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Overriding the European Commission's rulemaking? Practical experience in the European Union with post-Lisbon legislative vetoes with quasi-legislative acts

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Abstract

This article examines the European Parliament's and Council of Ministers' use of post-Lisbon legislative vetoes to override the European Commission's rulemaking. Using an original data set of legislative vetoes of Commission acts by both European legislators from December 2009 - April 2017, the contribution shows that levels of the formal exercise of the legislative veto to overrule the Commission's regulatory policies are very low. Particularly interesting, the level of exercise of legislative veto provisions has not increased significantly since the Lisbon Treaty came into effect, suggesting that the ways in which the Treaty formally augmented the powers of legislative scrutiny have not resulted in appreciably greater formal exercise of these powers *ultima ratio*. Moreover, no significant differences appear between the Council of Ministers and the European Parliament.

Introduction

Many contemporary governments couple broad delegation of rulemaking powers to administrative bodies with a scheme allowing the legislature to veto or disapprove of administrative rules (Wade and Forsyth, 2004; Mullan, 2001; Pearce and Argument, 2005). From the legislature's perspective, this pairing has some logic. On the one hand, legislatures have well-documented incentives to delegate broad powers to administrative agencies in part because of the greater time, flexibility, and expertise of dedicated administrators, and in part because it allows the legislature to avoid direct accountability for hard choices (Epstein and O'Halloran, 1999). On the other hand, a scheme for legislative scrutiny allows the legislature an institutional means to assert control over the vast lawmaking activities that their delegations have set in motion.

Until 2006, the European Union (EU) had one of these elements, but not the other (Pollack, 2003). The EU legislative bodies—the European Parliament (EP) and Council of Ministers (Council)—had an established practice of delegating broad powers to the European Commission (Bergström 2005). The European Commission (Commission), in turn, has been a prodigious maker of delegated legislation. It was not until 2006, in response to growing concerns about comitology's democratic accountability that both EU legislators obtained a legislative veto, i.e. the power to nullify Commission's actions. This creation of the so-called 'regulatory procedure with scrutiny' (RPS) was symbolically important because it granted the EP powers over the formulation of Commission administrative acts that more accurately reflected its powers in co-decision (Vaccari and Lintner, 2009). It also brought the EP's formal role of oversight closer to equal footing with the Council (Blom-Hansen, 2011).

The European Parliament, however, continued to bridle at not standing on perfect equal footing with the Council in oversight of the Commission's delegated legislation (Brandsma, 2013). In explicit response to these parliamentary concerns, the Lisbon Treaty eventually provided a new legal basis for delegated legislation in Article 290 of Treaty on the functioning of the European Union (TFEU), creating so called 'delegated acts' (DA), and also established new procedures for EP and the Council to exercise legislative scrutiny over the Commission's DA (Hardacre and Kaeding, 2011), including elimination of a requirement that the veto be based on one of a designated number of grounds. It is Article 290 TFEU that put the EP and Council on a virtually equal footing with regard to the legislative scrutiny of Commission quasi-legislative acts.

How have these legislative veto rights over quasi-legislative acts operated in practice and why? Have the reforms introduced in the Lisbon Treaty which were heralded as increasing the powers of EP had concrete effects?

Based on the costs of collective action within EP, the Commission's institutional interest in avoiding conflict with EP, and the relatively low costs for individual members of Parliament (MEPs) to bargain informally with the Commission in response to interest group monitoring and pressure, this article hypothesizes that the EP will infrequently invoke its newly granted power to veto DAs. The slightly lower costs of collective action in the Council suggest that it might make more use of its veto powers than the EP.

This article tests these hypotheses with regard to the EP's and Council's actual exercise of veto rights between December 2009 and May 2017. Our data illustrate an extremely modest formal use of legislative vetoes under the post-Lisbon DA. In addition, it reveals little difference in the EP's and the Council's formal use of legislative vetoes. By

proving a political economy analysis as well as data on recent experience, I am able to explain this practice. Further, by isolating the importance of informal negotiating for amendments to the Commission's draft measures, I expose that a critical aspect of understanding the relationship between the Commission and the EU legislative bodies is understanding the efficacy of individual legislators, committees or representatives in EP and the Council in obtaining adjustments in secondary legislation from the Commission outside of formal legislative vetoes – aspects which will be critical for future scholarly work on the effective control the European legislators exercise over the Commission.

The article is organized as follows. I first briefly describe the DA procedure for exercising legislative vetoes. I then develop hypotheses about how legislators are likely to use formal veto powers over administrative lawmaking or quasi-legislative actions, i.e. how Parliament and Council are likely to use their veto powers over the Commission and then present our empirical analysis for legislative vetoes by Parliament and Council from December 2009 – April 2017. I conclude by assessing the ways in which legislative scrutiny provisions in the field of delegated legislations affect formal EU policy-making.

1. The mechanics of secondary legislation and legislative vetoes in the EU

Delegated acts (DA): variable time period for vetos/objections

The delegated act (DA) process is a sharp departure from the RPS two-tier procedure practice. Overall, the process has been simplified because now the Commission presents its DA directly and simultaneously to both legislators treating Council and EP equally in this respect. The legislators then both have the same time determined by the basic act to object to the act on any grounds, as opposed on only on the three legal grounds for objection

specified by the RPS. The new one-tier DA procedure is simpler, but each basic act can set out different conditions for DAs on a case-by-case basis.

While we know a lot about comitology, its various phases of reform since the 1960s (Héritier *et al.*, 2013), its committee workings (Dehousse, 2003; Pollack, 2003; Christiansen, Oettel and Vaccari, 2009; Brandsma and Blom-Hansen, 2010; Brandsma, 2013; Dehousse, Fernández Pasarín and Plaza, 2014), as well as about how the post-Lisbon comitology regime in helping to reduce the democratic deficit of the EU (Georgiev, 2013) and its effects on the inter-institutional balance (Hofmann, 2009; Moury and Héritier, 2012; Héritier, 2012; Christiansen and Dobbels, 2013), we know very little about the practices of the RPS procedure and DAs (Hardacre and Damen, 2009; Kaeding and Hardacre, 2013; Voermans, Hartmann and Kaeding, 2014). Seven years after the entry into force of Article 290 TFEU, we lack somehow the empirical evidence of the practices of delegated quasi-legislative powers in the EU, which has become a major ‘battlefield in EU governance’ (Hardacre and Kaeding, 2010, p. 4, Kaeding and Stack, 2015).

The political economy of legislative vetoes

Political economy literature provides a useful reference point to generate some expectations about how these processes might work in practice. I draw on the literature on legislative scrutiny and bargaining in the US context because that literature is well developed (Volden & Wiseman, 2011) and because the US also had a long experience with legislative veto provisions. Even though party dynamics and committee structures are different in the EP and the US Congress, the political economy literature and US experience under the legislative veto is useful because, like the EU, the US is a system of separated

powers with a dual legislature and executive, with each body representing a different constituency (Bignami, 1999, pp. 466-69).

Two sets of dynamics which operate together – the relative lack of incentives of members of legislatures in systems of separated powers to invest resources to engage in oversight and the bargaining dynamics between the legislature and a risk-avoiding bureaucracy—suggest that legislative vetoes will be enacted very infrequently. First consider the incentives of members of the legislature in exercising a legislative veto. As a general matter, legislatures face notoriously high transaction costs to engage in collective action (Moe and Wilson, 1994).

Legislative action, particularly in the EP, faces multiple veto points; it can be thwarted at the EP's committee level, in disputes over jurisdiction among multiple EP committees, or by those who set the agenda for floor consideration. Even if a veto measure were able to make it onto the legislative agenda, it would have to obtain an absolute majority (AM) of MEPs and a qualified majority (QMV) of Member States (MS) in the Council in order to pass either legislative body. Just as important, RPS measures and DA tend to be technical and thus requiring significant investment to understand. This suggests that the costs of oversight for members of the legislature, educating others about the Commission's action in question, and assembling a coalition are likely to be very high relative to their rewards.

The timing requirements for legislative action to override Commission act exacerbate these issues. To veto any Commission regulatory policy, the EP or Council must normally act within a maximum of four months. That reduces the time for legislators to

master the files once they have attracted interest, and imposes a very short time line for assembling a coalition.

Furthermore, the Commission – perhaps because of its more attenuated political accountability – is notoriously adverse to prompting public conflict with EP (Gornitzka and Sverdrup, 2008; van Gestel, 2014). As a result, the MEPs and the Council will have an especially strong capacity to extract concessions from the Commission, and over time, to create a climate in which the Commission will anticipate legislative policy. Effectively, because the Commission places a high value on avoiding confrontation and sanctions, the EP and Council will exercise ‘latent control’ over the Commission without having to exercise the veto (Calvert, McCubbins and Weingast, 1989, p. 605). In sum, the burdens and obstacles to collective action will frequently outweigh benefits that members of the EU legislatures will receive from formal exercise of the veto, and the accommodationism of the Commission will strengthen the hand of individual bargaining with the Commission to obtain concessions.

While the Lisbon Treaty sought to enhance the oversight powers of the EP through making adjustments in the grounds and timing for vetoing a Commission’s DA (van Gestel, 2014), these political dynamics remain fundamentally unchanged, and would appear to matter more than the precise structure of the legislative veto mechanism. Accordingly, I hypothesize:

H1: Neither EP nor the Council veto Commission's quasi-legislative acts more frequently than before.

More specifically, the obstacles to EP exercising a formal legislative veto are even higher than for the Council. The transaction costs for collective action are obviously higher in Parliament. The existence of multiple parties in Parliament further raises the cost of reaching agreement. Moreover, individual MEP have to mediate between allegiance to their parties and national delegations which also increasing the difficulty of finding issues that will gain coalition support. At a practical level, the maximum of four-month deadline for exercising the veto makes external research very difficult to assemble, especially given the small numbers of secretariat and MEP support staff.¹ As a result, initiating collective action is likely to be led by MEPs with particularly strong stakes in particular Commission acts or policies and with the support by interest groups which enhances their capacity to have timely, ready-made solutions to issues they have followed and monitored the issue for years (Hardacre and Damen, 2009).

Council's incentive structure is simpler than the EP's. Instead of political constituencies or independent parties, member state representatives are beholden to their own national governments, and to represent their national government's interest in the Union's policy-making process (Beyers and Dierickx, 1998). This particular focus on the effects of Union laws on their own member states, however, diminishes the extent to which they are likely to have an incentive to investigate, or invest energies in overriding, a Commission's regulatory policy. As long as the Commission strategically avoids directly harming the interests of a particular member state, or tight coalition of states, its measures are unlikely to provoke much attention at the Council level, despite lower transaction costs for collective action in the Council.

¹ Egeberg, M., Gornitzka A., Trondal, J. and Johannessen M. (2016) 'Parliament staff: unpacking the behaviour of officials in the European Parliament', *Journal of European Public Policy* 20(4): 495-514.

H2: The Council will more frequently enact vetoes of Commission acts than EP.

Research design

To assess the experience and impact of legislative vetoes in EU policy-making, the dependent variable is a count variable representing the frequency of successful and unsuccessful legislative vetoes. We differentiate between EP vetoes and objections by the Council to control for differences in their execution of legislative oversight rights. Considering the different dates of the entry into force for DA (2009), I decided to investigate the complete period from December 2009 until April 2017.

To test our hypotheses, I extracted data from the websites of the EP's and Council's co-decision units and complemented it with information from the European Parliament's Unit for Reception and Referral of Official Documents. For cross-checking purposes and the procurement of additional data I conducted interviews with civil servants from the secretariats of the EP and Council.

Table 1 summarizes the total number of concluded legislative files including provisions for DA (so-called basic legislative acts). It took about a year after the entry into force of article 290 TFEU before EP and Council started adopting the first legislative files including provisions for DA.² In the meantime, in 2016, 51 per cent of the total number of concluded legislative files provided for DA empowerments.

² The first basic acts including DA provision were Regulation 438/2010 on pet animals, Directive 2010/45 on human organs transplantation, Directive 2010/30 on energy labelling, Regulation 973/2010 on customs tariff Azores & Madeira, and Regulations 1092 to 1095/2010 and Directive 2010/78 on financial supervision package.

Table 1. Number of concluded legislative files including provisions for DA (2009- April 2017)

Year	Number of concluded legislative files including provisions for DA	Number of paragraphs empowering DA	Total number of legislative acts	per cent- share between number of concluded legislative acts and those including provisions for DA
2010	22	62	66	33 %
2011	26	91	64	41 %
2012	22	207	87	25 %
2013	62	383	79	78 %
2014	76	350	192	40 %
2015	22	79	57	39%
2016	34	273	67	51%
2017	5	42	(-)	(-)
Total	270	1487	612	44 %

Source: Based on the information from the European Parliament's Unit for Reception and Referral of Official Documents

Legislative files with DA provisions most frequently cover environmental policies (20 per cent), financial services (15 per cent), transport (10 per cent), internal market and consumer protection (9 per cent), agriculture, and international trade (8 per cent), i.e. only six policy areas represent 70 per cent of the total.

Since the number of basic acts does not necessarily correspond to the absolute number of DA and RPS measures eventually adopted by the Commission—the Commission can issue multiple DA under a single basic act—table 2 reports the full list DA submitted to Parliament and the Council between 2009 and April 2017.

Table 2. DA submitted to Parliament and Council (2009- April 2017)

Year	Delegated acts submitted
2009	-
2010	4
2011	7
2012	38
2013	57
2014	177
2015	106
2016	139
2017	17
Total	545

Source: Based on the information from the European Parliament's Unit for Reception and Referral of Official Documents

These figures show that the number of DA submitted to the EU legislators grew steadily with its introduction in 2009 with an all-time peak (177) in 2014 and 2016 (139), i.e. a total number of 545.

Most DA cover only few policy areas: monetary affairs (31 per cent), agriculture (17 per cent), and environment (14 per cent).

All in all, the Commission submitted during the 2009-2017 terms 545 DA representing the study's reference point.

2. Infrequent use of legislative vetoes by the European Parliament

The results are presented in tables 3 and 4 displaying the frequency of (un-) successful vetoes in the framework of DA.

Table 3. Number of (un-) successful vetoes of DA by the European Parliament (2009- April 2017)

Result	Number of cases	Details of cases (in chronological order)
Successful veto in plenary (absolute majority)	6	Definition of “engineered nanomaterials” (ENVI); cadmium in illumination and display lightning (ENVI); ethyl alcohol of agricultural origin (AGRI); processed cereal-based food and baby food (ENVI); packaged retail and insurance- based investment products (ECON); high-risk third countries with strategic deficiencies (ECON/LIBE)
Unsuccessful veto in plenary	11	Scheme of generalized tariff preferences (INTA); PPP (ECON); OTC derivates (ECON, withdrawn); ACP group of states (INTA); Solvency II (ECON); 2x schemes of generalized tariff preferences (INTA); EU guarantee to the EIB Belarus (BUDG); minimum requirement for own funds and eligible liabilities (ECON); position limits to commodity derivatives (ECON); model financial regulation for PPP (BUDG); Union customs code (IMCO)
Unsuccessful motion for veto in parliamentary committee (simple majority)	16	GMES (ITRE); direct payments to farmers (AGRI); integrated administration and control system and conditions for refusal or withdrawal of payments (AGRI); paying agencies and other bodies, financial management (AGRI); public intervention expenditure (AGRI); the European Agricultural Fund for Rural Development (EAFRD) (AGRI); fruit and vegetables and processed fruit and vegetables sectors (AGRI); school fruit and vegetables scheme (AGRI); support programs for the olive-oil and table-olives sector (AGRI); agricultural products benefiting from private storage aid (AGRI); national support programs in the wine sector (AGRI); generalized tariff preferences Philippines (INTA); information relating to infant and young child feeding (ENVI); food for special medical purposes (ENVI); food information of gluten (ENVI); guidelines in the field of officially supported export credits (INTA)
Total	33 (out of 545) (6%)	

Source: Based on the information from the European Parliament’s Unit for Reception and Referral of Official Documents

For DA, the figures are revealing. Out of a total of 545 DA submitted to the EU legislator, EP considered objections in 33 cases (6 per cent) out of which six files were eventually vetoed successfully.

Table 4. Number of successful vetoes of DA by the Council of Ministers (2009- April 2017)

Result	Number of cases	Details of cases (in chronological order)
Successful veto (qualified majority)	2	Galileo, format for research and development expenditure data
Total	2 (out of 545) (0,3%)	

Source: Based on the reports from the Commission on the working of committees, <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Report.Report>, updated in September 2014

From the EP’s perspective, the two tables lead us to two central conclusions: firstly, Parliament rarely exercised its veto power to overrule quasi-legislative regulatory decision during 2009 to April 2017. In less than 1 per cent of all cases it opposed successfully to quasi-legislative instruments. Secondly, EP appears to be more active in using its oversight powers related to DA than RPS measures (2 per cent) (cp. Kaeding and Stack, 2015). In the following, I consider the results for the Council.

3. Isolated use of legislative vetoes by the Council of Ministers

Out of the 545 DA submitted to the Council during a period of eight years, Council successfully objected in only two case, which occurred in 2013 and 2014. The first case concerned common minimum standards on the rules for access to the public regulated service provided by the global navigation satellite system. Member states’ concerns

focused on three aspects: the scope of the act (i.e. its applicability to the Commission and agencies, not only to member states); some of the definitions; and the question of the attribution of the role of competent public regulated service authority (with a view to giving member states greater freedom in determining their internal organization).

From the Council's perspective, the two tables lead us to two central conclusions: firstly, Council rarely exercised its veto power to overrule quasi-legislative regulatory decision during 2009 to April 2017. In less than 0,4 per cent of all cases it opposed successfully to quasi-legislative instruments. Secondly, Council appears to be more active in using its oversight powers related to RPS measures in comparison to DA (cp. Kaeding and Stack, 2015). In the following, I compare the results for the two EU legislators.

Summary of results

Eight years after the introduction of the EU legislative veto, both EU legislators have used their formal veto powers rarely. Thus far both legislators objected to only two DA (Council) and six (EP) respectively (out of a total of 545 DA adopted between 2009 and 2014). Consequently, I see not only low levels of formal exercise of the legislative veto overruling Commission regulatory policies by both legislators, but also no significant overall differences between RPS measures and DAs (cp. Kaeding and Stack, 2015).

4. Discussion

Cadmium in illuminations, processed cereal-based baby food or packaged insurance-based investment products - the delegation of rule-making powers has become a nearly universal feature of the European legal systems. As broad discretionary power is vested in administrative actors, the Commission, there is a strong legitimacy demand for legislative

oversight of administrative action to ensure that it achieves commonly agreed upon objectives of the member states and ultimately the people. One of the most touted EU mechanisms for oversight and respective accountability for collective decisions (Brandsma, 2013) of the Commission is the legislative veto, whether in the context of the regulatory procedure with scrutiny (RPS) or post-Lisbon DA.

As it turns out, the EP and Council have rarely invested in taking formal measures to override Commission regulatory policies. Over an eight year period, from 2009 to April 2017, EP and Council considered legislative vetoes in a meager 6 per cent (DA), and eventually opposed to only 1 per cent and less from all possible cases successfully. These figures may not match the EP's and Council's energy for including legislative veto provisions in legislation in the first place, and the initial 'fear that Parliament would be tempted to (ab)use the new power too often, thus frustrating the smooth implementation of legislation' (Hardacre and Damen, 2009: 3), but follow the expectations of principles of political economy.

The relatively difference between the RPS vetoes and DAs (cp. Kaeding and Stack, 2015) also suggests that the easing of the formal requirements for exercising a veto under article 290 has had only a very modest impact on the patterns of their exercise.

However, these results do not imply that Parliament and Council have been sitting on their hands. The Parliament's ECON (economic and financial affairs) Committee, for example, set up so-called corrective scrutiny and preventive scrutiny slots. About once a month one or two delegated acts dossiers, selected by the political groups' coordinators, are publicly discussed in the ECON Committee. In addition, the creation of three agencies (ESAs), which conduct public consultations and make text proposals for DAs, which are

then endorsed by the Commission, has been used in an intelligent way. If the Commission wants to introduce non-substantial changes to the text proposals, it is free to do so and then adopt the DA. But if the Commission wants to introduce substantial changes to the agencies- drafts, they need to re-consult the agencies³. That is when the EP can intervene as a go-between. The EP would work with the information gleaned during the time-consuming public consultations. In practice, it is the stakeholders, which inform the interested MEP. Using the preventive scrutiny, the EP (or more precisely the selected MEPs) can intervene in a more subtle way than the 'nuclear weapon' of an accept/reject situation. In fact the weight of the EP in these negotiations is strengthened by the possibility to use the 'nuclear weapon'. In essence, the EP acts as a transmission mechanism for stakeholders' views.

Consequently, despite the reported low levels of formal exercise of the legislative scrutiny of Commission quasi-legislative acts the legislative veto has been an significant tool of oversight with an impact on Commission actions. Because members of the Commission can anticipate legislative opposition and accommodate it when raised, these new EU legislative veto mechanisms may still have a significant influence on the content of Commission action. In view of its own attenuated political legitimacy, the Commission has a strong institutional interest in avoiding a direct, open confrontation with either European legislator. Moreover, as a repeat player in drafting quasi-legislation, whether in the form of the RPS procedure or DAs, the Commission has a strong incentive to avoid establishing a practice of frequently legislative override of its actions (Stack, 2014, p. 84).

³ For more details on the EU agencies' role in drafting quasi-legislative acts see Costa, M. and Kaeding, M. "The conferral of powers to EU agencies: the case of delegated and implementing acts", Paper presented at the Workshop "Legislative Choice between Delegated and Implementing Acts" at the Deutsche Universität für Verwaltungswissenschaften in Speyer on 20 March 2017.

As a result, there are especially strong reasons to expect that the Commission will frequently be willing to compromise on specific substantive policy to avoid a political confrontation with either European legislators (Calvert, McCubbins and Weingast, 1989), or negotiate to make concessions to European legislators (Stack, 2014, p. 84).

Such ‘latent oversight’ is notoriously difficult to observe, even if its ‘role in implementing political control over the [bureaucracy] is in principle just as important as that of active control.’ (Calvert, McCubbins and Weingast, 1989, p. 605). While it is beyond the scope of this paper to theorize or document the practice of negotiations between the Commission and the EP, there is some evidence that a ‘de facto legislative right of amendment’ (Ponzano, 2008) through individual negotiations, not the formal exercise of the veto, have taken hold (Kaeding and Hardacre, 2013). These negotiations are not always public and therefore difficult to uncover, but in two cases, parliamentary committees for environmental affairs (on the use of animal testing) and for transport and tourism (on the use of seatbelts for children in air-planes) drafted objecting resolutions which were withdrawn even before the committee vote (see Hardacre and Damen for more detailed discussion) after the Commission indicated that the modifications required by the EP would be taken into account in a subsequent revision of the implementing measures.

This paper reveals the grounds for and documented the infrequent use of the formal exercise of the legislative veto in the EU, even under the reforms of Lisbon. That conclusion provides a critical perspective on the achievements of the Lisbon’s restructure of legislative oversight. It also exposes a critical agenda for future theoretical and empirical research: How do informal negotiations with the Commission work? To what extent do the EP and Council exercise latent power over the Commission? And more generally, under

what circumstances does this more informal oversight enhance the democratic legitimacy of the Commission's regulatory policy or, alternatively, lower the cost for interest groups to extract concessions from the Commission through lobbying individual legislators?

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