

Delegating legislative powers to the European Commission: The threat of Non-compliance with tertiary legislation in the member states

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Abstract

The Lisbon Treaty introduced quasi-legislative tertiary legislation – delegated acts – which empowers the European Commission to amend or supplement secondary legislation. Formally, member states control the Commission’s delegated acts only *ex post* via a veto power, while they continue to enjoy *ex ante* amendment power over the alternative Commission legislation, i.e. implementing acts. We analyze whether member states have lost control over executive policy-making with the introduction delegated acts in practice by examining the extent and determinants of their non-compliance with the two types of tertiary acts. Our analysis, using a new dataset on member states’ violations (transposition delays and infringement cases) of all EU tertiary directives adopted in the post-Lisbon Treaty period 2009-2016, shows that member states do not comply less with delegated than with implementing acts. Furthermore, non-compliance with delegated acts is linked to limited government capacity rather than preference divergence with the Commission. This suggests member states’ continue to exert informal influence over delegated acts or agree to their adoption only for non-controversial issues.

Introduction

The vast majority of European Union (EU) legislation constitutes tertiary acts adopted by the European Commission. The Lisbon Treaty introduced a new type of tertiary legislation, i.e. delegated acts (Article 290 TFEU), which grants the Commission quasi-legislative powers to supplement or amend secondary legislation of the EU Council and the European Parliament (EP) for the sake of efficiency. In this procedure, member states' experts may be consulted informally but do not have formal amendment rights. Instead, delegated acts only envision ex-post veto powers for the EU Council and the EP. This is in contrast to implementing acts (Article 291 TFEU), in the adoption of which the Council continues to enjoy ex-ante control via comitology (while the Parliament has lost say). Crucially, while there are technical and legal differences between delegated and implementing acts, in practice they serve as functional substitutes for the adaptation and implementation of EU policy. The decision to grant the Commission the power to adopt one or the other type of tertiary act requires a co-decision by the EU Council and the EP (Yordanova and Zhelyazkova, *forthcoming*).

These constitutional innovations raise concerns about intensified bureaucratization of EU policy-making after the Lisbon Treaty. Delegated acts significantly enhance the discretion of the Commission to produce legislation that is legally binding on the member states, while member states have lost influence in this new system of delegation of executive powers. The purely advisory role of national experts in the adoption of delegated acts creates the danger of a run-away Commission that ignores member states' preferences. Yet, we still have no systematic evidence whether adopted delegated acts do systematically fail to accommodate member states' preferences *in practice*. The paper addresses this question.

Specifically, we evaluate the degree to which member states have actually lost control over the EU executive through the introduction of delegated acts by analyzing the subsequent compliance of member states with these acts. Loss of member states' power and increased bureaucratization of policy-making is likely to generate problems when the EU policies are implemented in national settings (see Börzel, *forthcoming*). Bureaucratization of EU rules could hamper policy implementation because it allows the EU executive to pass legislation, which excludes national constituencies from the decision-making process ("integration by stealth"). This could trigger opposition at the implementation stage. While past research has found that the bureaucratic tertiary acts adopted by the Commission are generally easy to implement (Mastenbroek, 2003; Luergert and Dannwolf, 2009; König and Luetgert, 2009), this may have changed if member states have lost control over tertiary acts.¹ Thus, by analyzing the compliance of member states with various types of tertiary acts after the Lisbon Treaty, this paper adds to the literature on both EU bureaucratization and compliance.

We assume if member states' preferences are not being taken into consideration in the formulation of delegated acts, this should be reflected in low levels of subsequent compliance with such acts. This is justified by past research, which has shown that member

¹ Moreover, past studies have analyzed tertiary and secondary legislation together despite the fundamental differences between the two, thus running the risk violating the assumption of unit homogeneity (Toshkov, 2010).

states express their continued opposition to EU policies “through the backdoor” by not complying with the policies they have disagreed with already in the policy-making stage (Falkner et al, 2004; Thomson, 2010). Thus, we apply standard willingness and capacity based explanations of compliance to derive expectations about member states’ compliance with delegated acts given different assumptions about their level of control over delegated acts.

First, if the member states have lost control over the content of delegated acts and are unable to limit the use of such acts to non-controversial cases only², we should observe less compliance with delegated than with implementing acts (H1). In such cases, we further expect non-compliance with delegated to be driven by member states’ unwillingness to comply after the Commission has ignored their policy concerns. In particular, a member state should be less likely to comply with delegated acts the more its preferences deviate from those of the Commission (H1a). This is because a policy-driven Commission has higher incentives to ignore the preferences of governments it disagrees with. Second, if member states have retained control over the content of delegated acts (e.g. via their threat of veto or the Commission’s voluntary consultations with member states’ expert groups), there should be no differences in the level (H2) and the determinants (H2a) of member states’ compliance with delegated and implementing acts. Finally, if the EU legislators only grant the Commission the power to adopt delegated acts in relation to the most technical and non-controversial issues, then there should even be less non-compliance with delegated than with implementing acts (H3). Moreover, any non-compliance with delegated acts should then be related to member states’ capacity limitations rather than to their unwillingness to comply (H3a).

We test these expectations using an original dataset of all delegated and implementing directives adopted by the Commission in the period between the entry into force of the Lisbon Treaty in 2009 and the end of 2016. The dependent variable on member states’ compliance records is measure in two different ways, namely transposition delays and infringement cases initiated by the Commission against a member state for non-compliance. The findings offer no evidence for member states having lost control in delegated relative to implementing directives. Moreover, any non-compliance with delegated acts is driven by governmental capacity limitations rather than conflict with the Commission. Thus, at the very least, any loss of member states’ say over executive policy-making is not translated in compliance problems. These findings alleviate fears that member states have lost control and that EU bureaucratization has intensified with the introduction of delegated acts in the Lisbon Treaty.

In the following section, we offer an overview of delegated and implementing acts and discuss the implications of their usage for member states’ influence in policy-making. We proceed with a review of the theoretical literature on EU implementation, and in particular, preference-based and capacity-based expectations for compliance. Upon formulating our

² The EP may oppose this because it has the power of legislative scrutiny only over delegated acts, but not over implementing acts.

hypotheses on the extent and determinants of member states' compliance with delegated acts, we describe our research design, analysis and findings. We conclude with a discussion of the results and their implications for the so called bureaucratization of the EU that some underscore (König 2018).

Delegated vs. implementing acts

Nearly 80% of EU legislation constitutes executive acts, adopted by the Commission (Junge et al., 2015, p.788), which serve the purpose to specify, update and implement European legislation. Member states have historically exercised control over the Commission's adoption of executive acts through a comitology system, which entails committees of member states' experts that "decides whether to approve the Commission's acts or to refer them to the Council for further scrutiny" (Brandsma and Blom-Hansen, 2012: 939). The comitology system was created in the 1960s in response to member states' reluctance to delegate extensive powers to the Commission (Bergström, 2005; Blom-Hansen, 2008). In 2006, with the introduction of the regulatory procedure with scrutiny, the EP also received the right to block Commission acts that the Council had enjoyed.

The Lisbon Treaty transformed the system of executive policy-making by introducing the so-called delegated acts (Article 290 TFEU), which transfer to the well-defined powers to the Commission to amend or supplement non-essential elements of secondary legislation (i.e. measures of general scope, but not part of the core text of the legislative act itself). In the adoption of delegated acts, the Commission is held to account only ex-post by the EU legislators, instead of being subject to ex-ante control by the traditional committees of member state representatives in comitology (Article 290 TFEU). In particular, the EU Council and the EP share the powers to revoke the delegation or to object to the adoption of a specific delegated act within a time limit set by the basic legal act (Christiansen and Dobbels, 2013a, 2013b). By contrast, the traditional comitology system is preserved in the so-called implementing acts (Article 291 of the Lisbon Treaty). Despite some adjustments, overall implementing acts maintain the pre-Lisbon strategy of member states to oversee the Commission's executive functions through various committees. However, the EP has lost the right to veto implementing acts.

Most research on the new system of delegation has so far analyzed its development, control and preferences of institutional actors over the use of delegated or implementing acts and when one of the other type is used (Brandsma and Blom-Hansen, 2017; Yordanova and Zhelyazkova, *forthcoming*). These scholars generally agree that the distinction between delegated and implementing acts is not straightforward and the use of either type depends on political considerations (Brandsma and Blom-Hansen, 2012, 2016; Christiansen and Dobbels, 2013a, 2013b). The European Court of Justice confirmed with a case law ruling that ultimately the choice is to be made by the EU legislators (the EP and the Council), pursuant to the respective treaty articles.³ The different formal and informal control the member states can exert over delegated versus implement acts and the lack of clarity over when each type

³ Commission v Parliament and Council (Biocides, ECJ 16 July 2015, C-427/12).

of act is to be used make the practical implications of the introduction of delegated acts unclear. In particular, our understanding of whether and, if so, to what extent member states have lost control over the executive policy-making by the Commission as a result remains limited. We discuss this in the next section.

Have member states lost power with the introduction of delegated measures?

There are different views on the relative level of control exercised by the Council and member states over delegated as compared to implementing executive acts. On the one hand, the formal rules and the preferences of the Council indicate that it has lost control over executive decisions in the system of delegated measures. Firstly, it has *only* the nuclear option to either prevent a delegated act from being adopted or revoke the delegation altogether but no *ex ante* powers to substantively amend delegated acts in a way that reflects the preferences of member states (Christiansen and Dobbels, 2013a, 2013b). Moreover, the Council faces significant constraints in exercising its veto powers. Depending on the provisions in the basic legislative act, it has only limited time to formally voice its objection (between one and six months). Formal vetoes also need to be supported by a relatively large majority of member states (a qualified majority in the Council consisting of at least 72 per cent of its members representing at least 65 per cent of the EU's population). Because of the high voting thresholds, some scholars contend that the member states lose influence under the delegated act system as they can effectively block executive policy-making only when a large number of member states express disagreement with the Commission's draft measures (Kaeding and Stack, 2015). In line with these arguments, Siderius and Brandsma (2016) argue and find that the Commission is keener to build support and thus accommodate member states' preferences when drafting implementing acts than in the preparation of delegated acts. Consequently, the authors conclude that: "Because the Council will almost never veto delegated acts, there are fewer incentives for the Commission to meet the preferences of all Member States." (Siderius and Brandsma, 2016; 1277).

Secondly, the alleged loss of power of member states in delegated acts is also reflected in the preferences of the Council. There is a broad agreement in the literature that the Council generally favors strict comitology rules (Dogan 1997, 2000; Franchino 2007: 283–5; Hardacre and Kaeding, 2010; Blom-Hansen, 2011). After the adoption of the Lisbon Treaty, the Council has continuously insisted on the use of implementing acts or the ordinary legislative procedure during legislative negotiation whenever the use of delegated acts is debated (see Christiansen and Dobbels, 2013a).

On the other hand, however, the loss of formal influence by the member states may not have any practical implications. Member states may still exert informal influence over delegated acts, the Council may obstruct the adoption of such acts or agree to their use only in relation to the most technical and non-controversial issues. Firstly, Blom-Hansen and Brandsma (2012) argue that member states succeed in incorporating their preferences in delegated acts as a result of informal arrangements that commit the Commission to systematically consult national expert groups when drafting delegated acts (Council, 2011; Hardacre and Kaeding, 2011). These arrangements have been described as "reintroduction by the backdoor of the

committee regime” (Ritleng 2015, p. 255). Secondly, such informal consultations do not have strict time limits. That allows member states that disagree with the Commission’s draft measures to delay the adoption of delegated acts. Thirdly, the Council can block the use of delegated acts ex-ante by not conferring to the Commission powers to adopt such acts. The Council has incentives to do so when it fears policy drift from a runaway Commission and, thus, chooses to preserve control over tertiary legislation. This is most likely to happen in relation to highly controversial issues rather than technical issues.

In sum, there is mixed evidence for the claim that the member states have lost influence over executive policy-making process with the introduction of delegated acts. Moreover, any such loss of control would only matter when there is a threat that the Commission would pursue policies that are not congruent with member states’ substantive preferences, i.e. on more controversial issues. We lack systematic information on the Commission’s and member states’ preferences to evaluate the risk of executive drift regarding every (potential) delegated act. However, we argue that member states’ inability to influence the content or occurrence of delegated acts -- i.e. to amend Commission’s proposals or to choose strategically when the Commission is allowed to adopt delegated acts – should be reflected in their subsequent non-compliance with delegated acts and the determinants of this non-compliance. Below, we thus build our expectations based on the literature on EU compliance.

Theories of EU policy implementation

Research on EU implementation has shown that EU’s tertiary acts adopted by the Commission are less likely to experience compliance problems relative to the secondary acts (Luetgert and Dannwolf, 2009; Mastebroek, 2003; Toshkov, 2010). The main explanation is that tertiary acts constitute technical measures that facilitate decision-making by preventing the Council and the European Parliament from getting bogged down in details (Mastebroek, 2003; Craig & De Búrca, 1998: 140). As a result, these acts are “arguably easier to incorporate into national legislation than Council legislation” (Luetgert and Dannwolf, 2009: 313).

Yet, since the adoption of the Treaty of Lisbon, non-compliance with tertiary acts has not been a rare occurrence. In particular, our data set on the implementation of all 84 tertiary directives (33 delegated and 51 implementing directives), adopted in the first seven years after the Lisbon Treaty, shows a large number of transposition delays and infringement cases against member states. Of all the 2352 directive-member state dyads, transposition delays occurred in 547 dyads (or 24%; of which 163 were related to delegated acts) and in 464 dyads (or 20%, of which 185 were related to delegated acts) infringement proceedings were initiated against member states for non-compliance. Thus, non-compliance with EU’s tertiary legislation does not constitute a trivial problem and merits attention.

We follow established approaches to the study of policy compliance to formulate expectations about the determinants of member states’ compliance with delegated and

implementing acts. These approaches could be broadly divided into two groups: capacity-based and preference-based explanations.

The first approach presents non-compliance as the result of states' capacity limitations and complexity and ambiguity of EU legislation (also known as the 'management' approach). Based on the literature on international relations, capacity limitations arise when a government lacks the necessary resources or cannot muster sufficient political and bureaucratic support to enforce an international agreement (Chayes and Chayes, 1993, Tallberg, 2002). Applied to the case of EU implementation, it has been argued that national administrative constraints prevent or slow down the implementation of EU policies by national implementing actors (Börzel, 2005, Thomson, 2007; Zhelyazkova et al, 2016, 2017). Among such constraints, government and bureaucratic inefficiency, poverty and corruption are expected to affect member states' capabilities to process, interpret and adapt European rules into national settings (Haas, 1998, Mbaye 2001, Jensen 2007, Perkins & Newmayer, 2007).⁴

Preference-based explanations (also known as the enforcement approach), by contrast, suggest that states voluntarily choose to defect from international agreements if the perceived benefits exceed the costs of non-compliance (Downs et al, 1996; Fearon 1998). The benefits of non-compliance could be either associated with alternative priorities (given that compliance entails committing scarce resources that could be allocated to other uses), or policy preferences that differ from the contents of the adopted agreements. The costs of non-compliance refer to the probability of detection, perceived reputation losses and the threat of sanctions that could be imposed on violators (Tallberg, 2002; Börzel et al, 2005; Zhelyazkova et al, 2016). In the context of EU implementation, scholars generally focus on societal and government support for the EU or government policy preferences regarding EU directives (Thomson, 2007, Toshkov, 2009).

Based on these preference and capacity based explanations of compliance, we develop alternative hypotheses on the degree and determinants of member states' compliance with tertiary acts when departing from three alternative assumptions about member states' level of control over delegated acts. These assumptions are that member states: 1) exert less control over delegated acts than over implementing acts; 2) exert equal control over the two types of acts; or 3) transfer to the Commission the power to adopt delegated cases *only* in relation the least controversial issues. The assumptions and their respective hypotheses are summarized in Table 1.

⁴ In addition, institutional constraints on decision-making (i.e. veto players) are also expected to slow down the national legislative process and lead to delayed transposition (Tsebelis, 1999a, Haverland 2000, Hille & Hupe 2006, Haverland 2007).

Table 1: Assumptions and hypotheses on member states’ *de facto* control over and level of compliance with delegated acts

<u>Assumption 1:</u> Less control over delegated than implementing acts.	<u>Assumption 2:</u> Equal control over delegated & implementing acts.	<u>Assumption 3:</u> Delegated acts only in relation to the least controversial issues.
<i>H1: More non-compliance with delegated than with implementing acts.</i>	<i>H2: No differences in the level of non-compliance with delegated and implementing acts.</i>	<i>H3: Less non-compliance with delegated than implementing acts.</i>
<i>H1a: Preferences matter:</i> Non-compliance with delegated acts becomes <i>more likely</i> the greater the <i>distance between preferences</i> of the member states and the Commission.	<i>H2a: No differences in the determinants</i> of compliance with delegated and implementing acts.	<i>H3a: Capacity matters:</i> Non-compliance with delegated acts becomes <i>more likely</i> as <i>governmental effectiveness</i> decreases but is not affected by the distance between member states’ and the Commission’s preferences.

Firstly, if member states have less control over the Commission when it adopts delegated rather than implementing acts, the Commission could be passing legislation that does not meet the preferences of (at least some) member states to a greater extent than for implementing acts. Consequently, member states whose policy preferences have been ignored during the decision-making process would have incentives to deviate at the implementation stage. This process is often referred to as “opposition through the backdoor” because non-compliance with EU policies can be seen as the continuation of opposition by other means (Falkner et al, 2004; Thomson, 2010). Thus, if the member states are indeed unable to amend policies in a way that fits their preferences in the system of delegated acts, on average, we should observe relatively more compliance problems related to delegated acts than to implementing acts.

H1: Member states are *more likely* to experience compliance problems in relation to delegated acts than to implementing acts.

Moreover, even if the Commission is free in the adoption of delegated acts, this is unlikely to disadvantage all states equally. Instead, non-compliance problems with such acts should be particularly pronounced for member states, whose preferences deviate more from the Commission’ preferences.

H1a: Member states are more likely to experience compliance problems with delegated acts, the more their preferences deviate from the Commission’s preferences.

Secondly, despite their loss of formal powers, *in practice* the member states may have retained control over delegated acts. As discussed above, informal arrangements commit the Commission to keep consulting member state experts in the adoption of delegated acts despite the formal removal of comitology for such acts. Moreover, the member states can

then delay the adoption of delegated acts by slowing down this consultation procedure. Crucially, the Council retains the nuclear option of vetoing delegated acts, which may dissuade the Commission from deviating from member states' preferences. So, if member states are effectively able to retain control over delegated acts, we should find instead that:

H2. There are no differences in member states' probabilities of not complying with delegated and implementing acts.

Moreover, given maintained member state control over all types of tertiary legislation, we also do not expect there to be any differences in the determinants of non-compliance with delegated and implementing acts:

H2a: There are no differences in the determinants of member states' compliance with delegated and implementing acts.

Thirdly, and finally, if the Council has indeed lost control over delegated acts as compared to implementing acts, it may transfer to the Commission the power to adopt delegated acts only in relation to the most technical and non-controversial issues. This would result in a selection bias, whereby the implementing acts cover the more controversial issues. Consequently, we would expect conversely that:

H3: Member states are *less* likely to experience compliance problems in relation to delegated acts than to implementing acts.

Given non-controversial nature of delegated acts, member states' non-compliance is unlikely to be attributed to their unwillingness to comply. This is because delegated acts on non-controversial issues are unlikely to deviate from member states' preferences. We therefore expect capacity-based explanations to have stronger purchase on explaining non-compliance with such type of executive measures:

H3a: Member states are *more* likely to experience compliance problems with delegated act, the lower their *government effectiveness*. Member states' likelihood of experiencing compliance problems with delegated acts is not related to their preference divergence with the Commission.

Research design

To test our hypotheses, we collected information on member states' implementation activities. We first compiled a data set of all the delegated and implementing directives adopted by the European Commission between 1 December 2009 and 31 December 2016 based on the *Eurlex* database. EU directives need to be incorporated (i.e., transposed) into national legislation before a specified deadline by the relevant national authorities. Failure to meet the transposition deadline is construed as non-compliance with EU policy and subject

to infringement proceedings by the EU Commission.⁵ Therefore, to capture member states implementation of tertiary acts, we supplemented our tertiary act data-set with 1) information on the timeliness of transposition measures member states have reported to the Commission as evidence that they have incorporated delegated and implementing directives into their national legislation and 2) information on any infringement proceedings the Commission has initiated against member states in relation to non-compliance with any of the tertiary directives in our dataset.

Dependent variables

The analysis compares member states' compliance with delegated and implementing Commission directives. For robustness, we rely on two alternative indicators for non-compliance with EU directives: transposition delays and infringement cases opened by the Commission against law-violations by the member states. A member state delays transposition (coded as 1, otherwise 0) when national authorities fail to notify an implementing measure to the Commission before the deadline specified in a given directive. To avoid exaggerating member states' non-compliance, we only consider delays that occurred six weeks after the deadline or later. Another commonly used indicator for non-compliance is the initiation of infringement proceedings by the EU Commission against a member state's failure to comply with a given directive. The infringement procedure generally starts with the issue of a formal letter of notice regarding suspected violations, which constitutes our alternative dependent variable for non-compliance (coded as 1, otherwise 0)⁶. Both indicators of compliance are binary. Therefore, we employ logistic regression models. Moreover, our observations are member state-directive dyads as each member state has to comply with each directive. Therefore, we apply mixed effect logistic regression and nest observations in both directives and member states to deal with violations of the assumption of independence of cases.

Independent variables

The main independent variable distinguishes between delegated and implementing measures (*Delegated* = 1; implementing = 0). It is used to test H1, H2 and H3. To test the remaining hypotheses, we measure member states' bureaucratic capacities (*Government effectiveness*) based on the 'Government Effectiveness' indicator from the World Bank Indicators database (2019). The indicator captures perceptions about the quality of public services, as well as the quality of policy formulation and implementation in various countries. For the measure of the preference divergence between each government and the

⁵ By contrast, EU regulations are directly applicable to national target groups and do not require national transposition. While the Commission can still open infringement proceedings regarding the implementation of EU regulations, e.g. if national legislation or practice are incompatible with the EU requirements, the official EU data on policy infringement did not reveal a single case of pursued non-compliance with tertiary regulations by the European Commission.

⁶ Most studies on compliance use the subsequent infringement stage, the issue of reasoned opinion, as an indicator for member states' on-compliance. Whereas reasoned opinions establish that a member state has violated EU laws, there are too few observations on reasoned opinion in our data to be able to conduct any meaningful analysis. This may be because delegated and implementing measures had to be implemented only recently by the member states and the Commission is yet to issue reasoned opinions against non-compliance.

Commission (*Government-COM EU distance*), we use information about party positions on the EU dimension from Döring and Manow's ParlGov database (2017). Döring and Manow rely on expert assessment data from numerous sources and estimate the EU positions of each political party over time on a scale between 0 and 10. Based on the EU positions of political parties, we computed the EU position of each government in the Council as the average of the government parties' positions, weighted by their share of seats in government (Crombez and Hix, 2015). As the Commission's EU position, we take the EU position of the median Commissioner's government. Thereafter, we computed the absolute distance between each government and the Commission at the time of adoption of the respective tertiary act. Finally, to test our conditional hypotheses, we employ interactions of the variable *Delegated directive* with *Government effectiveness* as well as *Government-COM EU distance*.

We further control for a number of variables at member state and at directive levels that may confound the hypothesized relationship. As the member state level, we differentiate between Central and East European (CEE) and other member states with a dummy variable. Past research has demonstrated generally higher compliance of these newer EU member states than compliance of older member states (Sedelmeier 2008; Yordanova and Zhelyazkova, 2011; Zhelyazkova and Yordanova 2015; Börzel and Sedelmeier, 2017). Moreover, this control is essential as CEE states also exhibit lower governmental effectiveness, which is a key independent variable in our analysis.

Furthermore, we account for member states' sizes by incorporating information on their voting weights in the EU Council under the QMV procedure, based on the Treaty of Nice.⁷ Bigger states can more easily amass the qualified majority necessary to veto the Commission's measure. Thus, in the shadow of a possible veto, the Commission may be more inclined to reflect their preferences in adopted tertiary acts. This would lead bigger member states to experience less non-compliance than smaller member states.

At the directive level, we control for legislative complexity with an index we created using a principal component analysis of the number of recitals, number of articles and number of words in each tertiary act. This is to account for fact that some tertiary acts have a more limited scope than others and, as a result, may be easier to implement.

Moreover, we control for the year of passage of a tertiary act to account for the time that has passed since the entry into force of the Lisbon Treaty in 2009. The practice of the Commission consulting member state expert groups in the adoption of delegated acts, despite the lack of a formal comitology procedure, has been gradually introduced. Thus, non-compliance with delegated acts may have been more likely in earlier years, when member states were less regularly consulted and, hence, their preferences were more likely to be ignored by the Commission in the policy-making process. Finally, the analysis also includes fixed effects for policy area.

⁷ The weighted-vote system introduced in the Treaty of Nice was replaced on 1 November 2014 by a new qualified majority in the Treaty of Lisbon. Yet, until 31 March 2017 any member state could request, on a case-by-case basis, that the old system is applied.

Results

Table 2 shows the results of the analysis of whether and, if so, the conditions under which delegated directives are associated with more transposition delays by the member states than implementing acts. Model 1 includes the key independent variable and all controls. Models 2 and 3 include also interaction terms to test the conditional hypotheses on how the probability of transposition delays for delegated directives should be affected by member states' willingness and capacity to comply given their level of control over the content and use of delegated acts. The models with the alternative dependent variable capturing infringement cases are shown in Table 3 in the Appendix.

Contrary to H1, irrespective of the used dependent variable, the results show no support for the conjecture that member states are less likely to comply with delegated acts than implementing acts. The coefficient for *Delegated* directive is negative, albeit insignificant in the unconditional analysis of transposition delays (Model 1, Table 2), while it is significantly negative in the unconditional analysis of infringement proceedings (Model 1, Table 3). These results rather offer mixed support for H2 and H3, which hypothesized respectively no difference or even less non-compliance with delegated than with implementing acts. The respective explanations are that member states have maintained control over delegated acts (be it via informal means) and that member states restrict the power of the Commission to adopt delegated acts to non-controversial cases. Crucially, these results offer robust evidence that delegated acts have not intensified the EU bureaucratization by facilitating uncontrolled executive law-making. At the very least, such an executive drift is not reflected in member states level of compliance with tertiary legislation.

The findings on the conditional hypotheses offer further support for this conclusion. The significant interaction term of *Delegated* directive with *Government-Commission* distance on the EU dimension indicates significant differences in the impact of preference divergence on compliance with delegated and implementing acts. We explore these differences closer in Figure 1, which displays the marginal effects on transposition delay of delegated versus implementing acts at various levels of distance between a government and the Commission on the EU dimension. As this distance increases, on average, the probability of delayed transposition of delegated directives does not increase but stays low and even becomes indistinguishable from zero. The opposite holds for implementing acts, which are clearly associated with significantly higher probability of delayed transposition as the EU positions of a government and the Commission diverge. The findings are strikingly similar when we model the alternative dependent variable instead, i.e. the probability of an infringement case (Figure 3 in the Appendix). These results contradict H1b. Compliance problems with delegated acts cannot be attributed to ideological conflict between a government and the Commission, and, so to unwillingness to comply. This suggests that delegated acts have not deprived member states of the ability to assert their preferences at the policy-making stage, which should have been reflected in their subsequent opposition to such acts "through the back door" at the implementation stage.

Table 2: Cross-classified multilevel logistic regression of *transposition delays*

	Model 1	Model 2	Model 3
Delegated directive	-0.654 (0.418)	-0.196 (0.445)	1.246* (0.498)
GOV-COM distance (EU)	0.173 (0.098)	0.324** (0.106)	0.197* (0.098)
GOV Effectiveness	-0.192 (0.403)	-0.166 (0.409)	-0.145 (0.396)
Delegated*GOV-COM distance (EU)		-0.568** (0.160)	
Delegated*Government Effectiveness			-1.716** (0.220)
CEE	-1.264* (0.548)	-1.239* (0.556)	-1.633** (0.551)
Voting weights	0.010 (0.025)	0.007 (0.025)	0.005 (0.025)
Complexity	0.168* (0.078)	0.168* (0.080)	0.173* (0.082)
Year of act	-0.436*** (0.084)	-0.444*** (0.086)	-0.449*** (0.090)
Environment	0.680 (0.387)	0.669 (0.398)	0.692 (0.407)
Industry and Internal Market	1.265** (0.423)	1.274** (0.435)	1.308** (0.445)
Transport	0.138 (0.705)	0.170 (0.722)	0.152 (0.737)
Constant	876.3*** (168.9)	891.5*** (173.8)	903.0*** (179.3)
<i>Random effect (member state)</i>	1.058 (0.343)	1.091 (0.355)	1.075 (0.342)
<i>Random effect (directive)</i>	0.613 (0.156)	0.660 (0.166)	0.692 (0.172)
Observations	2267	2267	2267
Number of directives	84	84	84
Number of member states	28	28	28
LR chi2	-1017.6	-1008.7	-984.7

Notes: Reference policy is Agriculture. Standard errors in parentheses. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Instead, the results support H3b. The probability of non-compliance with delegated acts significantly decreases with governmental effectiveness, as the significant negative interaction term in Model 3 indicates. Figure 2 illustrates these results. Specifically, the probability of transposition delays of delegated acts decreases from 0.6 to less than 0.05 as governmental effectiveness ranges from its minimum to its maximum level observed in the dataset. The findings are less clear, but also not contradictory, if the issuance of a formal letter is considered instead (Figure 4). Interestingly, the probability of non-compliance with implementing directives does not decrease with governmental effectiveness as it does for delegated directives. This is another piece of suggestive evidence that the set of issues decided using delegated and implementing acts differ.

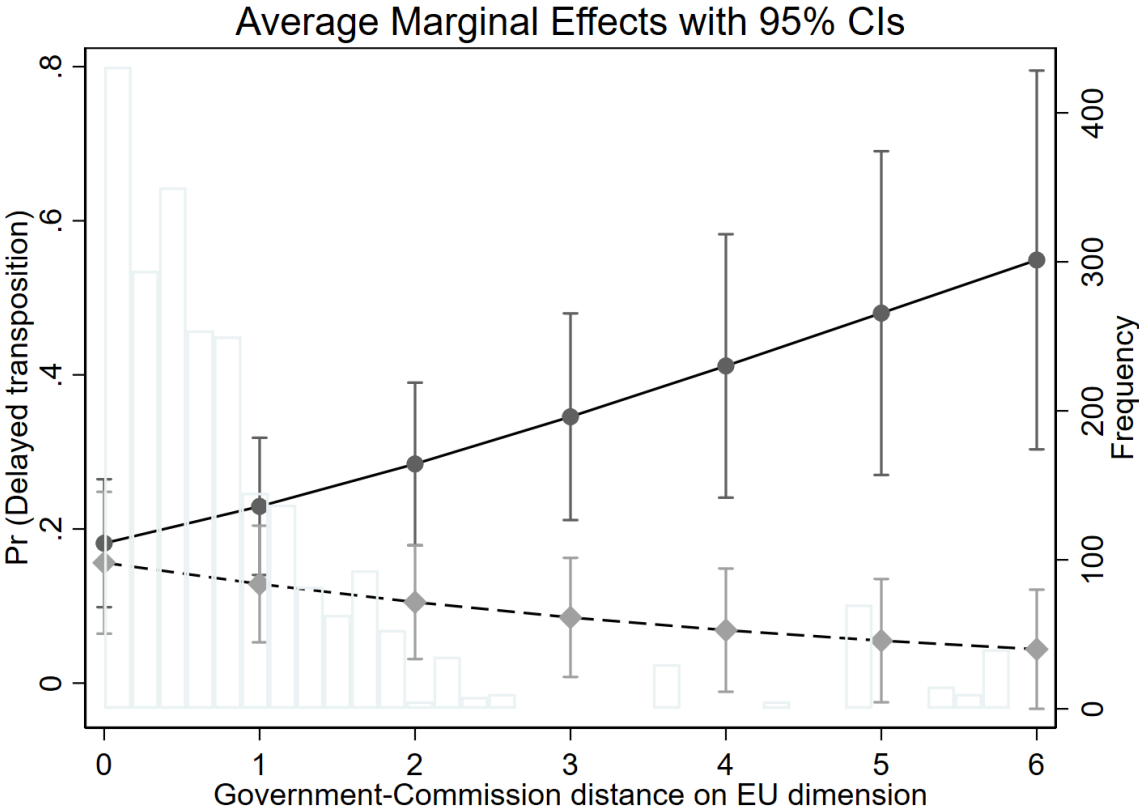


Figure 1: Predicted probability of delayed transposition of delegated and implementing directives over distance between a government and the Commission

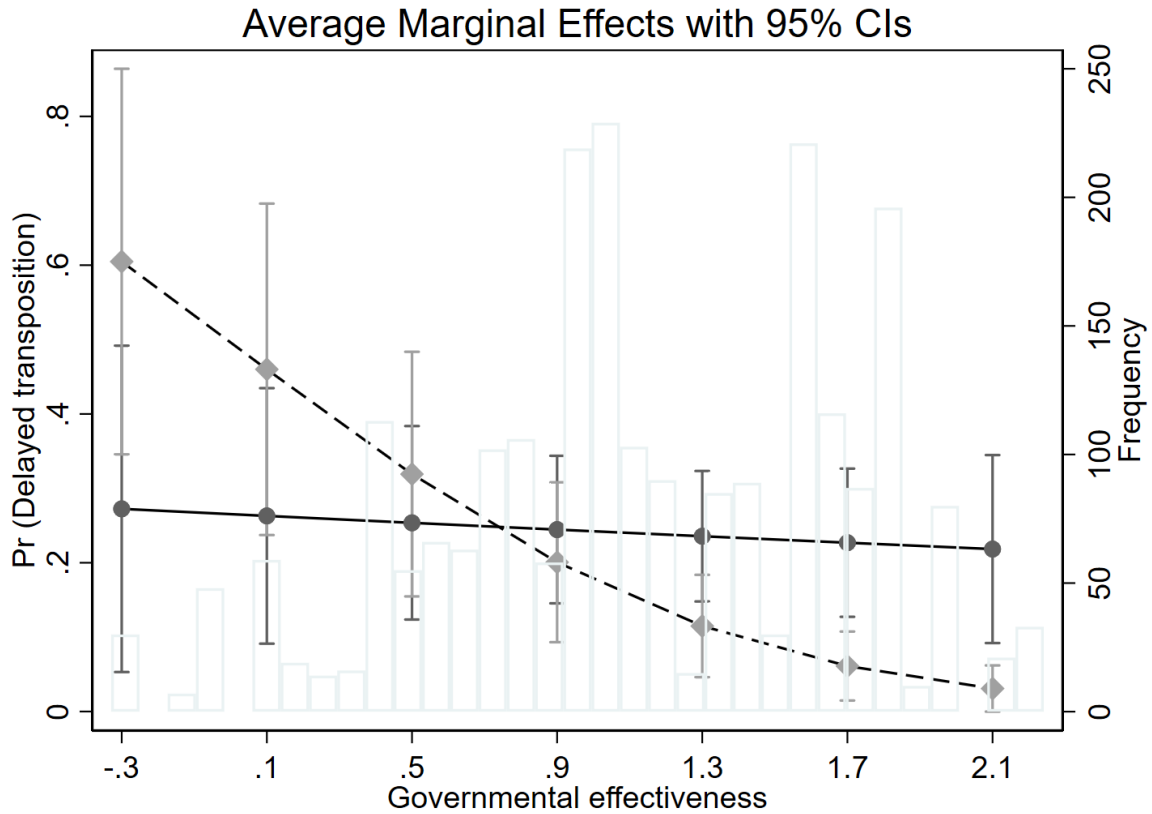


Figure 2: Predicted probability of delayed transposition of delegated and implementing directives over level of governmental effectiveness

Discussion

The goal of this study was to investigate the consequences from the introduction of the new EU system of delegation of quasi-legislative powers to the European Commission for legislative and implementation outcomes. While the Lisbon Treaty introduced major changes regarding the EU's legislative control over executive law-making by the Commission, we still lack understanding of the implications of these changes for member states' ability to maintain their influence over executive decisions. In this study, we investigated the extent to which the EU member states have lost power in the new delegated measures by comparing the member states' levels of compliance with the new delegated as compared to the established implementing executive acts. Moreover, we studied the determinants of non-compliance with delegated acts to extrapolate member states' *de facto* control over the use and content of delegated acts.

Based on the analysis of member states' compliance with all delegated and implementing directives adopted between 2009 and 2016, we did not find any evidence of delegated acts being associated with more compliance problems than implementing acts. If anything, the opposite is true (when considering infringement proceedings). Thus, member states do not seem to oppose delegated acts via non-compliance with such acts at the implementation

state. These results do not support the conjecture that delegated acts have led to a loss of member states' control over the Commission, even if the formal removal of comitology, which has been used to control the Commission's policy-making activities *ex ante*, may suggest otherwise. One possible explanation is that member states have sustained informal control over delegated acts. Another explanation is that member states strategically select only non-controversial issues for policy-making via delegated acts, i.e. for cases which would not be contested and would be easy to implement. Our results are most consistent with the latter explanation. This is because we do find that capacity-based explanations help explain non-compliance with delegated acts, while preference-based explanations do not.

Such selection bias in delegated acts, which appear to cover mostly non-controversial issues, alleviates concerns of intensified EU bureaucratization by the introduction of delegated acts in the Lisbon Treaty. Yet, it also indicates that the real loser of the revision of the system of delegation to the Commission is the European Parliament. In particular, the results suggest that the EP now only ever controls the Commission (through a veto power) on issues of little controversy, while it has lost control over what appears to be the more controversial tertiary legislation, i.e. implementing acts.

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Appendix

Table 3: Cross-classified multilevel logistic regression of infringement proceedings (issue of formal letter)

	(1)	(2)	(3)
Delegated directive	-2.048** (0.630)	-1.823** (0.635)	-1.065 (0.680)
GOV-COM distance (EU)	0.150 (0.100)	0.235* (0.107)	0.148 (0.101)
GOV Effectiveness	0.375 (0.512)	0.386 (0.513)	0.563 (0.510)
Delegated*GOV-COM distance (EU)		-0.212* (0.096)	
Delegated*Government Effectiveness			-0.888*** (0.227)
CEE	-0.229 (0.705)	-0.219 (0.704)	-0.373 (0.699)
Voting weights	0.0246 (0.033)	0.0243 (0.0324)	0.023 (0.032)
Complexity	0.0271 (0.116)	0.0282 (0.117)	0.0273 (0.118)
Year of act	0.573*** (0.136)	0.570*** (0.130)	0.584*** (0.129)
Environment	2.511*** (0.597)	2.514*** (0.597)	2.551*** (0.606)
Industry and Internal Market	1.966** (0.646)	1.971** (0.646)	1.999** (0.655)
Transport	1.024 (1.019)	1.032 (1.019)	1.041 (1.033)
Constant	-1156.4*** (274.8)	-1152.1*** (261.7)	-1179.7*** (259.6)
<i>Random effect (member state)</i>	1.911 (0.664)	1.905 (0.662)	1.886 (0.652)
<i>Random effect (directive)</i>	1.703 (0.399)	1.704 (0.396)	1.756 (0.408)
Number of directives	85	85	85
Number of member states	28	28	28
Observations	2380	2380	2380
LR chi2	-902.2	-899.7	-894.4

Notes: Reference policy is Agriculture. Standard errors in parentheses. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

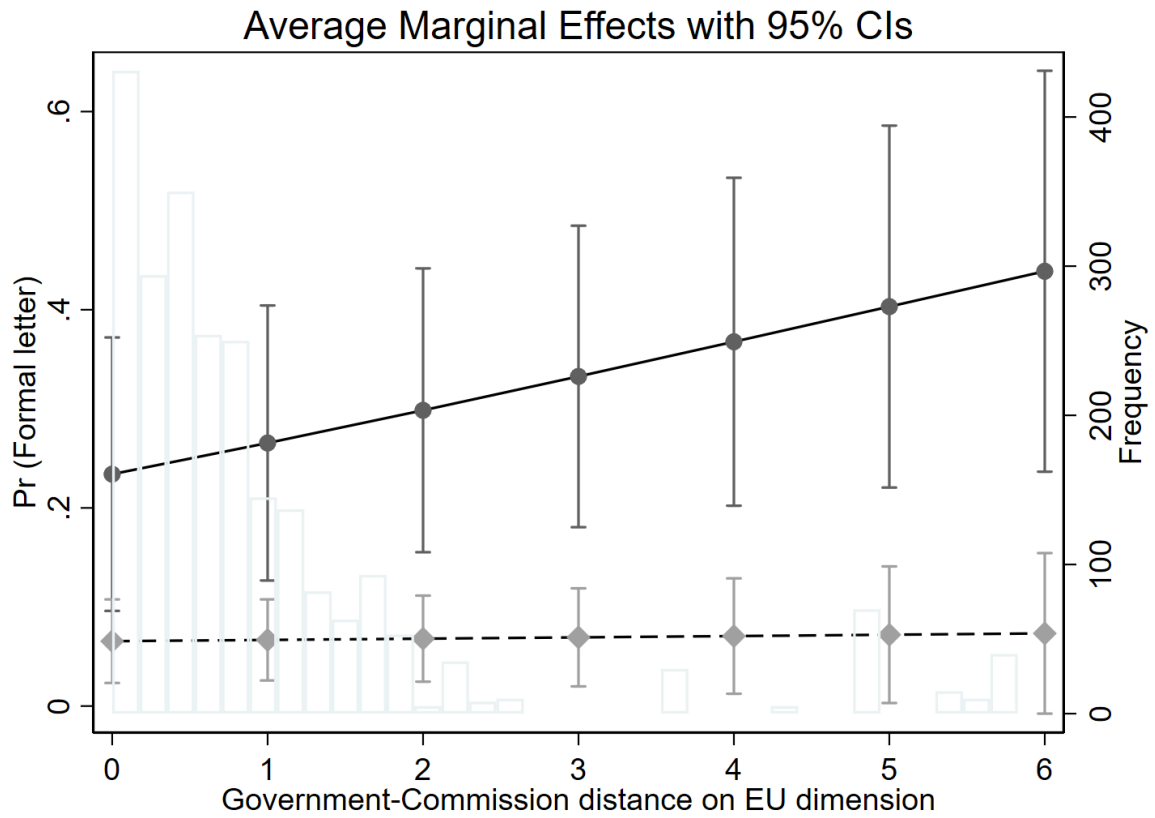


Figure 3: Predicted probability of infringement proceedings (formal letter) for delegated and implementing directives over distance between a government and the Commission

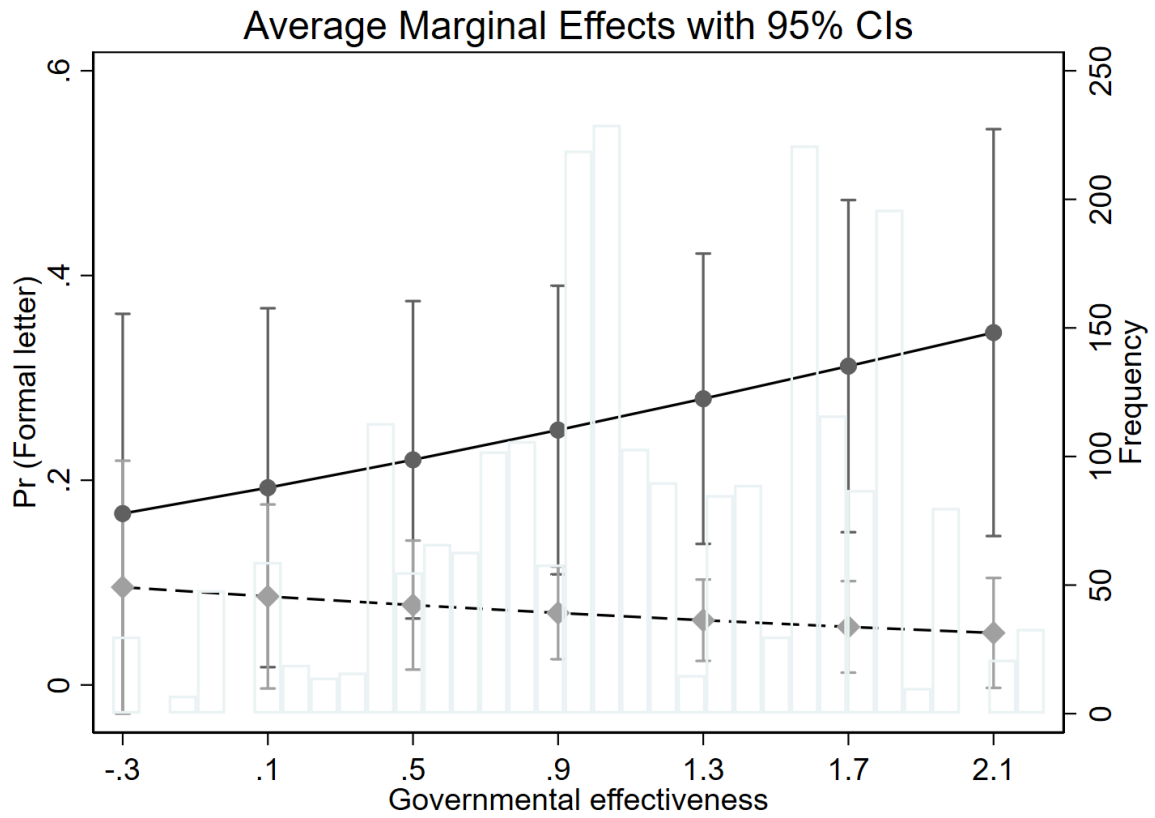


Figure 4: Predicted probability of infringement proceedings (formal letter) for delegated and implementing directives over level of governmental effectiveness