rev. 617,647; P. Craig, *The Lisbon Treaty*, 2013, p.256-258.
[59] W. Weiß, "After Lisbon, can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?" (2011) 2 JECLAP 441,448.
[60] See J. Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 C.M.L.Rev. 885,894.
[61] See J.-C. Piris, *The Lisbon Treaty*, (Cambridge: Cambridge University Press, 2010), pp.93-94, who points out that in contrast to the Lisbon Treaty under the European Constitution it

essential has to be regulated by the legislator in legislative acts contains a hint to a material conception of legislative acts (as opposed to other legal acts). A precise indication of what the "essential" is, still lacks, but the CJEU has clearly indicated, as set out above, that the essential is the prerogative of the legislative branch due to its political nature. This determination, however, raises another problem which pertains to the absence of a distinct legal concept of what might be a political issue under EU law. This absence might constitute the deeper reason behind the lack of a material conception of legislation in EU law. For some Europeanists, the EU is a mere technocratic and hence a rather unpolitical institution of denationalized administrative governance.[62] Even though such conceptualization of the EU considerably underestimates the powers delegated to the EU (which place the EU in position to intensely change the domestic legal and even constitutional order,[63] and render the EU a normative power even on global scale),[64] it expresses the inherent tension between the simultaneous presence of both a very often technocratic, overly detailed regulatory culture, on the one hand, and the existence of fundamental provisions of primary or secondary EU legislation that are significant for the life of individuals and that raise the need for improvement of the political legitimacy of the EU institutions´ supranational rulemaking, on the other hand. These conflicts cause a state of uncertainty about the nature of the EU in general. Undeniably, even though the EU has a political essence, it is combined with insecurity about the reach and essence of its powers towards political functions. This uncertainty makes reaching a constitutional consensus on the nature of EU legal rules and thus of EU legislation rather difficult, including on the determination of the 'political' or 'legislative' domain versus non-legislative rulemaking, as well as the determination of

should not have been the legislative procedure, but the denomination of the legal act as 'European law' or 'European framework law' which would have been decisive.

[62] Very pronounced P. Lindseth, *Power and Legitimacy*, (New York: Oxford University Press, 2010).

[63] A grand portion of domestic legislative content in the Member States is directly or indirectly steered from Brussels.

[64] E. Fahey, *The Global Reach of EU Law*, (Oxon: Routledge, 2016).

different forms of non-legislative acts. As Liisberg rightly stated (with regard to the Constitutional Treaty), despite the distinction between legislative and non-legislative acts, the EU "still is an ´unidentified political object´ … regardless of the imported language of legislation from national democracies".[65] The lack of clear conceptualization is reflected in the CJEU´s hesitance as to precise guidelines for what a legislative act must contain in view of the exigencies enshrined in art.290 TFEU (that the essential to be regulated by the legislative,[66] and the "objectives, content, scope and duration" of the delegation be determined by it). Even though the CJEU accepts that these are limitations to the process of delegation that must be fixed by the empowering legislative act,[67] the CJEU´s interpretation of these demands does not raise meaningful barriers to delegation.[68]

For this reason, it does not come as a surprise that the distinction between delegated and implementing executive rulemaking in arts 290 and 291 TFEU is extremely intricate, if not impossible. The intricacies of this distinction mirror the constitutional problem spelt out above. On a theoretical level, delegated rulemaking under art.290 can be ascribed to a quasi-legislative function conferred upon the Commission to regulate the non-essential, but still policy-related aspects of a legislative acts[69] (hence the control mechanisms are handed over to the EP and the Council, i.e. the legislative political institutions)[70], whereas implementing rulemaking appears to be related to the genuine

[65] J. Liisberg, "The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?", Jean Monnet Working Paper 1/06, 45.
[66] See M. Chamon, "'How the concept of essential elements of a legislative act continues to elude the Court: Parliament v. Council" (2013) 50 C.M.L.Rev. 849; D. Ritleng, The Reserved Domain of the Legislature. The Notion of Essential Elements of an Area, in C.F. Bergström/D. Ritleng (eds), *Rulemaking by the European Commission. The New System for Delegation of Powers*, 2016, pp.133,149-155.
[67] CJEU, *Commission v Parliament and Council* (C-427/12) EU:C:2014:170 at [38]; *Commission v Parliament and Council* (C-88/14) EU:C:2015:499 at [29]; *République Tchèque v Commission* (C-696/15 P) EU:C:2017:595 at [51-54].
[68] *République Tchèque v Commission* (C-696/15 P) EU:C:2017:595 at [58-66].
[69] See the statement in the EP Resolution of 30 May 2018 (fn 43): "questions of political sensitivity".
[70] See J. Bast, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 C.M.L.Rev. 885, 917-919; R. Schütze, "'Delegated'

executive function of applying the law to concrete cases (as the implementation of EU legislation is ascribed primarily to the EU Member States in art.291 (1) TFEU, implementing powers to be transferred to the Commission under art.291 (2) have the same function and character[71]) so that there appears to be, at first sight, a clear cut distinction standing behind the differentiation between delegated versus implementing executive rulemaking. On closer inspection, however, such attempts of explaining delegation versus implementation fail. The institutional choices,[72] the legislative practice, and the pertinent CJEU case law do not give clear criteria for a distinction between art.290 and art.291.[73] Against the constitutional indeterminacies and contestations of what the EU actually is and, consequently, of what legislation actually means in EU law, it comes without surprise that the CJEU is only incrementally trying to give some ideas about the notion of essential aspects enshrined in art.290 TFEU and cannot and will not offer grand ideas and conceptions about the essence of EU legislation and its political mission (as opposed to domestic constitutional courts that decide about an in principle uncontested political and constitutional space). In result, as even legislative acts are only determined by reference to a specified procedure, and lack material criteria in their application, in particular as regards their delimitation to other

Legislation in the (new) European Union: A Constitutional Analysis" (2011) 74 Modern Law Review 661,683.

[71] R. Schütze, "'Delegated' Legislation in the (new) European Union: A Constitutional Analysis" (2011) 74 Modern Law Review 692, 693.

[72] G. Brandsma/J. Blom-Hansen, *Controlling the Executive*, (New York: Oxford University Press, 2017), pp.5-7, report that the EP prefers delegation under art.290 over art.291 whereas Council and Member States favor implementation, due to the allocation of control and monitoring powers. The EP expressed "dissatisfaction at the fact that … the Council is still very reluctant to accept delegated acts when the criteria under Article 290 TFEU are met", see resolution of 30 May 2018 (fn. 43) para.50. Nevertheless, the practice appears to be a bit more complex as both institutions, EP and Council, insist in wielding significant control powers with regard to both kind of Commission acts, E. Tauschinsky/W. Weiß, in idem (eds), *The Legislative Choice between Delegation and Implementation*, (Cheltenham, Northampton: Edward Elgar Publishing 2018), p.233,242.

[73] For more detail see Tauschinsky/Weiß, *The Legislative Choice between Delegation and Implementation*, 2018, p.2,12. The ongoing discussion between the EU institutions about definite differentiation criteria still are not completed, see http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-criteria-for-the-use-of-delegated-and-implementing-acts.

legal acts, one cannot really expect that the sub-legislative rulemaking in the EU has been developed in the Treaties according to substantive concepts. As there are no material criteria for legislative acts (in delimitation to non-legislative acts), it is equally difficult, if not impossible to find them for executive rulemaking under arts 290 or 291, and consequently neither for the distinction between delegation and implementation, and even more so as the concept of implementation in EU law is not limited to art.291; as mentioned, the implementing powers entrusted to EU agencies do not fit into the dichotomy of delegation either under art.290 or art.291. The delegation of rulemaking powers to EU agencies goes beyond the scope of specific Treaty based authority[74] so that there hardly exist constitutional limitations to their use by the EU legislator.

Another, closely related reason for the impasse in distinguishing between arts 290 and 291 dates back to integration history. The very concept of implementation used in previous articles under the EC Treaty was far from clear. The establishment and increase of Parliamentary control, expanded by introduction of the regulatory procedure with scrutiny in 2006[75], circumvented the closer examination of whether such attempt in giving more control powers to the EP was in line with constitutional conceptions of rulemaking in the EU and with the allocation of different roles in rulemaking in accordance with the institutional balance of the then EC. Hence, as the very essence of Comitology was unclear, it comes without surprise that its successor, the combined rules of arts 290 and 291, is far from being clearly conceptualized in the treaties or in constitutional notions of EU law. This lack of clarity is even exacerbated (and simultaneously confirmed) by the frequent reference the CJEU case law on arts 290 and

[74] M. Chamon, in Tauschinsky/Weiß, *The Legislative Choice between Delegation and Implementation*, 2018, pp.174,180-182; H. Hofmann, in Bignami/Zaring (eds), *Comparative Law and Regulation*, 2016, pp.519,528. For the lack of conclusiveness of arts 290, 291 TFEU see CJEU, *United Kingdom v European Parliament, Council of the EU* (C-270/12) EU:C:2014:18 at [78-86]; *Spain v Council* (C-521/15) EU:C:2017:982 at [42,43] .

[75] See G. Schusterschitz/S. Kotz, "The Comitology Reform of 2006 Increasing the Powers of the European Parliament Without Changing the Treaties" (2007) 3 European Constitutional Law Review 68.

291 makes to its pre-Lisbon Comitology case law.[76] While it is, of course, unrealistic and undesirable to expect the CJEU to re-invent EU legal doctrine with each Treaty revision, it is on the other hand necessary to justify the use of old case-law where the Treaty provisions changed significantly. It is not evident that the notion of 'implementation' under art.291 is the same as it was under the EC Treaty.[77] In this manner, the lack of categorical clarity in the use and meaning of the notion of implementation under the former EC Treaty is transferred into Lisbon. Hence the difficulty we face in distinguishing art.290 from art.291 is inherited from pre-Lisbon, and the rules of arts 290 and 291 and the enshrined categories of delegation and implementation in themselves are not apt to enforce a change of practice or judicial insight in order to develop new categories.

Conclusion

In the end, we can conclude that even though the notion of legislation is determined also in EU law as decision-making on political issues, there is a lack of a material conception behind the distinction between legislative and non-legislative acts. In comparison to the Constitution Treaty, the Lisbon Treaty diminished the distinctive force of the category of legislative acts. Due to the absence of any material conception of legislation, no material concept of executive rulemaking exists, nor is there any distinctive notion of what comprises a political issue. As a consequence of the absence of substantive concepts, other constitutional limitations to executive rulemaking come to the fore,

[76] See, for example, CJEU *Czech Republic v European Commission* (C-696/15 P) EU:C:2017:595 at [49]; *National Iranian Oil Company v Council of the European Union* (C-440/14) EU:C:2016:128 at [49]; *European Parliament v European Commission* (C-286/14) EU:C:2016:183 at [43]; *Kingdom of Spain v Council of the European Union* (C-147/13) EU:C:2015:299 at [54]; *European Parliament, European Commission v Council of the European Union* (C-124/13) EU:C:2015:790 at [53].

[77] The CJEU treats this as self-evident in *European Parliament v European Commission* (C-65/13) EU:C:2014:2289 at [44].

namely procedural requirements for the exercise of executive rulemaking, and the legislator's control powers over executive rulemaking already enshrined in the EU rules, as we will develop below.

Consequences for analysing the White Paper scenarios

If the scenarios of the White Paper for the Future of Europe do not imply or require a change in the way how legislation in the EU is made or what it means in substantive terms, and, in consequence, if the scenarios do not suggest or imply a more substantive conceptualization of what legislation means (as opposed to non-legislative, executive rulemaking), then the future of executive rulemaking may only be reigned by the legisprudential deliberations about the administrative reasons for executive rulemaking set out above.

If, however, the scenarios hint at a clearer vision of what the EU might finally constitute, the concept of legislation could become better defined, and hence the distinction between legislation/legislative acts versus executive rulemaking as well, which would allow for a prognosis about the future of executive rulemaking in the EU also with a view to their constitutional preconditions. A litmus test insofar may be the policy fields that the different scenarios indicate as important for progress in the EU´s future. For, if the regulatory problems, which the scenarios address as being amenable to intensified and deepened EU cooperation and supranationalisation, comprise sensitive policy areas which are closely related to national sovereignty and national policy preferences, the nature of the EU may shift accordingly; the EU might then be challenged to turn into a stronger political being, which leaves behind a mere technocratic construction of the EU. With such a shift, the use of executive rulemaking may no longer be commendable to the same extent as before, and executive rulemaking may even be submitted to tighter, more sophisticated constitutional preconditions. Deepening or expanding EU

competences in policy areas that are very sensitive to its Member States due to delicate cutbacks of their national sovereignty (like supranationalizing fiscal policy or taxation) would induce the need for profoundly re-calibrating the institutional balance in the EU and hence reconsider the allocation of rulemaking power between the EU legislative and the EU executive.

Analyzing the Scenarios

The future of EU executive Rulemaking in a legisprudential perspective

The focus on better implementation features prominently in the Scenarios, apart from Scenario 2 (Nothing but the single market) as the latter scenario is based on strongly reducing EU regulation, which implies diminishing executive rulemaking. Scenario 1 promises strengthened financial supervision, the improved functioning of the capital markets and handing over the application of EU state aids law to national authorities,[78] all of which will increase the need for executive rulemaking either by the Commission or by existing or new EU agencies. Increasing decentralized implementation of EU State Aids law is accompanied by expanded executive rulemaking by the Commission, either on the basis of a mandate by the Council or by issuing soft law.[79] In the regulation of financial services and capital markets, the activity of EU agencies is central. In the same way, Scenario 4 (Doing less more efficiently) is based on more effective instruments "to directly implement and enforce collective decisions, as [done] today in competition policy or for banking supervision"[80], even though the number of policy areas in which

[78] White Paper, p.16.
[79] One could observe this in the state aid reforms that had already taken place. The State Aid Action Plan of 2005 (see COM (2005) 107 final) and the State Aid Modernisation of 2012 (see COM (2012) 209 final) came along with intensified executive rulemaking by the Commission based on an empowering Council Regulation 994/98 (now 2015/1588) which was amended several times to enlarge its scope.
[80] White Paper, p.22.

regulation by the EU will be adopted would be reduced. But in those areas which will be selected for intensified cooperation in the EU, executive rulemaking will gain importance. Scenario 4 explicitly provides for the adoption of "new rules and enforcement tools to deepen the single market in key new areas", new EU agencies and bodies, and the granting of "greater enforcement powers [to the EU in order to] ensure full compliance".[81] Likewise, Scenario 5 (Doing much more together) is based on more rapid enforcement of the decisions made in the EU.[82] The completion of the internal markets in services and e-commerce, a fully integrated EU capital market with EU supervision of financial services, and the "much greater coordination" in fiscal, social and taxation policy[83] will also require EU legislation in these areas to be complemented by executive rulemaking.

Comparably, the deepening of a harmonized, single EU regulation in the area of Schengen policy, financial markets, internal market and social and labour rights, and the closer cooperation of a group of EU Member States insofar, as foreseen in Scenario 3, all imply the use of executive rulemaking along the same lines. Harmonizing legislation adopted by the EU Member States participating in the enhanced cooperation within the EU framework set up insofar (see arts 20 TEU, 326-334 TFEU) will be amended by executive rules on the basis of mandates and procedures identical to those

[81] White Paper, p.22. For the cooperative implementation implications of Scenario 4 that strengthen the implementing role of EU institutions, see C. Calliess, "Bausteine einer erneuerten Europäischen Union" (2018) 1-2 Neue Zeitschrift für Verwaltungsrecht, 5-6.
[82] White Paper, p.24.
[83] White Paper, p.24.

provided in arts 290 and 291 TFEU[84] or by specific agency or body rulemaking,[85] in the same way as under normal EU rules. In particular, financial services regulation and the harmonization of rules for intensifying the internal market are prone to the use of executive rulemaking.

Scenario 6, finally, also implies a significant increase of centralized implementation or at least a strengthened centralized scrutiny over the domestic implementation of EU legislation. Consequently, executive rulemaking by the Commission or by newly founded or existing agencies may become even more relevant.[86]

Taken together, from a mere practical, legisprudential perspective, the future for executive rulemaking in the EU looks bright. Almost all of the scenarios imply some enhanced importance of effective and expeditious implementation of EU legislation which will be translated, as is submitted here, into expanded executive rulemaking by the Commission and EU agencies on the legal bases already enshrined in the EU Treaties. The increase in executive rulemaking will affect both its scope, the number of its mandates and its sheer number.

[84] For the use of delegated and/or implementing acts also within enhanced cooperation see the most recent enhanced cooperation on the establishment of the European Public Prosecutor´s Office, Council Regulation 2017/1939, [2017] OJ L 283/1. A mandate for delegated acts by the Commission which are to be adopted in a procedure identical to that under art.290 TFEU (see art.115) is provided in art.49 (3). For a mandate for implementing powers see art.14 (3), read in conjunction with recital 41 of the said regulation that calls the Council powers "implementing powers", in parallel to art.291 (2) TFEU, which allows transferring implementing powers to the Council (without Comitology type control, as art.291 (3) clarifies that the new type of Comitology committees provided for in Regulation 182/2011 only apply to implementing powers of the Commission). The Commission´s proposal for the Council Implementing Decision on the operating rules of the selection panel (COM (2018) 318), is based on art.14 (3), but also on art.291 TFEU and uses the same title as provided for in art.291 (4) TFEU.

[85] See for example for a mandate of the College of European Prosecutors to "further specify the conditions relating to the processing of such operational personal data, in particular with respect to access to and the use of the data, as well as time limits for the storage and deletion of the data" art.49 (4) of the EPPO regulation.

[86] C. Calliess, "Bausteine einer erneuerten Europäischen Union" (2018) 1-2 Neue Zeitschrift für Verwaltungsrecht 5-6.

This future of EU regulation, however, may result in concerns about the even more augmented role of the EU executive in EU policy-making.[87] It appears that while under the EU Treaties the EU legislation by Council and the EP is the default procedure for EU regulation, the practice of EU rulemaking may very heavily and increasingly rely on executive rulemaking. This prognosis is easily confirmed by the current figures of EU legislation versus executive rulemaking: Whereas — in accordance with President Juncker´s policy statements — the number of EU legislative acts drastically decreased in the last couple of years, the number of Commission delegated and implementing acts has multiplied already.[88] Under the scenarios of the White Paper, irrespective of which one looks at (with the exception of scenario 2), the high share of executive rules in the EU legal output might increase even more. Does it really contribute to making the EU more democratic, as promised, if executive rulemaking grows even more? The enhanced reliance on executive rulemaking prompts the need for diligently analysing whether its democratic accountability corresponds to the level of importance it incrementally gets. One may see the EP in line with this demand when it calls for "proper parliamentary scrutiny over the executive at the Union level" in order to ensure the legitimacy of the Union and to make the Union's decision-making system accountable to citizens.[89] These questions relate to the constitutional dimension of ever more executive rulemaking, to which we are now turning.

[87] See also F. Schorkopf, "Europas neue Ordnung" (2018) 9 Neue Zeitschrift für Verwaltungsrecht 14.

[88] For concrete figures see W. Voermans/J. Hartmann/M. Kaeding, "The Quest for Legitimacy in EU Secondary Legislation" (2015) 5 Theory and Practice of Legislation 5,18-21; cepStudie EU Indikator, 2nd edn 2018, pp.10-12. https://www.cep.eu/eu-themen/details/cep/eu-indikator-2-auflage.html

[89] See EP Resolution of 16 February 2017 on improving the functioning of the EU building on the potential of the Lisbon Treaty, P8_TA (2017) 0049, para.8.

The future of EU executive rulemaking from a constitutional perspective: the scenarios´ conceptions of legislative versus executive rulemaking

Political Imaginations of the EU in the White Paper scenarios

As mentioned, the White Paper scenarios do not explain which changes to Primary Law their implementation might require, nor do they indicate any idea of the finality or imagination of the EU behind them. Nevertheless, they reveal to some degree differing underlying ideas of the future shape of the EU as a whole. Whereas scenario 1 (Carrying On) clearly does not imply a new vision for the essence of the EU but focuses on the mere implementation of the current reform agenda initiated with the Bratislava roadmap, without altering the EU´s current indeterminate political existence, scenario 2 confines the raison d´etre of the EU to a single market. The EU would turn into a Customs Union plus and be deprived of its political essence to a significant degree, limited to a mere technocratic institution of market liberalization; the EU citizen would mainly be defined as a market citizen.[90]

Scenario 3 (Those who want more do more) goes hand in hand with a considerable change in the nature of the EU towards an EU of flexible and varying levels of integration, albeit using mechanisms already laid down in existing EU law. As flexible integration would further diversify over time, the resulting significant change in the overall shape of the EU would pose considerable difficulties for the institutional balance of the EU institutions, as the same EU institutions would operate in areas of varying levels of political integration. In the long run, the same institutional setup may not work equally well for areas with a purely technocratic orientation compared to areas with highly political decision-making among which Scenario 3 includes areas particularly sensitive to national sovereignty such as tax policy, justice and home affairs, migration,

[90] M. Everson, The Legacy of the Market Citizen, in Shaw/More (eds), *New Legal Dynamics of the EU*, (Oxford: Clarendon Press, 1995), pp.73-79.

and defence. Over time, the nature of executive lawmaking will differ between areas of lower and those of deeper integration, so that an identical institutional structure of executive lawmaking could no longer meet the higher legitimacy requirements of deeper political integration. In the long run, this scenario may prompt the need for a more nuanced design of the EU institutions depending on whether decisions are made in areas of low or high political integration, inside or outside closer integration. One could think, for example, of excluding Commission members from those EU Member States that do not take part in certain policy fields from participating in rulemaking.[91] Consequently, the constitutional requirements for executive rulemaking may differ, and the need for developing its legitimacy further in areas of deeper integration will arise as the EU insofar will gain considerable political salience. Hence, constitutional requirements for executive rulemaking are deemed to rise.[92]

Scenario 4 (Doing less more efficiently) and Scenario 5 (Doing much more together) have a strong impetus on more efficient regulation and implementation of EU law in selected policy areas. As mentioned, under both scenarios, executive rulemaking gets a particular focus. They imply a comparable vision of the EU as an instrument of delivering results for the benefit of its citizens and might develop the EU in a new direction, but with different political imaginations. While in both scenarios enhanced use of executive rulemaking is an instrument of effective regulation, they differ in the changes they imply for the political essence of the EU. Scenario 4 might not engender significant change, as the Member States´ intensified cooperation within the EU will focus on some policy fields like trade, migration and asylum, and borders in which the EU already has significant powers. In contrast, scenario 5 calls for deeper integration in

[91] See insofar art.46 (3) of the EP Resolution on the Constitution of the EU, [1994] OJ C 61/155.

[92] For accountability concerns raised by differentiated integration see also V. Schmidt/M. Wood, "The EU's new white paper underlines why Europe needs to be more open to its citizens", http://blogs.lse.ac.uk/europpblog/2017/03/10/the-eus-new-white-paper-underlines-why-europe-needs-to-be-more-open-to-its-citizens/

all policy fields and envisions more powers and tasks conferred upon the EU. Particular mention is made of very sensitive policy areas like economic and fiscal policy, a common EU defence and a new system of EU own resources. Thus, this scenario implies a considerable power shift from the Member States to the EU and would augment the EU´s political essence considerably as the EU would become an even closer Union.[93] Irrespective of these differences in political imagination of the EU between both scenarios, the even more enhanced use of executive rulemaking for efficiency sake common to them causes a shift in institutional balance, as the EU executive becomes even stronger (admittedly, whether the European Commission under scenario 4 will get a stronger position largely depends on its role in the policy fields of closer integration as scenario 4 reduces its role in traditional EU policy fields like state aids or regional development[94]). As a result, the executive-legislative relationship will require recalibration as executive rulemaking will become the standard routine of rulemaking in the EU. While such a technocratic functionalist approach might still appear acceptable under scenario 4, where the political imagination of the EU remains underdeveloped, scenario 5 considerably expands the political essence of the EU (without, however, clearly indicating the "qualitative leap" required),[95] which tightens the legitimacy demands and the need for recalibrating the relationship between legislative and executive rulemaking. The legitimacy issue is brought up in the White Paper itself, pointing — with regard to scenario 5 — to the "risk of alienating parts of society which feel that the EU lacks legitimacy".[96]

[93] See also C. Fasone/D. Fromage, "The Commission and the challenges of differentiation post-Brexit: its role and the new inter-institutional balance", ISL Working Paper 2018:1, p.8.
[94] C. Fasone/D. Fromage, "The Commission and the challenges of differentiation post-Brexit: its role and the new inter-institutional balance", ISL Working Paper 2018:1, p.8.
[95] M. Avbelj, "What future for the European Union?", WZB Discussion Paper, No. SP IV 2017-802, Wissenschaftszentrum Berlin für Sozialforschung (WZB), p.16.
[96] White Paper, p.24.

As mentioned, in contrast to all the other scenarios, scenario 6 explicitly was drafted with a view of bringing the EU forward while remaining within the currently existing EU treaties and hence within the present institutional and constitutional framework of the EU, and of doing so without making use of differentiated integration. Nevertheless, the scenario´s implications for the strengthened role of the EU executive induce the question of whether this change will not imply a shift in the institutional balance between the legislative and the executive in the EU. If the proposals tabled by President Juncker to merge the office of Commission President with that of the President of the European Council,[97] i.e. the introduction of another double hat for a Member — the President — of the Commission, and to introduce the office of an EU minister of Economy and Finance, as a Vice-President to the Commission,[98] are implemented, these events would, without a doubt, add to the political mandate of the Commission altogether. How would this structure then relate to the institutional balance, against the backdrop that executive rulemaking might get even more space under scenario 6? Implementing scenario 6 fully would result in a more political Commission that gets a role closer to a (trans)national government and that may make even more use of executive delegations (by providing for such mandates in its legislative drafts). This new political role, in turn, would require intensified parliamentarian control over the Commission and its rulemaking.

The above analysis has shown that at least in scenarios 3, 5 and 6 the EU executive, above all the Commission, grows into a stronger political role. Strengthening the political role of the Commission must be offset by an emphasis on the role of the legislature and by taking more serious the constitutional constraints for executive rulemaking, as a demand of institutional power balance between EU legislative and EU

[97] See J.-C. Juncker State of the Union Speech, p.9.
[98] See insofar Commission, "Further Steps Towards Completing Europe´s EMU: A Roadmap", COM (2017) 821.

executive. Ideally, these steps would call for clearer constitutional guidelines on the demarcation of legislation from executive rulemaking. However, as a substantive conceptualization of legislation and hence of executive rulemaking does not seem within reach (see above), nor considerably greater precision about the legislative reservation of the essential aspects of a policy enshrined in art.290, taking constitutional principles for executive legislation more seriously must, therefore, be translated into other requirements, without falling into the trap again of demanding greater substantive clarity about concepts of legislation or executive rulemaking. Sharper rules capable of effectively restraining the scope of executive rulemaking, and practically accessible, therefore mean requiring greater precision of agency mandates,[99] giving greater consideration to the procedural requirements of executive rulemaking, and strengthening the legislator's control over executive rulemaking. The EP´s request to turn the Commission into a genuine EU government/executive is along the same lines.[100] Extending the political role of the Commission requires strengthening its democratic accountability.[101]

Strengthening Parliamentary control over executive rulemaking

The above demand for strengthening the democratic accountability of a more powerful EU executive by granting greater control powers, in particular, to the EP goes hand in hand with recent calls for changes to the EU institutional architecture, which suggest enhancing the legitimacy of EU decision-making while "improv[ing] the effectiveness

[99] Insofar, the EP calls for "the introduction of a legal basis with a view to establishing Union agencies that may carry out specific executive and implementing functions conferred upon them" by the EU legislative in accordance with the ordinary legislative procedure, Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the EU, P8_T (2017) 0048, para.80.
[100] See EP Resolution of 16 February 2017, P8_T (2017) 0048, recital P, para.47; Resolution on improving the functioning of the EU, P8_TA (2017) 0049, recital V and para.29.
[101] See also Editorial Comments, "The EU-27 Quest for Unity", (2017) 54 C.M.L.Rev. 681,685.

of executive action".[102] Any proposal to extend parliamentary control over Commission rulemaking meets with some weaknesses of the current control scheme under arts 290 and 291 TFEU.

Although the EP enjoys considerable control powers under art.290 (2) to veto delegated acts or to revoke delegations, exercising them requires a component member´s majority vote. This requirement makes control of delegated acts by the EP a cumbersome and costly endeavour. Vetoes hardly happen. Of course, the very existence of such a possibility of control has a moderating effect on the Commission and gives the Parliament an informal amendment power.[103] Despite, the control mechanisms of delegation under art.290 were evaluated as doing "little to augment the democratic or "parliamentary" legitimacy of secondary legislation".[104] The Commission enjoys considerable autonomy in drafting delegated acts. Institutional practice meanwhile added further procedures to delegations under art.290, which provide for parliamentary influence and oversight mechanisms: Parliament is given equal access to all information on delegated acts (as is the case with implementing acts), and its experts have access to the Commission´s expert group meetings preparing for or advising the Commission in the drafting of delegated acts under art.290 in the same way as national experts.[105] Furthermore, the informal power flowing from the EP´s veto right has resulted in informal cooperation during the preparatory phase of delegated acts.[106]

[102] F. Fabbrini, Brexit and EU constitutional reform, in idem, *The Law and Politics of Brexit*, (New York: Oxford University Press, 2017), p.267,282.
[103] See M. Kaeding/K. Stack, "Legislative Scrutiny?", (2015) 53 JCMS 1268,1269.
[104] K. Stack, "The Irony of Oversight", (2014) 2 Theory and Practice of Legislation 61,62. See also, in a bit more positive tune, W. Voermans/J. Hartmann/M. Kaeding, "The Quest for Legitimacy in EU Secondary Legislation", (2015) 2 Theory and Practice of Legislation 5,9-10, 14-16.
[105] See EP resolution of 30 May 2018 (fn. 43), para.56. The expert groups are only consultative, without any blocking power, see IIA on Better Law-Making [2016] OJ L 123/1, para.28.
[106] See EP resolution of 30 May 2018 (fn. 43), para.57, where the EP stressed the need for their improvement.

Besides, there is a more practical problem of parliamentary oversight of having sufficient expertise and capacity to scrutinize implementing measures. The issue of expertise is exacerbated by the sheer number of executive acts that will increase under the scenarios. Analyses of Parliamentary oversight over executive rules adopted under the regulatory procedure with parliamentary scrutiny (art.5a of the Comitology Decision) showed that Parliament does, in principle, not lack the required expertise,[107] and has increased its control capacity,[108] even though it does not have the same resources as domestic parliaments have.[109] Nevertheless, the practical problem of managing the number of executive acts remains. In sum, although efforts have been made to strengthen parliamentary control over delegated acts (art.290), its level may not be capable of coping with an ever-increasing expansion of the scope and number of executive acts.

Parliamentary scrutiny over implementing acts (art.291) suffers from even more serious deficits. One might contend that implementing acts, as they are close to the practical application of EU law, do not require parliamentary control to the same extent as delegated acts. While such an assertion could be understandable from a theoretical point of view (as the conferral of implementing powers under art.291 could be regarded as a vertical delegation from the Member States, with the consequence that national control by comitology committees would appear sufficient),[110] it does not take into account that under EU law in its present form the distinction between delegation and implementation is difficult to make, as shown above. Therefore, the level of parliamentary scrutiny must be the same, at least insofar as empowerment under art.291 TFEU is used to enact

[107] See M. Kaeding/A. Hardacre, "The European Parliament and the Future of Comitology after Lisbon", (2013) 19 ELJ 382,384,399-400.
[108] G. Brandsma/J. Blom-Hansen, *Controlling the Executive*, (New York: Oxford University Press, 2017), p.133.
[109] W. Voermans/J. Hartmann/M. Kaeding, "The Quest for Legitimacy in EU Secondary Legislation", (2015) 2 Theory and Practice of Legislation 5,15.
[110] For such view see A. Héritier/C. Moury/C. Bischoff/C. F. Bergström, *Changing Rules of Delegation*, 2013, pp.132,133.

general rules, as their function then is equal to that of delegated acts. The EP is entitled to oppose the adoption of implementing acts if their mandate is enshrined in a legislative act and if they go beyond the implementing powers conferred in this legislative act (art.11 Comitology Regulation 182/2011).[111] Rule 106 Rules of Procedure of the EP allows Parliament to object to the adoption of the act if it considers it incompatible with EU law. In both cases, Parliament does not have a veto. The Parliament´s remonstrance only makes the Commission reflect ("review the draft implementing act") and state reasons. It is in the Commission´s leeway to maintain, amend or withdraw the draft implementing act. Compared to the control powers over delegated acts under art.290, Parliament is much more limited. It can only complain about legal failures and cannot refer to a divergent political assessment unless it disguises its dissenting political views as legal rebukes. In any case, the EP cannot enforce its assessment. In contrast to art.290, it can neither veto an implementing act nor revoke the conferral of implementing powers. The Member States representatives in the Comitology Committees have considerably more powers, definitely so in case of the examination procedure.[112] In any case, the Member States representatives may use the Comitology procedures for bargaining with the Commission, which to do is not available to Members of Parliament.

Overall, the effectiveness of parliamentary control over Commission rulemaking is not yet sufficient. This inadequacy is particularly worrying given the powerful position of the Commission being the drafter of the legislative acts mandating delegated or implementing rulemaking by itself. In this position, it has a powerful voice in determining the ambit and scope of the mandates for its executive rulemaking.

[111] Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] OJ L 55/13.
[112] Art.5 Regulation 182/2011.

What is therefore required are enhanced rights of scrutiny belonging to the EP. The above analysis describes its weaknesses. The EP, therefore, needs more staff assisting its Members in accompanying the preparatory phase of executive rules and in analysing their contents. Control power shouldn´t be subject to a Members´ majority (as demanded by art.290 (2); art.290 (2) however allows for the introduction of novel control mechanisms since the conditions enshrined therein are but examples)[113] and shouldn´t be confined to legal arguments. Implementing acts laying down generally applicable rules should be subject to EP rights of scrutiny comparable to delegated acts (veto; withdrawal of empowerment), and MEP observers have access to Comitology meetings between Member States representatives and the Commission. Effective control of executive rulemaking by the EP need not only take place with regard to delegated acts, but also with regard to implementing acts enacting general rules. Also to this end, "appropriate contacts at administrative level shall be maintained".[114]

Regarding control powers over EU agency rulemaking, where there is the need for "a sufficient degree of control … by the Union legislator", too, the EP already called for "the adoption of a framework regulation", including, amongst others, "the right of the EP to appoint and to dismiss the managing staff of the Union agency, to participate in the supervisory board of the Union agency, veto rights of the EP in relation to certain Union agency decisions, information obligations and transparency rules and budgetary rights".[115]

Strengthening Constitutional Restraints

[113] See the wording: "conditions may be as follows".
[114] As provided for in the Annex to the IIA on Better Law-Making [2016] OJ L 123/1, para.2, regarding delegated acts.
[115] EP Resolution on improving the functioning of the EU, P8_TA (2017) 0049, paras 46-47.

Giving greater consideration to the procedural requirements of executive rulemaking was another tool identified above for restraining the ambit of executive rulemaking. As shown, under the Treaty framework as interpreted by the CJEU, there hardly are constitutional rules that could effectively restrict the legislator´s preference of executive rulemaking over legislative enactment. Much is entrusted to the political process.

The focus, therefore, shifts to existing procedural constraints to executive rulemaking that are capable of restraining its use. Insofar, two prescriptions in arts 290 and 291 are relevant. First, art.290 requires the objectives, content, scope and duration of the delegation of power to be explicitly defined in the empowering legislative acts. This condition can be translated into more precise legislative mandates that determine the content and scope of executive rules. This precondition of empowering executive rulemaking must also apply to the conferral of implementing powers under art.291 (2) where such mandates imply the adoption of general rules. For, in this case, the latter functionally are fully equivalent to delegated acts. Second, the conferral of implementing powers to the Commission under art.291 (2) is subject to the prerequisite that the need for "uniform conditions for implementing legally binding Union acts" so requires. This condition is only met if the EU act to be implemented is ambiguous or uncertain to a degree that it needs to be clarified, supplemented or amended, hence the functional comparability between delegated and implementing acts.[116] This restriction on the conferral of implementing powers, which should be applied to agency implementation as well,[117] is hardly determined in substance by the CJEU.[118]

[116] A. Vincze, in Tauschinsky/Weiß, *The Legislative Choice between Delegation and Implementation*, 2018, p.19,27.
[117] M. Chamon in Tauschinsky/Weiß, *The Legislative Choice between Delegation and Implementation*, 2018, pp.174,191-192.
[118] See, e.g. *National Iranian Oil Company v Council* (C-440/14 P) EU:C:2016:128 at [25-41] and *Spain v Parliament and Council* (C-146/13) EU:C:2015:298 at [77-82].

As those limits do not appear to have been sufficiently paid attention to by the CJEU hitherto, they definitely present criteria along which executive rulemaking can be evaluated and thus controlled, both by the EU legislator and the Court. Taking these rules more serious as constraints to executive rulemaking however requires a reorientation of the CJEU´s current approach towards stricter enforcement of these constitutional constraints, including applying a denser standard of review, and then hold the EU executive to it.

Additional rules that could contain the usage of executive-rulemaking are conceivable and would not necessarily require amending the TFEU; enacting pertinent procedural and substantive rules in a legislative act would suffice.

Conclusion

From the perspective of the Commission and EU agencies, the future of EU executive rulemaking might look great as the focus on effective implementation of EU rules in most scenarios of the White Paper on the future of Europe and in the repeated complaint about the lack of effectiveness of the EU, together with the rising political salience of the Commission, will expand the scope and usage of executive rulemaking. An EU that aims at being perceived as delivering and becoming more effective unavoidably will sharpen its implementation instruments and will increasingly make use thereof, with executive rulemaking being one of its cornerstones. The objective of a more democratic and legitimate Union,[119] reflecting an item for reform often proclaimed, suffers from this increase, unless the expansion of executive rulemaking is accompanied by reforms that rebalance the relationship between the EU legislative and the EU executive and enhance parliamentary scrutiny over executive rulemaking. The Member States,

[119] See J-C. Juncker, State of the Union Speech 2017, p.2 and Priority 10 of the Letter of Intent.

however, may not think along such lines; it is telling that the Bratislava Declaration does not mention the European Parliament.[120] From a constitutionalist perspective, a bright future of EU executive rulemaking stirs concerns and demands for a clearer dividing line between legislation and non-legislative acts; merely procedural distinctions are not satisfying. It is alarming if the replies to the polycrisis of the EU lead to nothing else than to even more executive powers of the Commission and EU agencies. The proposals made in this article would strengthen parliamentary scrutiny and reinforce the constitutional limitations of executive rulemaking.

[120] In contrast, the Parliament is mentioned in Scenario 5 of the White Paper, p.25, indicating that it will control the ESM.