Danger! Glyphosate may Expose Weaknesses in Institutional Systems: EU Legislation and Comitology in the Face of a Controversial Reauthorisation

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The 2017 glyphosate reauthorisation process has exposed key weaknesses of the EU's institutional system. First, the role of Germany as Member State rapporteur and the subsequent decision to appoint a group of Member States to form the Assessment Group on Glyphosate (AGG) suggest that the nature of scientific assessments become blurred. These assessments are apparently not just purely objective, science-based and procedural elements of the authorization procedure, but require support from a significant number of Member States as well. Second, the arduous comitology trajectory in the glyphosate reauthorisation process has caused the Commission to initiate questionable changes to comitology. These changes would corrupt the coherence of the EU's legislative system in general and the constitutional distinction between delegated and implementing acts in particular. Moreover, they would overlook the more obvious solution of relying more on discretion on the part of the Commission. Lastly, the glyphosate reauthorisation has questioned the dichotomy between legislation and executive rule-making, an equally central element of the EU's constitutional order. This dichotomy is based on a distinction between essential elements that belong to the legislative domain and non-essential element which are more technical in nature. It has been claimed that weighing the economic benefits of pesticides against the health and environmental costs associated with their use is in essence a legislative choice. This claim highlights not so much the practical problem of how to draw the line between political and technical decision-making, but rather denies the very meaning of the dichotomy altogether. Yet, the current system on the placing on the market of plant protection products – based on the legislation providing the general framework and the executive applying this in concrete cases – is certainly not devoid of coherence and logic.

I. Introduction

In his 2016 State of the Union address, former European Commission president Juncker displayed a perhaps unusual level of frustration for the role the Commission had been forced into in the decision-making on the renewal of authorisation for glyphosate.[1]

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[1] European Commission, *State of the Union Address 2016: Towards a better Europe – a Europe that protects, empowers and defends*, available at <europa.eu/rapid/press-release_SPEECH-16-3043_en.htm>.

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Unusual indeed, also in light of the European Commission's ambition to be a more political and less technocratic institution.[2] Nevertheless, Juncker expressed his dissatisfaction at being forced by the Parliament and the Council to take a decision where EU countries could not decide among themselves whether or not to ban the use of glyphosate in herbicides. He announced that the rules of the existing Comitology regulation that allowed for that to happen would need to change. The Commission would table a proposal to this end.[3]

Equally unhappy about the course of events were some members of the European Parliament (EP) who argued that "the decision on the extension of glyphosate essentially involves a balancing of economic interests on the one hand and public health and environmental concerns on the other".[4] It will not escape the attention of those well-versed in the EU's institutional system that these MEPs thus called for such decisions to be made by the EU's legislature. The Commission could, however, adopt the decision independently as an act of executive rule-making,[5] which formally excluded the EP from the decision-making.[6] The argument made by the EP members thus questioned the dichotomy between legislative and non-legislative acts.

Hence, the 2017 glyphosate decision-making process demonstrated not only controversy on the role of EU institutions and Member States, but equally on the delineation between legislative and non-legislative acts (administrative rule-making). In this contribution the effects of the glyphosate decision-making process on these broader issues will be assessed. Thus, this contribution will not provide a critical assessment of the glyphosate reauthorisation decision-making itself, but will rather examine its effects on these selected aspects of the EU's institutional framework. Such effects will be assessed in light of the coherence of the EU's constitutional system and its underlying dichotomy between technical and political decision-making. The glyphosate decision-making has raised other issues as well, such as the role and independence of EU agencies and the contribution of the Citizens' Initiative[7] to the democratic quality of the EU.[8] These issues will remain outside the scope of this contribution, however.

Section II provides a short overview of the decision-making process on the glyphosate authorisation renewal around 2017. Then, in section III, the role of the Member States

[2] See for instance European Commission, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the next European Commission", Strasbourg, 15 July 2014.

[3] It did so shortly after. The proposal is discussed in section IV.

[4] Input by the Greens, available at <extranet.greens-efa-service.eu/public/media/file/1/5422>.

[5] Though in adopting the decision the Commission must cooperate with a committee of national experts, as we will see below.

[6] The only competence of the Parliament with regard to implementing acts is the so-called "droit de regard", which allows the Parliament (and also the Council) to adopt a resolution with the aim of having the Commission withdraw the implementing act at issue (Art 11 of the Comitology Regulation). The relevance of this right is limited, however. The EP must justify this step by arguing that by adopting the measure the Commission would overstep the limits of its powers. The EP has, however, no competence to formally block the adoption of the act at issue (the Commission is merely obliged to reconsider it).

[7] The Commission's response to the Initiative "Ban glyphosate and protect people and the environment from toxic pesticides" dates from 12 December 2017, COM C (2017) 8414 and is available at <ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-8414-F1-EN-MAIN-PART-1.PDF>.

[8] A Arcuri and Y Hale Hendlin, "The Chemical Anthropocene: Glyphosate as a Case Study of Pesticide Exposures" (2019) 30(2) King's Law Journal 234.

individually, in their position as member state rapporteur, will be assessed, followed by a discussion of their *collective* role, in comitology committees (section IV). Section V focuses on the effects of the glyphosate decision-making on the question of what issues the EU legislature must regulate itself and which elements may be left for the Commission to regulate. In the final section the effects of the glyphosate decision-making and the responses it has sparked will be discussed as well as the prospects this will bring for the EU's institutional system.

II. Highlights of the glyphosate authorisation renewal decision-making process

Initially, glyphosate was admitted to the European market in July 2002, a decision which was based on based on Directive 91/414/EEC. This directive has been replaced by Regulation 1107/2009/EU (on the marketing of Plant Protection Products). In the period 2012–2017 glyphosate was subject to scientific review in light of the expiring authorisation (July 2016). In this process of (re-)authorisation, the role of the so-called rapporteur Member State is key. According to the 2009 Regulation, the producer must submit the application to the Rapporteur Member State.[9] The latter checks the admissibility of the application[10] but most importantly compiles a draft assessment report that assesses, based on the state of play in scientific research, inter alia mutagenicity and carcinogenity risks.[11] Germany, the rapporteur Member State for glyphosate, issued – by way of its *Bundesinstitut für Risikobewertung* (BfR) – a positive report, indicating in particular that glyphosate would not entail significant carcinogenicity risks. Although assessing active substances involves many more public health and environmental aspects, the controversy about glyphosate revolved indeed around the carcinogenicity risks. The responsible EU agency, the European Food and Safety Agency (EFSA), followed with an equally positive assessment, indicating that glyphosate was "unlikely to pose a carcinogenic hazard to humans".[12] The International Agency for Research on Cancer (IARC) had, however, concluded that glyphosate would be "probably carcinogenic to humans".[13] This sparked a controversy about the reliability of EFSA's findings.[14]

Nevertheless, the Commission pushed for a renewal of the authorisation of glyphosate, but the adoption of the implementing regulation to this end is subject to the committee

[9] Art 7 of the Regulation.

[10] Art 9 of the Regulation.

[11] Art 11 of the Regulation.

[12] EFSA, *Conclusion on the peer review of the pesticide risk assessment of the active substance glyphosate*, of 12 November 2015, available at <efsa.onlinelibrary.wiley.com/doi/abs/10.2903/j.efsa.2015.4302>.

[13] Report from the International Agency for Research on Cancer of 21 December 2015, available at <www.iarc.fr/wp-content/uploads/2018/07/MonographVolume112-1.pdf>.

[14] Its report had been based, inter alia, on evidence from the Glyphosate Task Force, a group of 22 companies financing safety studies into the herbicide. This party was not considered to be objective. In reaction, the Commission adopted a legislative proposal to improve transparency in scientific assessments as well as the quality and independence of the scientific studies that are the basis of the assessments carried out by the European Food Safety Authority, COM(2018) 179.

procedure system (or "comitology") based on the Comitology Regulation.[15] Comitology concerns a unique feature of EU law, which allows the Member States to control decision-making over executive rule-making. The system was born in the 1960s when the Member States did not wish to overburden the legislature with the regulation of all aspects of the Common Agricultural Policy (CAP) but at the same time sought to avoid a situation in which the Commission would have considerable freedom to implement the CAP according to its own preferences. The solution was found in what is officially labelled as the committee procedure system.[16] It obliges the Commission to cooperate with committees of national experts in the adoption of implementing acts. The powers of these committees differ according to the procedure that is prescribed.

The applicable procedure in the case of the glyphosate reauthorisation is the examination procedure, which was introduced in 2011. If the examination committee does not deliver an opinion (which is the outcome if no qualified majority can be established either in favour of or against the draft implementing act), the European Commission shall not adopt the draft act if it concerns (inter alia) the protection of the health or safety of humans, animals or plants. Decisions on the (re-)authorisation of active substances are of a particular kind, as it is not possible to not take a decision: these substances must either be accepted or banned from the internal market. The options in a "no opinion" scenario for the Commission are to amend the draft implementing act and submit the new version to the examination committee, or to submit the original draft act to the appeal committee, which is a higher level committee.

In the glyphosate case, the Committee on Plants, Animals, Food and Feed (PAFF – the responsible committee in the field) could not reach a qualified majority either in favour of or against the proposed implementing act. The German abstention in the voting procedure was an important reason for this. Eventually, when the German representative in the appeal committee voted in favour, the committee could come to support the reauthorisation decision, albeit for a limited period of five years only.[17] This allowed the Commission to adopt the implementing regulation, an outcome it probably had not expected in light of the arduous decision-making on sensitive products and substances in the past. In the period 2014–2017 such decision-making persistently resulted in deadlock.[18] This was the reason for the Commission to propose amendments to the system of comitology, which will be discussed in the next section. In the meantime, the reauthorisation was disapproved of by Members of the European Parliament, which had just one week before held a public hearing on the Citizens' Initiative (ECI) "Ban glyphosate and protect people and the environment from toxic pesticides".[19] Inevitably, this gave the impression of the EP being bypassed.

[15] Regulation 182/2011/EU of the European Parliament and the Council of 28 February 2011.

[16] For an elaborate overview of comitology's history, in particular the development of its legal bases, see P Ponzano, "Comitologie: un point de vue de la Commission?" (2008) 4 Revue de droit de l'Union Européenne 713.

[17] For a more elaborate account of the course of events see J Tosun et al, "A Case of 'Muddling Through'? The Politics of Renewing Glyphosate Authorization in the European Union" (2019) 11 Sustainability 440.

[18] M Mühlböck and J Tosun, "Responsiveness to Different National Interests: Voting Behaviour on Genetically Modified Organisms in the Council of the European Union" (2018) 56(2) Journal of Common Market Studies 385.

[19] European Parliament (ENVI committee), *Public hearing on Ban glyphosate of 20 November 2017*, available at <multimedia.europarl.europa.eu/nl/public-hearing-on-the-european-citizens-initiative-ban-glyphosate-and-protect-people-and-the-environment-from-toxic-pesticides-at-enviitreagripeti-committees_EP062031_06-V_v>.

Comitology, however, is a system of executive rule-making and for that reason does not imply co-deciding powers for the Parliament. Such powers belong to the Parliament under the ordinary legislative procedure. Thus, the issue of the EP's involvement essentially revolves around the question whether decisions on the authorisation of active substances should be for the EU legislature to make.

III. The Member States individually

Member States have a crucial role in the authorisation of active substances in the EU. They impact decision-making through comitology, which is – as elaborated above – a common feature of EU executive rule-making. In the case of the authorisation of specific products and substances an extra element of Member State involvement is added. Specific Member States are designated to act as rapporteurs, which means they compile the file and carry out the first assessment before the EFSA does. In other words, the Member States (at least the Member State rapporteur) are involved from the very beginning of the decision-making to the very end of it when the implementing act is adopted in comitology. The responsibility of Member States as rapporteurs may seem mostly, or even entirely, technical and procedural, but the glyphosate decision-making demonstrated that it may still put the Member State rapporteur in a difficult political situation. Apart from credibility issues of the competent authority, it has questioned the freedom of Member States to abstain or vote against decisions in comitology when their initial position has been positive. Formally, Member States indeed retain this freedom: no legal obligation exists under EU law that would bind the Member States in comitology to assessments made earlier as Member State rapporteur. Undoubtedly, this is at least partly due to the fact that the national representative in comitology (representatives of the ministry) is not the same as the actor which assessed glyphosate in the first instance (in this case, the German Federal Agency for Occupational Protection).

The response prompted by Germany's role may nevertheless be viewed as a simple sanctioning measure. In May 2019 a Regulation was adopted, taking the rapporteurship away from Germany.[20] The Regulation opened the possibility for a group of Member States – rather than an individual Member State – to assume the role of rapporteurs. The reasons put forward in the regulation are the expected workload and the complexity of the task related to the evaluation of a specific active substance; a desired repartition of the workload and a pooling of expertise. Nothing in the official considerations suggests that the change of the governance system would have anything to do with the German performance as rapporteur Member State. The composition of the current Assessment Group on Glyphosate (AGG) – France, Hungary, the Netherlands and Sweden – suggests, however, that the Commission and the other Member States were not even willing to trust Germany to be part of this system of collective responsibility.

Broader ramifications of the appointment of the AGG become visible when we zoom out from Germany's special role. The appointment of a group of Member States reduces

[20] Implementing Regulation 2019/724/EU of 10 May 2019, OJ L 124/32.

first of all the vulnerability of having just one responsible Member State. A common assessment by a group of Member States strengthens the legitimacy thereof, and is less likely to be set aside or overturned. At the same time, however, it may suggest that the assessments are considered to be (at least in part) of a political nature. Indeed, the involvement of a greater number of Member States suggests a greater reliance on input legitimacy arguments. This line of reasoning suggests that scientific assessments are not just purely objective, science-based and procedural elements of the authorisation procedure, but require support from a significant number of Member States. The counterargument, as put forward by the Commission, runs that the complexity of the issue and the need to pool the necessary expertise (rather than the alleged political nature of the issue) require the collective responsibility of a group of Member States. However, no evidence was put forward to demonstrate the inability of the biggest of Member States to adequately deal with the issue. Moreover, if expertise is indeed a crucial factor, it makes little sense to exclude the Member State that has built extensive expertise as a Member State rapporteur from the Assessment group, even if it has indeed lost credibility for the way in which it dealt with the initial assessment.[21] Thus, the suggestion that a political rationale underlies this change in the glyphosate decision-making system cannot be simply dismissed.

IV. The Member States collectively: comitology

The collective role of the Member States entered the limelight when the glyphosate renewal decision-making reached comitology. The assessment of the events must be considered in light of the origins of comitology and the assumptions on which it has been based. The first of these assumptions is that the EU legislature cannot simply regulate each and every aspect of all EU policies.[22] As is the case in other jurisdictions, the EU equally relies strongly on executive rule-making for the implementation of its policies. Particular to the EU system, however, is the principle that executive rule-making authority is decentralised: the prime responsibility for the implementation of EU legislation lies with the Member States.[23] The Commission's authority to adopt implementing acts is secondary and limited to situations in which a need for uniform conditions for the implementation EU acts exists.[24] Thus, the Commission's implementing powers are situated in the supranational zone which borders on one side the area of Member States' *individual* powers to implement EU policies[25] and on the other the EU's legislative zone, in which the Member States

[21] Arcuri and Hale Hendlin, supra, note 8, at p 248.

[22] PP Craig, "Comitology, Rulemaking and the Lisbon Settlement. Tensions and Strains" in CF Bergström and D Ritleng, *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford University Press 2016) p 174.

[23] Art 290(1) TFEU provides that the Member States shall adopt all measures of national law necessary to implement legally binding EU acts.

[24] Art 291(2) TFEU.

[25] Advocate-General Jääskinen argued that the main constitutional issue for implementing acts would thereby be the respect for the primary competence of the Member States to implement EU legislation (in contrast to delegated acts, for which democratic control would be the main issue: conclusion in Case C-270/12 *United Kingdom v Council and Parliament*, ECLI:EU:C:2013:562).

collectively decide on legislation in the Council. It proved difficult for the Member States to accept such an 'in-between' zone in which they would be excluded from the decision-making altogether. Moreover, they realised that implementing powers may still entail significant regulatory choices. Thus, they refused to accord the Commission a blank cheque.[26] Involving national experts in comitology compensates to some extent for the loss of authority of the Member States to adopt implementing measures themselves. The third subparagraph of Article 291 TFEU establishes the competence for the EU legislature to regulate how the Member States control the Commission, which awards the system Treaty (and thereby constitutional) status. The scope of implementing authority of the Commission (and thus of comitology) is not only defined by the enabling provision from the parent legislative act. The CJEU has established that implementing acts must comply with the "essential general aims pursued by the legislative act" and must be "necessary or appropriate for the implementation of that act without supplementing or amending it".[27]

The Treaty of Lisbon and the subsequent adoption of the new Comitology Regulation[28] have brought important changes to comitology. Most notably, no longer do any of the current procedures directly involve the Council (or the EP). This was different under the old regime. The Regulatory Procedure with Scrutiny (known under its French acronym PRAC) gave the strongest powers of oversight and allowed the Council and the European Parliament to block the adoption of implementing acts. In the set-up of the Treaty of Lisbon, this procedure has been replaced by the concept of delegated acts (Article 290 TFEU).[29] This formally excludes issues subject to delegation from the comitology system. Fierce institutional battles have been the result of this, as the European Parliament has consistently favoured delegation over implementation, while the Council has been a strong proponent of implementation instead. The possibility to *ex ante* impact the decision-making through national experts has, for the Council, been too precious to easily relinquish.[30] The CJEU has had to decide on the demarcation between delegation and implementation but in doing so it has left considerable discretion to the legislature.[31] In particular, the degree of discretion

[26] Craig, supra, note 22, p 175.

[27] Case C-65/13, ECLI:EU:C:2014:2289.

[28] Regulation 182/2011/EU of the European Parliament and the Council of 28 February 2011.

[29] However, the procedure is still applied for implementing acts based on legislation that predates the Treaty of Lisbon. Proposals from the Commission to align the RPS provisions to either delegated acts or implementing acts (the so-called "omnibus proposals") have not been adopted, but the three institutions have reached agreement on aligning individual RPS provisions that represent only a minority of the total RPS provisions.

[30] As a response to the contentious nature of the issue, both the Commission and the EP have sought to demarcate implementation and delegation better. By contrast, the Council has preferred to decide on a case-by-case basis. The Commission adopted guidelines: the Delegated Acts Guidelines of 24 June 2011, SEC (2011) 855 and the Implementing Acts guidelines of 25 October 2012, SEC (2012) 617. The European Parliament has adopted a report prepared by its member Szajer which had as its main aim to identify objective criteria for the choice between the two measures: Report of 4 December 2013 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI)). The Commission's commitment to consult national experts as well before adopting delegated acts may, to some extent, have eased the Council's aversion to these acts.

[31] In its decision in the *Biocides* case – the landmark decision in this regard – the CJEU ruled that this discretion is subject only to compliance with the substantive and procedural criteria provided for by the TFEU: Case C-427/12, *Biocides*, ECLI:EU:C:2014:170.

awarded to the Commission is for the Court not a relevant factor for the choice between implementation and delegation.[32]

Two other procedures from the old comitology regime – the regulatory procedure and the management procedure – equally involved the Council if there was disagreement on lower levels. The present-day procedures, however, no longer provide any role for political institutions. The current most far-reaching procedure is the examination procedure. This procedure does include an appeal possibility which the Commission has had to accept.[33] But the appeal procedure merely involves a committee of higher-ranking (but not political) representatives. The CJEU has made clear that it will strictly review whether the procedures laid down by the Comitology regulation have been observed.[34] All in all, the comitology system post-Lisbon is arguably more technocratic in nature and is positioned more distinctly from the EU's political institutions.

Here we arrive at the fundamental question on the foundations of comitology. Where does it derive its legitimacy from? Is comitology based on the need for technical expertise or rather on a need for political control?[35] The dichotomy has been crucial in the glyphosate dossier as well. If one argues that the adoption of implementing acts essentially involves the translation of technical knowledge and expertise into law, comitology may be viewed as a form of objective and evidence-based decision-making aimed at effective and efficient problem-solving. In such a technocratic perspective, comitology is essentially based on output legitimacy. This brings along an argument to keep politics out of the decision-making altogether. An opposing view is that every elaboration of general legislative norms involves at some level a balancing of interests and values. Indeed, especially in fleshing out the details of an issue, crucial regulatory choices are made. Thus, "the technical" can never be fully separated from "the political". This means that there is an inherent political dimension to comitology. Consequently, alternative legitimacy sources must be tapped into. This explains the European Parliament's quest to get a stronger grip on comitology. However, this view not only relies on external democratic accountability mechanisms. Alternative legitimacy sources may equally be explored by viewing comitology as a form of deliberative democracy. In such a perspective, comitology serves as a forum for political processes and as a coordinating mechanism between supranational and national and governmental and social actors.[36] This co-existence of different and even conflicting views on the nature of comitology and its legitimacy

[32] Case C-88/14, *Visa Regulation*, ECLI:EU:C:2015:499.

[33] This was not part of the Commission's proposal for the Comitology Regulation: European Commission, 9 March 2010, COM (2010) 83 final.

[34] Case C-183/16 P, *Tilly-Sabco*, ECLI:EU:C:2017:704.

[35] Legal scholars, political scientists and public administration scholars alike delved into the issue. The comitology dichotomy of technical versus political decision-making has perhaps been deboned most profoundly by Shapiro: M Shapiro, "'Deliberative', 'Independent' technocracy versus Democratic Politics: will the Globe echo the EU?" (2005) 68 Law and Contemporary Problems 341.

[36] C Joerges, "Reconceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws" in B Kohler-Koch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Lanham, Rowman & Littlefield 2007) p 311.

sources is bound to create institutional and political tensions.[37] The ambiguous position of the Commission on comitology further fuels its undetermined status. On the one hand, the Commission has sought to free itself as much as possible from what it considered as unwarranted constraints of its executive autonomy.[38] On the other hand, the regulatory practice has demonstrated a close and effective cooperation between the Commission and committees of national experts that led some scholars to the observation that comitology has integrated or fused national and European administrative domains.[39]

The glyphosate renewal process has been rich in comitology. In 2016, the Commission tabled a proposal on two occasions which both resulted in "no opinion". Thus, a short extension of the authorisation was agreed to give the European Chemicals Agency (ECHA) time to draw up a report and for EFSA to present additional findings.[40] The intention was to create the best circumstances for a well-founded and legitimate decision. When the findings of ECHA and EFSA became available in 2017, however, the decision-making circumstances had deteriorated even further. The contestation of EFSA's independence and the submission of the Citizens' Initiative to ban glyphosate complicated the discussions between the Commission and the Member States. As a compromise, a shorter renewal period became the most realistic alternative, but the PAFF in November 2017 again delivered a "no opinion" result. Very soon after, however, (the temporary extension of the authorisation was to expire by the end of 2017) the matter was put to the Appeal committee which could reach a qualified majority in favour of a shorter renewal period of five years.[41]

In reaction to the arduous glyphosate decision-making, the Commission proposed a fourfold change to the comitology system, with the particular aim of avoiding "no opinion" outcomes by the committee of appeal.[42] The first proposal was to make public the voting behavior of individual Member States.[43] According to the second proposal the voting rules would be eased, in the sense that abstentions and absences would not be considered as participating Member States for the calculation of the qualified majority. More problematic are the proposals to include the Council in the decision-making. The third proposal would essentially entail that the Council could act as the appeal committee, after at least one initial meeting of the appeal committee composed of representatives of lower rank.[44] In addition, and this is the fourth proposal, the Commission could ask the Council as an institution for an opinion in case of "no opinion" in the appeal committee.[45]

[37] Christiansen and Dobbels have examined these tensions empirically and concerning comitology they have zoomed in specifically on the appeal committee: T Christiansen and M Dobbels, "Interinstitutional Tensions in the New System for Delegation of Powers" in Bergström and Ritleng, supra, note 22, p 87 (in particular section 5.2.4).

[38] Craig, supra, note 22, p 175.

[39] W Wessels, "Comitology: Fusion in Action. Politico-administrative Trends in the EU System" (1998) 5 JEPP 209.

[40] Implementing Regulation 2016/1056/EU of 29 June 2016.

[41] Implementing Regulation 2017/2324/EU of 12 December 2017.

[42] Proposal for a Regulation amending Regulation 182/2011/EU of 14 December 2017, COM(2017) 85 fin.

[43] This element of the proposal was supported by Members of the European Parliament: see question for a written answer by Swedish MEP Andersson from 15 June 2018, available at <www.europarl.europa.eu/doceo/document/E-8-2018-003285_EN.html?redirect>.

[44] Art 3(7), proposed addition of a sixth subparagraph.

[45] Art 6, proposed insertion of new paragraph 3a.

These latter proposals are problematic as they blur the line between implementing and delegated acts. Indeed, a key distinguishing feature is that the systems of control are founded on different rationales. Whereas delegation is subject to institutional control (by both the Council and the European Parliament), implementing acts are controlled by national representatives on expert level.[46] For Advocate General Jääskinen this reflects the dichotomy of interests that underlie the distinction between delegation and implementation: the primary concern for delegated acts, as instruments of "quasi-legislation", is democratic accountability.[47] By contrast, in case of implementing acts the primary responsibility of the Member States with regard to the implementation of EU law is the main consideration.[48] Thus, the dichotomy between delegation and implementation reflects a "politics of separation" that characterises the EU's legislative system (including the distinction between legislative and non-legislative acts, as will be seen later).

The Commission's reform proposal is thus contrary to the Treaty of Lisbon's constitutional arrangements on legislative acts. Both the third and fourth proposal entail a role for the Council in comitology (either formally or factually), a situation which the Treaty of Lisbon explicitly sought to bring to an end.[49] Moreover, the Commission expressly justified involvement of the Council by the need to be able to allow for a political discussion on sensitive issues.[50] This is not in line with the rationale for the system of control for implementing acts and, indeed, must rather be qualified as a consideration that fits the system of control over delegated acts. As an important consequence, it would be difficult to maintain the position that the European Parliament should remain excluded from comitology. Indeed, if control over the Commission is limited to national representatives at expert levels, there is sense in excluding the EP. This reasoning loses its credibility, however, if comitology at the appeal stage is guided by the need for "political discussion on sensitive issues".

Furthermore, from a constitutional perspective it would be more convincing to seek solutions in another direction, namely in increasing (rather than diminishing) the Commission's executive discretion. In light of the current legitimacy problems of the EU, and especially in light of the efforts of scholars and other actors to address the executive dominance problem,[51] this direction may seem counterintuitive. Yet, in this case there are good reasons to consider exactly this. It would entail that in situations in which Member States' viewpoints (even in second instance) do not result in

[46] PP Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation" (2011) 36 ELRev 671.

[47] This difference in the foundations of accountability does not imply that the exercise of the resulting accountability mechanism is without problems as Peers and Costa have demonstrated: S Peers and M Costa, "Accountability for Delegated and Implementing Acts after the Treaty of Lisbon" (2012) 18(3) European Law Journal 427.

[48] Conclusion in Case C-270/12 *United Kingdom v Council and Parliament*, EU:C:2013:562.

[49] Indeed, the distinction between delegation and implementation reflects this ambition. The Working group IX on Simplification of the European Convention considered that in case of delegation, the "legislator delegates a power which is intrinsic to its own role. It must therefore be sure of being able to monitor its use". Thus, the two legislative institutions were to have strong powers under delegation (Final Report, CONV 424/02, p 11). By contrast, the provisions on implementing acts do not provide for any role for these two institutions and control may only be exercised by the Member States (point 1 of the Explanatory Memorandum of the Commission proposal for the Comitology Regulation, fn 28).

[50] Consideration 8 of the proposal.

[51] See eg D Curtin, "Challenging Executive Dominance in European Democracy" (2014) 77 Modern Law Review 1.

a clear collective position, the Commission should not need to search further to find legitimacy for its decisions. Indeed, comitology implies a system of control over the Commission, but this does not necessitate a situation in which the Commission (and, indeed, thereby society) should be paralysed where the Member States are unable to effectively exercise such control.[52] It would be more obvious to interpret a "no opinion" outcome as the Member States abandoning their chance to impact the decision-making. Moreover, granting the Commission the power to decide would establish a role for the Commission to act as an arbiter between apparently opposing national views or interests. In other parts of EU policy, this is exactly what the role of the Commission is.[53]

However, this requires consideration of Article 5(4) of the Comitology Regulation. This provision contains a list of situations in which the Commission may not adopt an implementing act in case of "no opinion". The rationale of this provision is that some issues may be too sensitive to be adopted without sufficient committee support.[54] The provision specifically mentions issues pertaining to the health or safety of humans, animals or plants. Formally, however, this exception does not apply here. The Plant Protection Products Regulation, adopted pre-Lisbon, initially referred to the regulatory procedure under the old Comitology Decision.[55] The Comitology Regulation of 2011 automatically aligned the old regulatory procedure to the examination procedure. By way of transitional measure it provided that the only exception to the Commission's discretion to adopt an implementing act (for measures previously subject to the regulatory procedure) in case of "no opinion" would be when the basic act would specifically prohibit this. The Plant Protection Products Regulation, however, does not appropriately reflect the transformation from the old Comitology Regulation to the new Regulation and in particular the change from the regulatory procedure to the examination procedure. Now that the new Comitology Regulation displays such a strong sensitivity to the need for sufficient support in case of implementing measures that relate to concerns of public health and safety of humans, animals and plants, the Plant Protection Products Regulation should make it explicit why it would deviate from that principle. The arguments to support this may be easy to find – especially as we are dealing here with reauthorisation procedures rather than initial authorisations – but they need to be specified. Thus, an amendment to the Plant Protection Products Regulation to justify why Commission discretion should be relied upon here would be appropriate and would take away the impression that the reauthorisation processes under the regulation are at odds with the Comitology regulation and Article 5 thereof in particular.

Apart from avoiding deadlock – especially in cases of (re-)authorisation in which "no-decision" after "no-opinion" is not an option – awarding the Commission the

[52] See also Chamon, who considered the introduction of the examination procedure as an improvement over the old regulatory procedure in light of the increased discretion for the Commission: M Chamon, "De nieuwe regels voor 'comitologie' na het Verdrag van Lissabon" (2011) 4 Nederlands Tijdschrift voor Europees recht 127, at p 135.

[53] And, indeed, Art 6(3) of the Comitology Regulation establishes the legality of the Commission's discretion to adopt a measure in case of no-opinion.

[54] Comitology Regulation, consideration 14.

[55] Art 5 Decision 1999/468/EC, OJ L 184/23.

power to take the decision in case of no-opinion aligns better with the constitutional arrangements on implementing acts and their position within the wider Treaty framework as introduced by the Treaty of Lisbon. Whilst accepting the difficulties associated with the "politics of separation", the reality is that the Treaty of Lisbon has sought to differentiate implementation from delegation under Article 290 TFEU and from legislative acts.[56] Unlike delegation, issues subject to implementation do not qualify as "quasi-legislation" and should thus not involve a prominent role for the Council or the EP.[57] Awarding the Commission the competence to decide in case of "no-opinion" would equally confirm the nature of comitology as a system of control over the Commission, rather than as a system of "co-decision" between the Commission and the Member States. The persuasiveness of the latter argument obviously depends on where one stands with regard to the nature of comitology and its legitimacy sources as outlined above.

V. Legislation

The glyphosate reauthorisation process is essentially a case of the (re-)politicisation of an issue placed within a technical decision-making context.[58] Despite the controversies and conflicting interests that manifested itself in the decision-making process, the end result was still an implementing regulation and the matter thus did not reach the legislative level. At a deeper level of analysis, this politicisation demonstrated that the "politics of separation"[59] on which the EU legislative system is built has something inherently precarious about it. The possibility of separating technical from political decision-making and distinguishing fundamental legislative choices from the elaboration thereof in technical detail seems in practice close to legal fiction. Thus, the mismatch between the formal status of the decision as an implementing act and its perceived political relevance fuelled discontent in the EP.

The criticism from the side of the EP on the glyphosate decision-making questions the dichotomy between legislation and executive rule-making. Such a dichotomy is not particular to the EU. Indeed, the EU shares with other constitutional orders a system of conditions and limits on the scope of the executive's powers to adopt acts of general application.[60] A key element thereof is of a formal nature: executive rule-making authority in the EU is derived from legislative acts. Such parent acts contain

[56] In the legislative practice that emerged after the entry into force of the Treaty of Lisbon, some of the sharp edges of the distinction have been reduced however, eg by the Commission's commitment to consult national experts before adopting delegated acts: point 4 of the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts, attached to the Interinstitutional Agreement on Better Lawmaking of 12 May 2016, L 123/1.

[57] Since the Treaty of Lisbon, the term "quasi-legislation" has become affiliated to delegated acts to denote regulation which is closer to legislative acts than "pure" executive rule-making (implementation). In other words, this vocabulary suggests that the dichotomy between delegation and implementation has – apart from an institutional dimension – a substantive meaning as well.

[58] A Arcuri, "Glyphosate" in J Hohmann and D Joyce (eds), *International Law's Objects* (Oxford, Oxford University Press 2018) p 234.

[59] ibid.

[60] D Ritleng, "The Reserved Domain of the Legislature. The Notion of 'Essential Elements of an Area'" in Bergström and Ritleng, supra, note 22, p 133.

an authorisation clause to enable the Commission to adopt implementing or delegated acts. In the case of the glyphosate authorisation, the parent act – the Plant Protection Products Regulation – confers, in Article 13, the Commission with the power to adopt implementing regulations on the authorisation of active substances. The formal legality of the reauthorisation decision is therefore not at issue. Only a change to Article 13 would alter this, for example to exclude glyphosate from the reauthorisation process through comitology. Indeed, it is part of the legislature's discretion to decide that decision-making on glyphosate would need to remain in the legislature's domain. At the moment this is not a real option, and it is even unlikely whether the European Parliament itself would actually support this.

However, the dichotomy between legislative acts and executive rule-making in the EU has a substantive dimension as well. "Essential elements" of an issue have to be regulated at the legislative level.[61] This limits the powers of the Union's executive institutions (which may not regulate such elements), but it equally limits the discretion of the EU legislature in what it may delegate. Nevertheless, the concept of "essential elements" is obviously elusive, and still allows the EU legislature to define to a great extent the border between legislation and executive rule-making. The CJEU has clarified, however, that political choices, based on a balancing of conflicting interests qualify as such in any case.[62] This still allows for flexibility, but it has at least given more concrete shape to the concept.[63] It would not be too complicated to make a case that the glyphosate reauthorisation indeed involves essential elements in the sense defined by the CJEU. Tosun et al have demonstrated that glyphosate is widely used in conventional farming in Europe and has been employed for non-agricultural purposes as well. Thus, its authorisation involves "weighing the economic benefits of pesticides against the health and environmental costs associated with their use".[64] Although they do not make the point, this could easily justify why the renewal of glyphosate would need to be a matter for the legislature.[65] The latter conclusion would impose itself even more if we would consider the approach that the Advocate General proposed in the *Schengen Border Code* case. He suggested to consider the sensitivity of the issue, the impact and intrusiveness of the measures proposed and the centrality of the measure to the parent act as key criteria. At least on the basis of two of the three criteria, glyphosate reauthorisation could qualify as an essential element.[66]

[61] This substantive criterion has existed since the decision of the CJEU in Case 25/70, *Köster*, ECLI:EU:C:1970:115. Since the Treaty of Lisbon it has required constitutional status on the basis of Art 290 TFEU. Although this provision only deals with delegated acts, the case to continue to apply it to implementing acts as well is compelling: Ritleng, supra, note 60, p 143 ff.

[62] Case C-355/10, *European Parliament v Council (Schengen Border Code)*, ECLI:EU:C:2012:516. See also subsequent case law discussed by Chamon: M Chamon, "Limits to delegation under Article 290 TFEU" (2018) 25 Maastricht Journal of European and Comparative Law 231.

[63] Chamon has argued that the CJEU only rephrased the terminology from the Treaty, but the formulation of the criterion as developed by the CJEU and its application in the Schengen Border Code case make a strong case that we are dealing now with a much more concrete and workable definition than the Treaty concept itself: M Chamon, "How the Concept of essential elements of a legislative act continues to elude the Court. *Parliament v Council*" (2013) 50 CMLR 849.

[64] Tosun et al, supra, note 17, at p 441.

[65] Indeed, the formulation is very similar to that of the CJEU in the *Schengen Border Code* case, supra, note 62.

[66] For a further discussion of the Advocate General's approach, see Chamon, supra, note 62.

Beyond the "essential elements" doctrine, the EU legislature could in any case decide to keep the decision-making on market access of any plant protection products in its own hands. Whether this would be based on the essential elements doctrine or not, it would in any case imply a rejection of the current system, which is based on a legislative framework that lays down the procedural and substantive parameters of the authorisation process but leaves the actual authorisation decisions to the executive.

There is a compelling logic to this division as well. It creates a meaningful division of responsibility according to which the adoption of substantive and procedural parameters[67] is largely in the hands of the legislature, whereas the actual application thereof is viewed as technical decision-making. In other words, rejecting this division and accepting that concrete (re-)authorisation decisions may qualify as essential elements as well, would imply that distinguishing between technical and political decision-making is rendered obsolete.

VI. Conclusions

The glyphosate reauthorisation process has exposed two major weaknesses of the EU's institutional system. First, it has challenged its comitology system, both its concrete functioning and the foundational principles on which it is built. Most importantly, it has questioned whether comitology essentially involves a system of co-decision between the Member States on the one hand and the Commission on the other. Whereas the Treaty of Lisbon and the subsequent Comitology regulation have sought to clarify the system, the glyphosate decision-making has demonstrated that the fundamental dilemma has not been adequately addressed thus far. The Comitology Reform proposal tabled by the Commission risks obscuring the nature of comitology even further.

The second weakness exposed by the glyphosate decision-making regards the dichotomy between legislation and executive rule-making. Albeit necessarily flexible, this dichotomy has become firmly embedded in the EU's constitutional structure. Substantively, it is based, at least ultimately, on the ability to differentiate between political and technical decision making. This distinction is essential for legitimising executive rule-making and comitology, its boundaries (the issues covered by it) and for how comitology works (most notably the actors involved). This distinction is at the heart of the laws governing it and is a key part of the arguments of those who negotiate the conditions for implementing it. The contestation of the technical nature of the glyphosate reauthorisation has not so much highlighted the practical problem of how to draw the line between political and technical decision-making, but rather has denied the meaning of the dichotomy altogether.

[67] Laying down some of the details thereof has equally been delegated to the Commission.