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Legislative, Delegated Acts, Comitology & Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces

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Abstract

This article seeks to contribute to *The Conference on the Future of Europe* by arguing that its debates on substantive policies and democratic foundations cannot be detached from consideration being given to the configuration of the Union's normative spaces in which those policies will be developed and implemented. In its current stage of development, we can find in the Union legal system two competing conceptions for the configuration of its different normative spaces, one that relies on the Member States for resources and legitimacy and another that intends to free itself from those constraints. This article will argue that a uniquely European model of governance will benefit from the integration of both conceptions in the configuration of its normative spaces, not only where they are provided for by the Union Treaties but also those that have developed in the shadow of those official spaces, which they complement and increasingly supplant.

1 Introduction

Modern law-making requires a complex system of configurations that determine how legal norms are made, by whom and with what effect. Constitutions of older provenance would merely provide for the adoption of legislative acts,[1] while those of more recent origin will also include configurations for the adoption of non-legislative norms.[2] These configurations will be shaped by constitutional meta-norms, such as democracy, the rule of law, and, in federal systems, also considerations of federalism, even though the particular configurations in each legal system will often vary according to the political, historical and cultural pre-conceptions of such constitutional principles. Constitutional norms do, however, neither provide for an exclusive set of configurations nor for all relevant principles and rules that govern such configurations. In particular configurations for the adoption of non-legislative acts are complex and varied in light of the demands of the administrative state[3] allowing normative spaces to emerge that encompass a wide variety of actors, such as courts, tribunals, administrative agencies and even private parties.

Normative spaces can arise in different ways. Constitutions usually entrust a legislative body with the central task of law-making in the form of legislation.[4] While enjoying a high level of legitimacy that results from their democratic mandate and the procedure in which legislative

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[1] See Article I of the US Constitution.

[2] See Art 38 of the French Constitution of 1958 and Art 80 of the German Federal Constitution of 1949.

[3] A. Bogdandy, P.M. Huber and S. Cassese (eds.), *The Administrative State, Volume I* (OUP 2017).

[4] See, however, Art 37 of the French Constitution of 1958.

acts are adopted,[5] legislative bodies have, however, only limited capacity for norm creation. Limitations of the legislative configuration require the legislator therefore to entrust the adoption of further norms to other actors. The main avenue for the establishment of normative spaces is through delegation of powers to those actors. The, often, limited provision of principles and rules for such delegation even in modern constitutions, on the one hand, and the perceived need for delegation to a wide variety of actors, on the other hand, lead in practice to delegations, and thereby configurations for normative spaces, that were not envisaged by the constitution. Each of those normative spaces will vary in their configurations of actors, procedures and legal norms which they create. This inevitably will lead to contestation that will have to be resolved through political arrangements and judicial determinations that often supplement constitutional provisions (in this case creating a supra-normative space). It is the considerable level of abstraction of legislative norms, often in combination with express provision of discretion, that create normative spaces. Actors entrusted with a delegation will then adopt norms, which, while more specific, require further delegations to other actors to implement and ultimately to apply norms of a higher level. Normative spaces can arise at every point in this delegation chain (from legislation to application) and will depend on the level of abstraction of previous norms and the specific discretion available to those actors. But even at the level of application of norms, normative spaces exist, in particular where administrative actors apply norms that are highly abstract. Such normative spaces can, however, also exist where the constitution itself entrusts its application to specific actors. Those may be regional or local bodies, or administrative bodies, but also courts and even private parties entrusted with public functions.

The growing transfer of law-making competences from the Member States to the European level in successive Treaty revisions has led to a hierarchical differentiation of legal norms that matches and arguably exceeds in its complexity that of national legal systems. The Union's legal system has thereby produced its own configurations for its normative spaces. While the principles, such as democracy, the rule of law and federalism, that have guided this process at European level are similar to those in national legal systems, they have found their specific expression in the various configurations of norm-making within the EU through formal political arrangements, judicial determinations by the CJEU, but also through informal arrangements, such as inter-institutional agreements. But some of these configurations have also assumed a more hybrid nature through a mix of EU mechanisms and mechanisms that have resulted from international agreements between Member States outside of the EU legal system.

This article seeks to contribute to *The Conference on the Future of Europe* (*CFE*) by arguing that its debates on substantive policies and democratic foundations cannot be detached from a debate about the appropriate configuration of the Union's normative spaces in which those policies will be developed and implemented. This article will show that, in its current stage of development, we can find competing conceptions of configurations for the different normative spaces that reflect the ongoing evolution of the EU's legal system somewhere in-between an executive regime dependent on its Member States for resources and legitimacy and an autonomous constitutional system that intends to free itself from those constraints. These competing conceptions are at play not only in the normative spaces that are provided for by the Union Treaties but can also be found in normative spaces that evolve in the shadow of those official spaces, which they complement and increasingly supplant.

[5] On the legitimating function of the principle of legality in continental European legal systems, see 'Introduction: Legality in Multiple Legal Orders' in L. Besselink, F. Pennings and S. Prechal (eds.) *The Eclipse of the Legality Principle in the European Union* (Kluwer, 2011), at 7.

The article will proceed from the official normative arrangements for the adoption of legislative and non-legislative acts as they are currently provided in the Union Treaties before turning to configurations that have emerged in the shadow of those arrangements. It will argue that these competing visions behind the normative spaces in Union law have shaped a uniquely European model of governance.

2 Union Law-making

A central normative space also in the Union's legal system is that of Union legislation.[6] The adoption of Union legislative acts by the Council and the European Parliament in the ordinary legislative procedure combines both constitutional considerations of democracy, the rule of law but also the particular flavour of federalism that imbues the Union. By integrating the national executives within the Union's institutional structure, it continues to harness the legitimacy and expertise of those national actors within the discipline of Council as Union institution. Uniquely, it places the Commission with its exclusive power to submit legislative proposals in a position of agenda-setter and mediator. At the same time, by making the European Parliament an equal partner in the decision-making process it limits the executive dominance of the Council in favour of the democratic principle that legislation be made by directly elected representatives of Union citizens. It thereby can be understood as an expression of a more parliamentary oriented constitutional system. This is underscored by mechanisms which are intended to strengthen the deliberative quality of the legislative process, such as the the greater involvement of national parliaments and the incorporation of participatory mechanisms set out in Article 11 TEU providing binding standards for the involvement of Union citizens in EU legislation.

The functional interest representation of the three institutions in the Union's legislative process is, however, not based on a system of parliamentary representation of a nation, but as highly evolved transnational governance system incorporates interests of the Member States and its citizens into the adoption of its legislative process to formulate a common European interest under the mediation of the European Commission.[7] To this end the Commission, Council and European Parliament have their distinct but complementary responsibilities. This carefully crafted institutional balance ensures a high degree of co-operation in the deliberation of legislative acts. The legislative procedure, through the deliberative nature of its procedure and the representative nature of its institutional actors, is therefore functionally equivalent to the national legislative procedures.

All the same, Union legislation adopted in the ordinary legislative procedure competes with other normative spaces at Treaty level representing older forms of executive governance. The most obvious example in the current arrangement for Union legislation is the existence of special legislative procedures. In particular the procedures which merely provide for the European Parliament's consultation seek to ensure the existing predominance of the national executive interest. Similarly, the provision of legal bases in the Treaties limits the scope of Union legislation in favour of processes dominated by executive actors to the exclusion of the European Parliament. This is not just the case for isolated instances of the adoption of Union acts based on the Treaties by the Council, but also finds its expression in what remains of the Open Method of Co-ordination, the adoption of social partner legislation, and the normative

[6] A. Türk, 'Primary Legislation and Legislative Procedures', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* (OUP, 2018), at 689.
[7] Ibid., at 715.

space occupied by the European Central Bank. Given the potential for disputes between the Union institutions about the applicable legal bases, it is not surprising that the CJEU has become the ultimate arbiter in these disputes. The Court has made it clear that 'in the context of the organization of the powers of the [Union] the choice of legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amendable to judicial review'.[8] The determination of the institutional balance has thereby created a normative space of considerable constitutional significance for the Court. The Court, while acknowledging their importance in the Union legal order, has, however, made it clear that the meta-principles of democracy and the protection of fundamental rights have only limited relevance in the assessment of the appropriate choice of legal basis.[9] This would therefore create an opportunity for the *CFE* to strengthen the use of the ordinary legislative procedure, in particular by abolishing special legislative procedures.

The expansion of the ordinary legislative procedure as normative space would constitute a move towards a more autonomous constitutional system. At the same time, it would also expose to a greater extent the structural flaws of such an approach. First, the continued absence of a genuine European public space and the lack of genuine European parties which would make elections to the European Parliament more than discussions about second-order issues and would allow for pan-European deliberation and contestation of policy preferences,[10] diminish the European Parliament's claim to be truly representative. Second, the rationale of the Commission's central role in the legislative process will come under increased scrutiny. The Commission's appointment process is currently a reflection of the balance between the greater desire by the European Parliament for the Union's parliamentarisation and the continued influence of national governments. Tipping the balance further in favour of the European Parliament would expose the Commission to the shortcomings of the European Parliament's democratic credentials. At the same time, the Commission will not be able to justify its central role in the legislative process simply by reference to its technocratic expertise. It is doubtful that the Commission can claim a higher level of expertise than other Union institutions, but more importantly doing so risks turning ordinary political mistakes into existential political crises. A shift from outcomes to process could, however, address this. The justification for the Commission's exclusive right to make legislative proposals would place greater emphasis on its capacity and responsibility to consult and integrate private and public stakeholders' views in the process of shaping Union legislative proposals.[11]

These inherent limitations on the Union's democratic legitimacy due to the context in which the Union's normative space is situated already impact on the democratic legitimacy of the Union's currently predominantly regulatory function. They also constitute considerable barriers if the *CFE* intends for the Union to assume a greater distributive role and would be fatal of it intended to proceed to a (re-)distributive function on the basis of even limited direct taxation. It would therefore be advisable to continue with a model that integrates national authority and legitimacy within the Union's normative space of Union legislation while at the same time balancing it with a transnational parliamentary representation mediated by a

[8] Case C-300/89 *Commission v Council*, ECLI:EU:C:1991:244, para 10.
[9] See Case C-130/10 *Parliament v Council*, ECLI:EU:C:2012:472, at paras 81-83. See also A. Türk, supra note 6, at 706-712.
[10] See A. Follesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', (2006) 44(3) *Journal of Common Market Studies* 533.
[11] See J. Mendes, 'Participation and the rule of law after Lisbon: A legal view on Article 11 TEU', (2011) 48 *Common Market Law Review* 1854. See also N. Vogiatzis, 'Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process', (2017) 23(3-4) *European Law Journal* 250.

European Commission mobilising and integrating private and public stakeholders in the legislative process.[12]

3 Union Non-legislative Rule-Making: the Official Spaces

Given the capacity limitations of the Union legislative process(es) and of the other normative spaces provided by its legal bases, the Union Treaties provide for additional normative spaces by way of delegation of powers. While Article 290 TFEU entrusts the Commission with the adoption of delegated acts to amend or supplement Union legislative acts of general application, Article 291 TFEU provides the Commission (and exceptionally the Council) with the power to adopt implementing acts where uniform conditions for implementing legally binding Union acts are needed. These avenues for the adoption of non-legislative norms have evolved from the prevailing comitology model, dominated by executive actors, to accommodate at sub-legislative level the increasing importance of the European Parliament in the law-making process. Both avenues represent different conceptions of the nature of the Union legal system and therefore represent different models of normative rule-making with their own distinct mix of constitutional principles that underpin their configuration.

Delegated acts under Article 290 TFEU can be seen as representing a model of centralised rule-making that grants the Commission autonomous regulatory space to adopt quasi-legislative norms. This power is tempered by the democratic principle that entrusts the Union legislator with the power to revoke the delegation but also to object to specific delegation measures. This, in particular, empowers the European Parliament to exercise its democratic mandate also at non-legislative level. This model is closer in nature to that of modern national constitutional systems. In contrast, implementing acts under Article 291 TFEU are adopted following the older comitology process that subjects the Commission to oversight by committees which are comprised of representatives of the governments of Member States, mainly civil servants, which enjoy varying degrees of powers of intervention.[13] The latter model is more heavily influenced by the traditional vision of the Union's legal system, namely that of an integrated administration[14] and grants the Member States greater direct control over Union non-legislative rule-making.

Given the distinct nature of the configurations for non-legislative rule-making in Articles 290 and 291 TFEU not only in respect of the legislative process but also between each other, one would have assumed that a clear line separates the two sub-legislative normative spaces from that of Union legislation on the one hand and in respect of each other. Such a clear demarcation has, however, remained elusive in practice.

3.1 Vertical blurring of lines: The essential elements doctrine

While it provides clarity as to the actors and the procedure in which legislative acts are adopted, a procedural definition of legislative acts, as used in Union law, does not determine the scope

[12] On the need for a political decision on the participation of interests, and generally the Union's citizens, as an instrument for enhancing the democratic legitimacy of Union lawmaking, see F. Bignami, 'Three Generations of Participation Rights before the European Commission' (2004) 68 *Law and Contemporary Problems* 61, 72-81; Stijn Smismans, *Law, Legitimacy and European Governance. Functional Participation in Social Regulation* (OUP, 2004).

[13] Regulation 182/2011, [2011] OJ L 55/13.

[14] A. Türk, 'Comitology', in A. Arnull and D. Chalmers (eds.), *The Oxford Handbook of European Law* (OUP, 2015), chapter 13.

of Union legislation. The scope of Union legislation is instead determined by two separate mechanisms. First, the legal bases of the Union Treaties, in so far as they provide for a legislative procedure, allow for the intervention of the Union legislator in discrete policy fields of the Union. While such intervention extends now over the vast majority of Union policy fields it is by no means comprehensive.[15] Second, Union legislation in a certain policy field rarely comprehensively provides for all the relevant rules, allowing for significant intervention by Member States or Union institution(s) in case of delegation under Article 290 or Article 291(2) TFEU.

While implementation of Union legislation is by default the responsibility of the Member States,[16] any delegation under Articles 290 and 291 TFEU is subject to the 'essential elements' doctrine, which, at least in theory, is to guard against the danger of the Union legislator abandoning its legislative function in favour of administrative rule-making. The essential elements doctrine thereby protects the principle of democracy and the rule of law, in particular the horizontal and vertical allocation of powers within the Union legal system. Even though it is now expressly enshrined in Article 290 TFEU, the doctrine finds its origin and also its more precise contours and reach in the jurisprudence of the Court.[17] While not specifically mentioned in Article 291 TFEU, the doctrine continues to apply to the conferral of implementing powers under this provision.[18]

The Court has emphasised that what elements are considered to be essential has to be based 'on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned'.[19] The Court has specified that essential elements are those that require 'political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments.'[20] This is in particular the case where a measure has a significant impact on fundamental rights or interferes with the sovereign rights of third countries.[21] Second, while the Union legislature can confer on the Commission powers under Article 290 TFEU to amend or supplement non-essential elements, the definition of the powers

[15] On the impact of this 'categorical federalism' on the competence order within the EU, see S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Legislative Powers', (2015) 35(1) *Oxford Journal of Legal Studies* 55.
[16] See Article 291(1) TFEU.
[17] Case 25/70 *Einfuhrstelle v Köster*, ECLI:EU:C:1970:115, para. 6. See also Case C-240/90 *Germany v Commission*, ECLI:EU:C:1992:408, at para. 36; Case C-104/97 P *Atlanta and Others v Council and Commission*, ECLI:EU:C:1999:498, at para. 76; Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie GmbH and another v Council and Commission*, ECLI:EU:T:2004:37, para. 119; Case C-66/04 *United Kingdom v European Parliament and Council*, ECLI:EU:C:2005:743, at para. 50.
[18] Case C-363/14 *European Parliament v Council*, ECLI:EU:C:2015:579, at para. 46.
[19] Case C-363/14 *European Parliament v Council*, ECLI:EU:C:2015:579, para. 47. See also Case C-355/10 *European Parliament v Council*, ECLI:EU:C:2012:516, paras. 67 and 68; Case C-540/14 P *DK Recycling und Roheisen v Commission*, ECLI:EU:C:2016:469, para. 48; Case C-696/15 P *Czech Republic v Commission*, ECLI:EU:C:2017:595, para. 77; Case C-44/16 P *Dyson v Commission*, ECLI:EU:C:2017:357, para. 62.
[20] Case C-355/10 *European Parliament v Council*, ECLI:EU:C:2012:516, para. 76. See also Case C-363/14 *European Parliament v Council*, ECLI:EU:C:2015:579, para. 46; Case C-540/14 P *DK Recycling und Roheisen v Commission*, ECLI:EU:C:2016:469, para. 47; Case C-696/15 P *Czech Republic v Commission*, ECLI:EU:C:2017:595, para. 78; Case C-44/16 P *Dyson v Commission*, ECLI:EU:C:2017:357, para. 61.
[21] Case C-355/10 *European Parliament v Council*, ECLI:EU:C:2012:516, paras. 76 and 77; Case C-363/14 *European Parliament v Council*, ECLI:EU:C:2015:579, paras. 49-57; Case C-696/15 P *Czech Republic v Commission*, ECLI:EU:C:2017:595, para. 86.

must be 'specifically precise'[22] in that its object, content, scope and duration have to be expressly defined in the legislative act.[23]

While these limitations are specifically aimed at the Union legislature when conferring those powers, they are also relevant in assessing the legality of the exercise of the delegated powers by the Commission. In respect of Article 290 TFEU, while it has broad discretion in the exercise of its conferred powers,[24] the Court will review whether the Commission has acted within the powers conferred on it.[25] This means, firstly, that the Court will assess whether the Commission has not adopted, amended or disregarded the essential elements of the matter.[26] Secondly, the Court will review whether the Commission act comes within the regulatory framework of the legislative act,[27] more specifically whether the Commission has respected the limits of its authorisation as defined by the objective, content and scope of the powers granted in the legislative act.[28] This also includes an assessment of whether the Commission has complied with the nature of the power conferred.[29] Similarly, despite the more limited scope of conferral under Article 291(2) TFEU, Union acts can still confer considerable implementing powers to the Commission, and exceptionally, the Council. It is therefore not surprising that the Court continues to interpret the limits of the implementing powers conferred on the Commission widely.[30] The Court has made it clear that the limits of the Commission's powers have to be assessed by reference to the essential general aims of the basic act.[31] Within those limits the Commission can adopt all necessary measures provided that they do not amend or supplement the basic act.[32]

It seems to follow from the above that the criteria for the application of the doctrine as developed by the CJEU have remained at a high level of abstraction and have, if anything, had merely a signalling effect to deter abuses rather than constituted an organising constitutional principle.[33]

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[22] See also Case C-696/15 P *Czech Republic v Commission,* ECLI:EU:C:2017:595, para. 49.
[23] See Article 290(1) TFEU. See also Case C-696/15 P *Czech Republic v Commission,* ECLI:EU:C:2017:595, para. 48.
[24] Case C-696/15 P *Czech Republic v Commission,* ECLI:EU:C:2017:595, para. 52; Case C-44/16 P *Dyson v Commission,* ECLI:EU:C:2017:357, para. 53.
[25] Case C-44/16 P *Dyson v Commission,* ECLI:EU:C:2017:357, para. 53.
[26] Case C-355/10 *European Parliament v Council,* ECLI:EU:C:2012:516, para. 66; Case C-696/15 P *Czech Republic v Commission,* ECLI:EU:C:2017:595, para. 51; Case C-44/16 P *Dyson v Commission,* ECLI:EU:C:2017:357, para. 65.
[27] Case C-44/16 P *Dyson v Commission,* ECLI:EU:C:2017:357, para. 53.
[28] Case C-696/15 P *Czech Republic v Commission,* ECLI:EU:C:2017:595, paras. 51 and 60.
[29] See Case C-286/14 *European Parliament v Commission,* ECLI:EU:C:2016:183, para. 46. This means that a power to supplement the legislative act does not include a power to amend it (ibid., para. 53).
[30] See Case 23/75 *Rey Soda,* ECLI:EU:C:1975:142, para. 14; Case 61/86 *United Kingdom v. Commission,* ECLI:EU:C:1988:45; Case 22/88 *Vreugdenhil,* ECLI:EU:C:1989:277, para. 16; Case C-156/93 *Parliament v Commission,* ECLI:EU:C:1995:238, para. 24.
[31] See Case C-65/13 *European Parliament v Commission,* ECLI:EU:C: 2014:2289, para. 44; Joined Cases T-261/13 and T-86/14 *Netherlands v Commission,* ECLI:EU:T:2015:671, para. 44; Joined Cases C-78/16 and C-79/16 *Pesce and Others,* ECLI:EU:C:2016:428, para. 46.
[32] See Case C-65/13 *European Parliament v Commission,* ECLI:EU:C: 2014:2289, paras. 44-46; Joined Cases T-261/13 and T-86/14 *Netherlands v Commission,* ECLI:EU:T:2015:671, para. 44; Joined Cases C-78/16 and C-79/16 *Pesce and Others,* ECLI:EU:C:2016:428, para. 46.
[33] See Case C-355/10 *European Parliament v Council,* ECLI:EU:C:2012:516. See also Case C-363/14 *European Parliament v Council,* ECLI:EU:C:2015:579; Case C-540/14 P *DK Recycling und Roheisen v Commission,* ECLI:EU:C:2016:469; Case C-696/15 P *Czech Republic v Commission* ECLI:EU:C:2017:595; Case C-44/16 P *Dyson v Commission,* ECLI:EU:C:2017:357.

3.2 The horizontal blurring of lines: Policing the boundaries of Articles 290 and 291 TFEU

In the same way as the substantive demarcation between Union legislation and non-legislative acts is rather fluid, the assumption of a clear distinction between the two non-legislative rule-making spaces has proven difficult. This is all the more important given their different theoretical conceptions and consequently different configurations.

In the first instance, the continued existence of the regulatory procedure with scrutiny which in scope is similar to Article 290 TFEU but in terms of procedure is closer to the comitology regime under Article 291 TFEU has been a bone of contention between the Union institutions. Despite its anachronistic position within the landscape of non-legislative procedures and several attempts for its resolution, the removal of the PRAC has proven difficult in practice.[34]

Second, the process for the adoption of delegated acts now includes a commitment by the Commission of the involvement of national experts[35], a key feature of the comitology process and more akin to a system of integrated administration. While such experts cannot exercise the same powers as comitology committees, their involvement has a restraining effect on the Commission, in particular when seen in light of the power of the Council to object to Commission delegated acts.

Third, it is rather doubtful that meaningful criteria can be found that distinguish between 'supplementing' (Article 290 TFEU) and 'implementing' (Article 291 TFEU).[36] Articles 290 TFEU allows the Union legislator to confer to the Commission the power to adopt delegated acts that amend or supplement legislative acts. And where uniform conditions for implementing legally binding Union acts are needed, Article 291(2) TFEU allows such Union acts to confer implementing powers on the Commission[37] subject to control by Member States.[38] The Court has pointed out that under Article 290 TFEU 'the purpose of granting a delegated power is to achieve the adoption of rules coming with the regulatory framework as defined by the basic legislative act.'[39] On the other hand, when the Union legislator grants an implementing power under Article 291(2) TFEU, the Commission has to provide 'further detail in relation to the content of legislative acts , in order to ensure it is implemented under uniform conditions in all Member States.'[40]

In contrast to its traditional approach that the determination of a legal basis has to be assessed on the basis of objective factors and cannot be left to the institution's conviction[41], the Court

[34] M. Chamon, 'Dealing with a Zombie in EU Law: The Regulatory Comitology Procedure with Scrutiny', (2016) 23 *Maastricht Journal of European and Comparative Law* 714.
[35] See Interinstitutional Agreement between the European Parliament, the Council, and the European Commission on Better Law-making of 13 April 2016, [2016] OJ L 123/1, section 28.
[36] P. Craig, 'Delegated and Implementing Acts', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law* (OUP, 2018) at 716, 747.
[37] In exceptional cases implementing powers can also be delegated to the Council.
[38] See Regulation 182/2011. On the comitology system more generally, see C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); C.F. Bergström, *Comitology, Delegation of Powers in the European Union and the Committee System* (OUP, 2005); P. Craig, *EU Administrative Law* (OUP, 3rd edn, 2018) chapter 5; A. Türk, supra note 14.
[39] Case C-427/12 *Commission v European Parliament and Council*, ECLI:EU:C:2014:170, para. 38. See also Case C-88/14 *Commission v European Parliament and Council*, ECLI:EU:C:2015:499, para. 29.
[40] Case C-427/12 *Commission v European Parliament and Council*, ECLI:EU:C:2014:170, para. 39. See also Case C-88/14 *Commission v European Parliament and Council*, ECLI:EU:C:2015:499, para. 30.
[41] Case C-300/89 *Commission v Council*, ECLI:EU:C:1991:115, para 10; Case C-363/14 *European Parliament v Council*, ECLI:EU:C:2015:579, para. 47.

has pointed out that the Union legislator has discretion when granting delegated or implementing powers.[42] In the *Biocides* case, when assessing whether the Union legislature could have conferred, in Article 80 of Regulation 528/2012, on the Commission implementing powers in the meaning of Article 291(2) TFEU, the Court limited, therefore, its review to manifest errors of assessment whether the EU legislature could reasonably have taken the view that the legal framework only needed further detail (without amending or supplementing it) and that uniform conditions of implementation were required.[43] In a subsequent case the Court made it, however, clear that any discretion in the choice of Article 290 TFEU or Article 291(2) TFEU had to be exercised in compliance with the conditions laid down in those provisions.[44] Where the Union legislature confers on the Commission the power to adopt a provision, which has the effect, of amending, if only temporarily, the normative content of the legislative act in question, Article 290 TFEU has to be used.[45]

The reluctance of the CJEU to intervene in such disputes[46] has created normative spaces dominated by informal procedures and non-binding agreements.[47] All the same, the political actors involved have only found some basic principles for such a distinction.[48] The clarity of the criteria set out in the relevant inter-institutional agreement remains doubtful, as the sections referring to acts establishing a procedure, method or methodology as well as those relating to an obligation to provide information and those relating to authorisations acknowledge that those acts can be adopted by way of delegated as well as implementing acts.[49] The distinction of whether rules additional to or build on the content of the basic act[50] does not resolve the issue, as both delegated acts and implementing acts will inevitable 'add to' or 'build on' the existing legal rules.[51]

3.3 Blurring of lines: other implementing powers

While Article 291(2) TFEU constitutes the central provision for conferring implementing powers on the Commission, and exceptionally, the Council,[52] it is, however, clear from the case-law that it is not the sole provision allowing for the conferral of implementing powers. The Court has held that implementing powers can also be conferred by other provisions of

[42] Case C-427/12 *Commission v European Parliament and Council,* ECLI:EU:C:2014:170, para. 40. See also Case C-88/14 *Commission v European Parliament and Council,* ECLI:EU:C:2015:499, para. 28.
[43] Case C-427/12 *Commission v European Parliament and Council,* ECLI:EU:C:2014:170, para. 40.
[44] Case C-88/14 *Commission v European Parliament and Council,* ECLI:EU:C:2015:499, para. 28.
[45] Case C-88/14 *Commission v European Parliament and Council,* ECLI:EU:C:2015:499, para. 42. This is so even if such an amendment merely takes the form of the insertion of a footnote in an Annex of the legislative act (ibid, para. 43).
[46] See Case C-427/12 *Commission v European Parliament and Council,* ECLI:EU:C:2014:170, para. 40; Case C-88/14 *Commission v European Parliament and Council,* ECLI:EU:C:2015:499, para. 28.
[47] T. Christiansen and M. Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts' (2013) 19 *European Law Journal* 42.
[48] See 'Non-binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union' of 18 June 2019, Interinstitutional Agreement between the European Parliament, Council and Commission, [2019] OJ C 223/1.
[49] Ibid., sections II E-G.
[50] Ibid. sections II C-G.
[51] P. Craig, supra note 36, at 716, 723.
[52] See Case T-68/14 *Post Bank Iran v Council,* ECLI:EU:T:2016:263, where the General Court held that a regulation adopted on the basis of Article 215 TFEU can confer implementing powers under the conditions of Article 291(2) TFEU (para. 64), including to the Council (para. 72). See also Case C-440/14 P *National Iranian Oil Company v Council,* ECLI:EU:C:2016:128, paras. 33-40.

primary law, such as Article 43(3) TFEU,[53] or by Union legislation, where, in contrast to Article 291(2) TFEU, the conferred power does not lend itself to implementation by Member States.[54] On the other hand, the Court does not allow the Union institutions to create secondary legal bases which make it possible to adopt measures for the implementation of Union legislation by other rules than those provided in the Treaties.[55]

3.4 Back to the future: return to an updated comitology regime

Given the uncertainties of the current regime with two distinct provisions for the adoption of sub-legislative acts, it is suggested for the *CFE* to consider the return to an integrated system for the adoption of sub-legislative act, including those to amend or supplement legislative acts, by the Commission, subject to the control by the Member States and, given its increased importance in the law-making process, also the European Parliament.

4 Disrupting the Official Spaces: shadow actors

The complexities of 'official' normative spaces in Union law are, however, compounded by the increasing importance of actors that are not or only implicitly recognised in the Union Treaties, such as Union agencies, networks, and private parties. While some of those actors only play a role in certain areas of Union law, others have become pervasive in all spheres of Union law. Similarly, the influence of such actors in the Union's normative spaces can vary significantly. Such actors can be entrusted with making contributions in official Union spaces, such as Articles 290 and 291 TFEU, but can also play a dominant role in normative spaces created by Union legislation. The limitation of their powers is still largely determined by the Court's updated *Meroni* doctrine, which requires, at least in respect of Union agencies, that delegated powers be 'precisely delineated and amenable to judicial review'.[56] And while the *Meroni* doctrine has imposed some constraints not only in judicial litigation but also in the political debate about conferrals of powers to such actors, the Court's more recent interpretation of its doctrine seems to have been intended to lessen the constraints for such actors.[57] Judicial retreat has thrown a particular focus on the, often informal, inter-institutional dynamics in the determination of normative spaces in which such actors operate and the configurations which results therefrom.

4.1 Union agencies

Union agencies have come to occupy a significant role in all spheres of Union law. Most Union agencies are entrusted with the collection, exchange and dissemination of information at Union and national level. To this end, agencies are often part of multi-level networks composed of public authorities at national and Union level, building epistemic communities that transcend organisational loyalties. Such agencies build scientific and technical expertise, and/or collect and exchange sensitive data and information. These agencies will usually also co-ordinate activities among the Union and Member States and between Member States. At Union level

[53] Joined Cases C-103/12 and C-165/12 *Parliament and Commission* v *Council,* ECLI:EU:C:2014:2400, para. 50; Case C-113/14*Germany* v *Parliament and Council,* ECLI:EU:C:2016:635, paras. 55 and 56.
[54] See Case C-521/15 *Spain v Council,* ECLI:EU:C:2017:982, paras. 48 and 49, where the Court upheld the conferral of an implementing power to the Council to impose sanctions on Member States to ensure compliance with the rules on economic and budgetary policies of the Union.
[55] Case C-540/13 *European Parliament v Council,* ECLI:EU:C:2015:224, para. 33.
[56] Case C-270/12 *United Kingdom v Parliament and Council,* ECLI:EU:C:2014:18, at para. 53.
[57] M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP, 2016).

some agencies are also increasingly integrated into the process of policy formulation and implementation by providing scientific and technical advice or by drafting the relevant Union rules. This is usually complemented by the adoption of soft law in the form of non-binding guidelines and standards that inform the activities of national authorities and private parties. Some agencies can take administrative decisions in discrete fields of Union law, such as the European Aviation Safety Agency (EASA) for type-certification of aircraft, the European Securities and Markets Authority (ESMA) for the enforcement of EU financial law, or the Single Resolution Board (SRB) in the resolution of financial institutions.

In agenda setting and planning processes at Union level we usually find the Commission in a central role. While increasingly formalised, these processes often engage other actors, such as national administrations, private parties, as well as EU agencies in consultations. Union law frequently provides Union agencies with the opportunity to supply technical input in the legislative procedure, often to assist the Commission in drafting legislative proposals.[58] Similarly, administrative acts adopted by Union institutions, either with general or individual application, usually involve Union agencies only in the providing of non-binding input into measures adopted by other Union bodies. In the standard cases where the Commission adopts delegated acts under Article 290 TFEU or implementing acts under Article 291 TFEU, Union agencies are often merely entrusted with providing input in the form of opinions that are not binding on the Commission.[59] Yet, in other cases the Union legislation makes the consultation of the agency a mandatory part of the procedure.[60] While they are not binding, such opinions will make it more difficult for the Commission to deviate from them. A combination of mandatory involvement of agencies and limited scope for deviation by the Commission can be found in the case of ESMA. Union legislation entrusts ESMA with the mandatory drafting of binding technical standards (BTS) for the Commission,[61] which can deviate from those drafts only in limited circumstances.[62] Increasingly Union agencies are being given the powers to adopt legally binding administrative acts themselves, which create normative spaces for Union agencies.

Union agencies, established as a response to the particular political and functional needs within the Union's legal system, have come to epitomise not only the model of functional integration within the Union's system of mixed administration but also the challenges which this poses for the rule of law.[63] While set up by Union law as Union bodies, they incorporate in their governance structures actors from national administrations. Endowed with legal personality and independence due to their scientific or technical expertise, they often interact at Union level with other executive actors, notably the European Commission, which are given countervailing means of control over their actions. While such control is often the result of the CJEU's *Meroni* doctrine, some agencies are still left with considerable power to engage in

[58] For EASA, see Art 76(1), Reg 2018/1139. For EFSA, see Art 22(2) and (6), Reg 178/2002. For ESMA, see Arts 8(2)(g) and 34(1), Reg 1095/2010.
[59] See Art 22(6), Reg 178/2002; Arts 8(2)(g) and 34(1), Reg 1095/2010; Arts 75(2)(b), 76(1) and 115, Reg 2018/1139, (but where those measures comprise technical rules, the Commission cannot change their content without prior coordination with the agency, see Art 75(2)(b)).
[60] See Art 28(1), Dir 2001/18, where EFSA's opinion is a mandatory part of the adoption of Commission implementing acts under Arts 18(1) and 30(2), Dir 2001/18. For EMA, see Art 5(2), Reg 726/2004, which forms the basis for the Commission's decision adopted under the Regulation, Arts 10(2) and 87(3).
[61] See Arts 10 and 15, Reg 1095/2010.
[62] See recital 23 and Arts 10(1)(8) and 15(1)(7), Reg 1095/2010.
[63] M. Catanzariti and A. Türk 'EU agencies and the rise of a mixed administration in the EU multi-jurisdictional setting: facing the challenges of the rule of law', in M. Scholten and A. Brenninkmeijer (eds.), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (Elgar, 2020) at 18.

quasi-regulatory and administrative activities of a wide and varied range in their interaction with Union bodies, and also with national administrative bodies, which they may assist, monitor and even control in a shared administrative space. Actions of Union agencies therefore are often part of complex administrative processes, within which their responsibility, and hence accountability, is legally and politically difficult to establish.[64]

4.2 Private actors

Similarly, private parties have become an integral part in Union rule-making for the achievement of EU policies. While the involvement of private parties in EU regulatory governance has allowed European legislation to focus on the essential aspects of such policies and to harness the expertise of such bodies and their closer proximity to the relevant policy issues, the retreat of the public authorities in favour of private actors has raised concerns about the legitimacy of private-party rule-making.[65]

Such disquiet about the delegation of responsibility and power to private parties is most evident in the field of European standardisation, where the EU has entrusted private bodies with the adoption of harmonised European standards. For economic operators, compliance with such standards, although voluntary, confers considerable legal and practical advantages for undertakings engaged in intra-Union trade. By creating incentives for compliance with standards, standardisation activity plays an important role in the realisation of an internal market for goods. European standard setting is not merely a process of technical translations of political mandates by the Commission but entails a good deal of political judgment and thereby constitutes a normative space.

The conferral of significant power to private actors therefore also in this instance shifts the focus to how normative spaces should be constructed in which private actors exercise those powers. While the *Meroni* doctrine is a reminder that the Union institutions cannot abdicate their political responsibility, it is open to debate to what extent the public interest has to assert itself in this space.

4.3 Bringing shadow actors in the open

While EU agencies and also private parties have an important role to play within the Union's normative spaces, it is important that they are brought out of the shadows. EU agencies in particular would benefit from formal recognition in the Treaties, which should also provide for an explicit basis for EU legislation setting out the general principles governing the functioning of Union agencies.[66] Herein lies another opportunity of the *CFE* to strengthen the governance structures of the Union.

5 Disrupting the Official Spaces: Soft law instruments

The complexities of the Union's normative spaces are further increased by an increasingly wide range of soft law instruments that Union actors, be they official or shadow actors, employ.[67]

[64] See G.J. Brandsma and C. Moser, 'Accountability in a multi-jurisdictional order', in M. Scholten and A. Brenninkmeijer (eds.), supra note 63.
[65] H.C.H. Hofmann, G. Rowe Hofmann and A. Türk, *EU Administrative Law and Policy* (OUP, 2011), chapter 17.
[66] See M. Chamon, supra note 57, at 369-381.
[67] See L. Senden, *Soft Law in European Community Law* (Hart Publishing, 2004).

Such soft law instruments are used to complement the Union's more traditional regulatory instruments even in areas where the Community/Union method is well established.[68] There they can no doubt perform important functions, such as ensuring the unity of administrative practice, enhancing legal certainty and predictability in the interpretation and application of Union law, by sharing information and indicating changes in political direction of Union policy.[69] Yet, in the Union's multi-level governance system which relies to a large extent on decentralised forms of enforcement of Union law at national level, these functions seem largely unattainable.[70] Since the Union courts have acknowledged that soft law instruments can impose (limited) obligations only on the Union actors from which they emanate[71] but not on national authorities[72] or individuals,[73] it has been questioned how soft law instruments in multi-level governance can ensure consistent application of Union law or enhance legal certainty and transparency.[74]

Within the Union's governance structures, soft-law instruments are even more prevalent in policy areas, in which, due to their sensitivity, the Member States preferred softer governance structures to the use of the Community/Union method.[75] The Open Method of Coordination (OMC) as 'new' form of governance[76] has therefore come to dominate areas where the Union has only been given limited competences.[77] The OMC has raised expectations that governance can be effectively exercised without resorting to command and control mechanisms that would not be acceptable to Member States in those areas. All the same, concerns about this form of governance persist. While it is said that the OMC has the potential to enhance deliberation, learning and participation, it is doubtful that this potential has been fully realised.[78] Moreover, the OMC has been seen as 'a threat to the rule of law and associated political and legal accountability mechanisms'.[79] And the dominant position of national and supranational executive bodies in the OMC process have raised concern about its democratic legitimacy.[80] What is more, the financial crisis has shown that the soft governance approach in economic policy co-ordination was insufficient to ensure financial stability. This area has therefore seen a considerable 'hardening' in the character of Union law, even though the rules may still be more open textured and enforcement softer than in other areas of Union law.[81]

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[68] F. Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', (2015) 21(1) *European Law Journal* 68, 77.
[69] H.C.H. Hofmann, G. Rowe Hofmann and A. Türk, supra note 65, at 541.
[70] See O. Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law As a Tool of Multi-Level Governance', (2014) 21(2) *Maastricht Journal of European and Comparative Law* 359.
[71] See Joined Cases C-189/02, 202/02, 205/02, 208/02 and 213/02 *Dansk Rorindustri and others v. Commission*, ECLI:EU:C:2005:408, at para. 211.
[72] Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, at para. 31.
[73] Case C-410/09 *Polska Telefonia Cyfrowa* ECLI:EU:C:2011:294, at paras. 31-34. As a result, the national authorities could rely on Commission guidelines even if they were not published in the language of their Member State.
[74] See O. Stefan, supra note 70, at 373-374.
[75] P. Craig, supra note 38, at 236.
[76] D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', (2001) 39(4) *Journal of Common Market Studies* 719.
[77] E. Szyszcyak, 'Experimental Governance: The Open Method of Coordination', (2006) 12 *European Law Journal* 486.
[78] P. Craig, supra note 38, at 236.
[79] C. Scott, 'Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU', (2009) 15 *European Law Journal* 160, 172.
[80] M. Heidenreich and G. Bischoff, 'The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies', (2008) 46 *Journal of Common Market Studies* 497, 501-503.
[81] See F. Terpan, supra note 68, at 91-92.

When reflecting on substantive changes to Union policies, the *CFE* has therefore also to consider whether soft law instruments and soft law governance structures are most appropriate to advance such policies.

6 Disrupting the Official Spaces: Hybrid arrangements

Finally, it can be observed that in some areas the Union's normative spaces are complemented in important respects by extra-Union arrangements. Such hybrid structures, which are governed by mechanisms that have their basis partly in Union law and partly in international agreements concluded by the Member States outside the Union, have assumed considerable prominence in the wake of the financial crisis.[82] While the Union has considerably strengthened its economic governance mechanisms through several pieces of Union legislation,[83] arrangements that were set up by the Member States on the basis of international agreements, such as the European Stability Mechanism[84] and the European Fiscal Compact,[85] outside the Union legal order have exposed the political and legal limits of Union integration. Similarly, the Single Resolution Mechanism, as one of the pillars of the Banking Union, constitutes an important, but incomplete, part of the resolution of eurozone banks that are subject to the centralised process of resolution. It has been complemented by the Single Resolution Fund, based on an international agreement by the Member States, that will ensure the efficient application of the resolution tools and actions of the Union's Single Resolution Board as central resolution authority.

Such hybrid arrangements constitute pragmatic solutions, if not a Union method,[86] where political or legal impediments exclude exclusively Union arrangements. But they are not without difficulties. Hybrid arrangements increase complexity. This is in particular so in case of the Fiscal Compact whose provisions large overlap with existing Union rules on fiscal discipline.[87] What is more, they lead to fragmentation of actors, processes and instruments of the Union system.[88] Under such arrangements non-Union actors can exercise important powers that impact on the operation of Union normative spaces, such as the 'Euro Group' which, although not a Union body,[89] plays an important role in the eurozone.[90] Conversely, Union bodies and institutions can be asked to contribute to the work of international arrangements, such as the ESM and the Fiscal Compact.[91] Hybrid arrangements therefore raise therefore important questions about transparency as well as political and judicial accountability.[92]

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[82] K. Armstrong, 'The new governance of EU fiscal discipline', (2013) 38(5) *European Law Review* 601.
[83] This is commonly referred to as the six-pack and two-pack.
[84] Treaty on the Establishment of the European Stability Mechanism (2012), as amended in 2021.
[85] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (2012).
[86] The phrase is ascribed to Angela Merkel, who used it at the opening ceremony of the 61st academic year of the College of European in Bruges, 2 November 2010.
[87] See P. Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism' (2012) 37(3) *European Law Review* 231, 247.
[88] See F. Martucci, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)', in F. Amtenbrink, C. Hermann, and R. Repasi (eds.), *The EU Law of Economic and Monetary Union* (OUP, 2020) 293, at 316.
[89] See Case C-597/18 P *Council v K. Chrysostomides & Co. and Others,* ECLI:EU:C:2020:1028, at para. 86.
[90] See Art 137 TFEU and Protocol No. 14.
[91] See Case C-370/12 *Pringle,* ECLI:EU:C:2012:756, at para. 158.
[92] See F. Martucci, supra note 88, at 315-317; B. Rittberger, Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU (2014) 52(6) *Journal of Common Market Studies* 1174; A. Poulou, 'The Liability of the EU in the ESM framework', (2017) 24(1) *Maastricht Journal of European and Comparative Law* 127.

The *CFE* should consider bringing, at least some,[93] of the extra-Union arrangements within the Union legal order.[94]

7 How to Configure Normative Spaces in Union Law?

This article has argued that the *CFE* needs to ensure that the configurations of the Union's normative spaces are appropriate for the Union's substantive policies and democratic foundations. Any changes to those policies will therefore inevitably have to entail a review of the normative spaces in which those policies are developed and implemented. The article has in this respect made suggestions to improve the current arrangements, by strengthening the ordinary legislative procedure, by integrating the currently bifurcated regime of sub-legislative acts, by making the use of EU agencies more explicit, by reviewing the extensive use soft law instruments and structures, and by bringing extra-Union arrangements within the Union legal order.

An assessment of whether the specific configurations (in terms of actors; the norms they can adopt; and the processes they need to follow) of the Union's normative spaces are adequate in light of the space they occupy within the Union's legal system and by whom such configurations shall be determined (EU Treaties, EU legislation, inter-institutional agreements), will depend on a consensus on the relative importance of the meta-principles and political conceptions that shape normative spaces generally at each of those different levels and the appropriate role of the CJEU to resolve conflicts where such a consensus cannot be achieved, in particular bearing in mind that the judicial process itself constitutes a normative (and in some cases even a supra-normative) space.

The importance of such meta-principles will be determined within the unique European model of governance that has emerged over time, without following a pre-conceived path, as a result of key political and constitutional decisions that have shaped the European integration process. The considerable transfer of competences to the European level, albeit with different intensity across policy fields, can be seen as the result of an increased belief by the Member States in and dependence on the capacity of the Union for the solution of cross-border problems. At the same time, national actors have actively been integrated at European level in the agenda-setting and legislative process (European Council, Council of Ministers) not only to protect their interests and ensure compliance, but also to provide the Union with a level of (input) legitimacy and resources that are currently beyond its capacity.

Similarly, the preference for a decentralised system of implementation of European legislation with only limited powers being given to the Commission for the application of competition and state aid rules[95] allowed the implementation and enforcement of European law to benefit from the administrative capacity and established legitimacy of the Member States. The European administration that has emerged from the 'Europeanisation' of the national administrative systems has been described by the academic literature mainly by reference to this shift from

[93] Article 16 of the Fiscal Compact already contains a provision for its integration into Union law. There is no similar clause in the ESM Treaty.

[94] See European Commission, 'Proposal for a Council directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States', COM (2017) 824 final; European Commission, 'Proposal for a Council regulation on the establishment of the European Monetary Fund', COM (2017) 827 final.

[95] Early attempts by the Commission to establish a more centralised system of implementation and enforcement were rejected by the Member States. See C.F. Bergström, *Comitology – Delegation of Powers in the European Union and the Committee System* (OUP, 2005) at 46-47.

dual to co-operative federalism[96] as multilevel,[97] mixed,[98] shared,[99] composite,[100] or integrated administration. [101] It has resulted in the functional integration of national and Union administrations, which remain organisationally autonomous, in the implementation of Union law with a high degree of procedural cooperation. While the complex interaction and co-operation of executive actors at Union level with national administrations and between national administrations, operating subject to an increased Europeanisation of national procedures and organisational rules, has increased the effectiveness of the system of application of Union law, it has also exposed many and varied challenges to the rule of law. It is difficult to allocate legal and political responsibility. The Union's judicial system, based as it is on the separation of jurisdictions, is often struggling to ensure, and be seen to ensure, effective judicial protection, while the Union's political actors have found it difficult to assert political control and accountability over executive actors which are often neither their agents nor within their jurisdictional reach.

The construction of the Union's normative spaces has therefore to proceed from this reality. All the same, the reality and normative need for parliamentarisation of the Union's normative spaces necessitates greater involvement of democratic mechanisms in the Union's normative spaces, such as oversight by the European Parliament, increased participation by private parties, and greater transparency, even though it has to be mindful not to undercut the very foundation of the Union's governance system that currently relies to a considerable extent for its legitimacy and operational capacity on national actors within and outside the Union's legal system.

[96] R. Schütze, *From Dual to Cooperative Federalism* (OUP, 2009).
[97] See J. Trondal and M.W. Bauer, 'Conceptualising the European multilevel administrative order: capturing variation in the European administrative system', (2017) 9(1) *European Political Science Review* 73.
[98] See G. Della Cananea, 'The European Union's Mixed Administrative Proceedings', (2004) 68 *Law and Contemporary Problems* 197.
[99] See P. Craig, supra note 38, at 80.
[100] See E. Schmidt-Aßmann, 'Introduction: European Composite Administration and the role of European Administrative Law' in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia, 2011).
[101] See H.C.H. Hofmann and A. Türk, 'The development of integrated administration in the EU and its consequences', (2007) 13 *European Law Journal* 253.