CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

Shifting Sands: Enhancing Democratic Oversight in the EU's Unilateral Trade Policy

Thomas Verellen

CLEER PAPERS **2024/3**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

SHIFTING SANDS: ENHANCING DEMOCRATIC OVERSIGHT IN THE EU'S UNILATERAL TRADE POLICY

THOMAS VERELLEN

CLEER PAPERS **2024/3**

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at E.Kassoti@asser.nl. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

ABSTRACT

This paper critically evaluates the European Union's increased use of unilateral trade instruments within its broader trade policy, aiming to enhance 'open strategic autonomy.' It addresses the significant expansion of the EU's trade policy toolbox with regulations like the Foreign Direct Investment Screening, the Anti-Coercion Instrument, the Foreign Subsidies Regulation and the Deforestation Regulation, which aim to restore a level playing field, bolster security, and sustainability. However, this shift raises concerns about democratic accountability, particularly in transparency and oversight mechanisms. The study presents a detailed analysis of the decision-making processes associated with these unilateral instruments, highlighting substantial accountability gaps in the face of growing EU institutional powers. Offering a taxonomy of these processes, the paper assesses their alignment with the EU's constitutional principles of representative democracy. It concludes with proposals for reforms that increase both the legitimacy and accountability of these policies, enhancing democratic oversight without necessitating treaty changes.

ABOUT THE AUTHOR

Thomas Verellen, Assistant Professor in EU and International Law, Utrecht University, t.e.verellen@uu.nl

INTRODUCTION

EU trade and investment policy has experienced a unilateral turn.[1] As the policy area has become increasingly 'geopoliticized', the European Commission considered that, in addition to a multilateral and bilateral trade policy strategy, the EU should also strengthen its unilateral capabilities.[2] Following a series of legislative proposals by the Commission, the EU's unilateral trade toolbox expanded significantly.[3] In addition to traditional trade defence instruments such as anti-dumping and anti-subsidy measures, it now also includes instruments such as the Foreign Direct Investment (FDI) Screening Regulation, the International Procurement Instrument, the Foreign Subsidies Regulation, the Deforestation Regulation and the Anti-Coercion Instrument. All of these initiatives fit in the Commission's ambition to strengthen the EU's 'open strategic autonomy'[4], and to put in place a trade policy that is 'open, sustainable, and assertive.'[5]

This paper focuses on a risk that comes with the rapid transformation of that toolbox. The unilateral turn risks further exacerbating a democratic accountability gap in EU trade policy-making: the EU institutions acquire new powers, but these new powers, which often have important discretionary elements, are not necessarily matched with effective democratic accountability instruments.[6] In this paper, I describe the shape and contours of this accountability gap, and I propose a number of reforms that could help to close the gap. I will do so in four steps. In chapter 1, I introduce a number of concepts and distinctions to steer the analysis that follows. In chapter 2, I map the different decision-making procedures that currently exist in EU unilateral trade policy. In chapter 3, and

---

[1] See the contributions to a special issue published by European Foreign Affairs Review on the topic of the unilateral turn, including Thomas Verellen and Alexandra Hofer, 'The Unilateral Turn in EU Trade and Investment Policy' (2023) 28 European Foreign Affairs Review 1; Ferdi De Ville, Simon Happersberger and Harri Kalimo, 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments' (2023) 28 European Foreign Affairs Review 15. In a similar vein, see generally Geraldo Vidigal, 'The Unilateralization of Trade Governance: Constructive, Reconstructive, and Deconstructive Unilateralism' (2023) 50 Legal Issues of Economic Integration.

[2] On the geopoliticization of EU trade and investment policy, see Sophie Meunier and Kalypso Nicolaidis, 'The Geopoliticization of European Trade and Investment Policy' (2019) 57 JCMS: Journal of Common Market Studies 103. More recently, see also Kathleen R McNamara, 'Transforming Europe? The EU's Industrial Policy and Geopolitical Turn' (2023) 0 Journal of European Public Policy 1.

[3] For an overview, see Verellen and Hofer (n 1).

[4] Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Europe's moment: Repair and Prepare for the Next Generation*, COM(2020) 456 final, 27.5.2020, 12-13.

[5] Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18.2.2021. Exploring the emergence of 'open strategic autonomy', see generally Luuk Schmitz and Timo Seidl, 'As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy' (2022) 61 JCMS: Journal of Common Market Studies 1.

[6] Highlighting how the new instruments endow the Commission with discretionary powers, see Wolfgang Weiß, 'The EU's Strategic Autonomy in Times of Politicisation of International Trade: The Future of Commission Accountability' (2023) 14 Global Policy 54, 58.

building on the mapping exercise undertaken in chapter 2, I identify a number of democratic accountability gaps. In a final section 4, I put forward a number of reforms to close the gap. I finish with a short conclusion.

The paper suggests there are reasons to worry: there are important democratic accountability gaps in EU unilateral trade policy. Many of these gaps are longstanding and not specific to trade policy, yet their detrimental impact is exacerbated as the EU increasingly acts by means of unilateral instruments in its trade policy.[7] At the same time, there are opportunities for improvement. By means of relatively small interventions that do not require Treaty change, the democratic credentials of the EU in this increasingly important corner of EU trade policy can be strengthened.

1. ACCOUNTABILITY, LEGITIMACY, DEMOCRACY AND DELEGATION

Before proceeding to the substantive analysis in chapter 2, 3 and 4, a number of concepts and distinctions are in need of definition. Drawing on the work of Marc Bovens, I define *accountability mechanisms* as institutional relations or arrangements in which an agent can be held to account by another agent or institution.[8] In contrast to Bovens, however, I use the term more loosely to include mechanisms that operate both *ex ante*—for example a mechanism that requires the executive to consult with the legislature before it adopts a measure—and *ex post*—for example a mechanism that requires the executive to report to the legislature after it adopts a measure.

Accountability is closely connected to *legitimacy*. If an EU institution (the agent) is properly accountable to another EU institution (the principal), and the principal is itself accountable towards the citizenry—typically through the vehicle of democratic elections—then both the agent and the principal are, at least *prima facie*, democratically legitimate. Legitimacy is the goal, whereas accountability is the vehicle to attain the goal. In other words, by establishing lines of accountability running from agent to principal, the overall legitimacy of the polity—here the EU—is enhanced.[9]

Both accountability and legitimacy come in different flavours. Particularly relevant to this paper is the distinction between *political*—and, in polities committed to

[7] No issue in EU studies has been debated as much as the EU's alleged 'democratic deficit.' For a seminal contribution, see Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013), which sees the EU's 'democratic deficit' as part of a broader process by which electorates become disengaged and elites increasingly isolate themselves from political pressures.

[8] See his 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', *Accountability and European Governance* (Routledge 2012) 948.

[9] In this sense, see also Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447, 456 ('Accountability is indirectly of importance because, ultimately, it can help to ensure that the legitimacy of governance remains intact or is increased').

democracy: democratic accountability—on the one hand, and *legal* accountability on the other. Legal accountability consists in the agent answering to a court of law—in the case of the EU primarily the Court of Justice of the EU.[10] Political or democratic accountability consists in the agent answering to a democratically elected institution—in the case of the EU the European Parliament and the Council. The former is elected directly by the EU citizenry; the latter indirectly, with the Member State executives being accountable vis-à-vis their national legislatures, which are in turn democratically elected. This double source of democratic legitimacy in the EU is expressed in Article 10 TEU, which in its second paragraph holds:

> Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

In this sense, democracy in the context of the European Union is multi-layered, as a constitutionally constructed federal *demos* exists alongside multiple national (and indeed subnational) *demoi*.[11]

The recognition that within the European Union a federal *demos* exists alongside at least 27 national *demoi* has implications for the standards against which I assess the democratic credentials of EU unilateral trade policy making. To my knowledge, the EU is unique amongst international organizations in its constitutional commitment, codified in Article 10 TEU, to the construction of a representative democracy that transcends the nation state. In this paper, I take this constitutional commitment to representative democracy seriously.[12] Doing so leads me to ground my analysis of the EU's democratic credentials in a relatively thick conception of democracy in which democratic legitimacy is understood as requiring that the citizenry have a say over the laws—and executive decisions—that govern them, and that the government be responsive to citizen concerns. In this conception of democracy set out in the Treaties, democracy thus requires participation—participation through representation, but participation nonetheless.[13]

---

[10] ibid 456.

[11] In this sense, see e.g. Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible' (2015) 21 European Law Journal 546, 554; Robert Schütze, 'Models of Demoicracy: Some Preliminary Thoughts' (European University Institute 2020) 2020/08 43.

[12] After having slumbered for over a decade since its introduction in the Lisbon Treaty, Art. 10 TEU has recently received academic attention. John Cotter proposed to 'instrumentalise' the provision to address democratic backsliding in EU Member States (see his 'To Everything There Is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) 47 European Law Review.) And on Verfassungsblog I have argued that Art. 10 TEU should be understood as part of the EU's constitutional identity. See my 'Hungary's Lesson for Europe' (*Verfassungsblog*, 8 April 2022) <https://verfassungsblog.de/hungarys-lesson-for-europe/> accessed 8 April 2022.

[13] For a similar conception of democracy, see generally Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, 2019).

This thick conception of democracy-as-participation can be contrasted with thinner, more procedural conceptions of legitimacy according to which in an international organization such as the EU a sufficient degree of legitimacy can be achieved by enforcing narrow mandates and by putting in place effective access to documents procedures to ensure that decision-making be transparent.[14] Under the thick conception of democracy mentioned earlier, transparency is a necessary precondition to allow for participation, while transparency without participation falls short of the standard of representative democracy set out in the Treaties.[15]

While the Lisbon Treaty reinforced the democratic credentials of EU foreign policy-making by strengthening the role of the European Parliament in the process of making international agreements, the involvement of democratically elected institutions in executive decision-making—including in the unilateral trade policy context—remains limited.[16] As will be discussed in this paper, this is problematic because the new instruments endow the Commission with important discretionary powers.[17] These include the power to start an investigation, to take investigative measures and to adopt interim measures. The power to adopt final measures often has a discretionary component as well, as the decision to adopt measures is often made subject to a balancing test that requires the Commission to weigh the negative effects of the targeted third country measure or policy against its positive effects. How the Commission makes those determinations matters a great deal, not only for the parties involved, but more broadly also for trade relations between the EU and the third country at issue.

It is sometimes argued that the availability of judicial review makes democratic control over individual decisions redundant, for as long as the executive acts within the scope of its democratically set mandate, the preferences of the citizenry are respected.[18] In such a framework, it is the responsibility of the CJEU to make

---

[14] For a critique of this type of proceduralism in the context of European Monetary Union, see generally Mark Dawson, Adina Maricut-Akbik and Ana Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) 25 European Law Journal 75.

[15] Making the same point, see Deirdre Curtin, '"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency' (2017) 23 European Law Journal 28, 39.

[16] On accountability and legitimacy issues in EU external relations outside of the unilateral context, see e.g. Jan Wouters and Kolja Raube, 'Rebels with a Cause? Parliaments and EU Trade Policy after the Treaty of Lisbon', *The Democratisation of EU International Relations Through EU Law* (Routledge 2018); Laura Puccio and Roderick Harte, 'The European Parliament's Role in Monitoring the Implementation of EU Trade Policy' in Olivier Costa (ed), *The European Parliament in Times of EU Crisis* (Springer International Publishing 2019); Andrej Auersperger Matić, 'The Role of the European Parliament in the Shaping of the Common Commercial Policy' in Michael Hahn and Guillaume Van der Loo (eds), *Law and Practice of the Common Commercial Policy : The First 10 Years after the Treaty of Lisbon* (Brill Nijhoff 2020); Wolfgang Weiß, 'The European Parliament's Role in the Operation of Trade Agreements: Parliamentary Control and Executive–Legislative Balance in External Action' in Diane Fromage and Anna Herranz-Surrallés (eds), *Executive–Legislative (Im)balance in the European Union* (Hart Publishing 2020).

[17] See again Weiß (n 7) 58. In the same vein, see McNamara (n 2) 15, on how the politicization of industrial policy in the EU challenges the EU's legitimacy.

[18] For a critical analysis of the assumption that competition law enforcement authorities should

sure that those institutions respect the limits of their powers. However, judicial review is no substitute for democratic control of discretion exercised within the scope of the powers that have been delegated to the executive. Even where the Commission's mandate is narrow and the exercise of its powers is subject to meaningful substantive conditions—as is the case, for example, for trade defence instruments or the Foreign Subsidies Regulation—democratic controls on how the Commission exercises its powers remain vital as the exercise of any power inevitably has a discretionary component.[19] The exercise of that discretion must be subject to effective democratic accountability mechanisms if we are to take seriously the requirement that the functioning of the EU be based on representative democracy.[20]

2. HOW DECISIONS ARE MADE: EIGHT MODELS

To get a better sense of how the EU takes decisions in the area of unilateral trade policy, I examined the following unilateral trade instruments that are currently in force:

(1) the Anti-dumping Regulation,
(2) the Anti-subsidy Regulation,
(3) the Foreign Subsidies Regulation,
(4) the International Procurement Instrument,
(5) the Enforcement Regulation,
(6) the Blocking Statute,
(7) the Foreign Direct Investment (FDI) Screening Regulation,
(8) the EU's new Export Control Regulation,
(9) the Deforestation Regulation, and
(10) the Anti-Coercion Instrument.

In addition, I looked at four instruments that fall outside of the scope of the EU's competence to conduct a common commercial policy (CCP), but which nonetheless have important repercussions for trade flows in and out of the EU:

(1) Article 101 TFEU,
(2) Article 102 TFEU,
(3) the Merger Regulation, and
(4) restrictive measures that affect trade flows.

Competition law instruments matter for trade relations for the straightforward reason that EU competition law applies to all undertakings active on the EU

be independent, see Monti, "Independence, Interdependence, and Legitimacy" in Ritleng (Ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2016), pp. 180–205.

[19] In this sense, see Verellen, 'Imperial Presidency versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States' (n 20).

[20] Art. 10(1) TEU.

market regardless of nationality, and that many of the companies affected by competition law operate across borders.[21]

Restrictive measures adopted on the basis of the EU's common foreign and security policy (CFSP) competence, for their part, matter because the EU not only imposes restrictive measures that are targeted at individuals, but also economic sanctions that restrict trade flows, as we have seen, for example, in the context of the 2022 Russian invasion of Ukraine.[22] To be clear, the unanimity requirement that governs the adoption of most CFSP restrictive measures by the Council makes for a very different decision-making dynamic than the one applicable to unilateral trade instruments adopted on the basis of the CCP. Relevant, also, is that CFSP restrictive measures are adopted directly on the basis of the relevant Treaty provisions, whereas many of the other instruments discussed in this paper are adopted on the basis of powers delegated by the legislature to the executive, be it Commission or Council. These differences are taken up in the analysis that follows. They do not, however, constitute reasons to exclude CFSP restrictive measures from the analysis. To the contrary, post-Lisbon, the CFSP Treaty provisions have been integrated into the general framework of EU law.[23] As a consequence, the competence to conduct a CFSP is an EU competence, and the measures adopted on the basis of CFSP competence are EU measures.[24] It thus makes much sense to include CFSP restrictive measures so as to ensure that the analysis is comprehensive.

For each of the abovementioned instruments, I examined the applicable decision-making rules. This analysis allowed me to identify eight decision-making models. I will discuss each of these models in greater detail further below. Each model can be placed on a spectrum between two ideal types: on the one hand, a complete *centralization* of powers in the hand of the Commission and, on the other, a complete *decentralization* of powers in the hands of the individual Member States. Model 1 comes closest to the centralization ideal type, whereas Model 8 comes closest to the decentralization ideal type. The tables below offer an overview of the eight decision-making models (Table 1) and a number of examples of instruments (Table 2). The subsequent subsections present the eight models in greater detail.

---

[21] From this angle, it is not surprising that the EU occasionally includes competition policy chapters in trade agreements. See e.g. the Trade and Cooperation Agreement concluded with the UK, Title XI, Chapter II entitled 'Competition Policy.'

[22] In so doing, the EU reconnects with older conceptions of sanctions as an instrument of economic blockade. On the origins of sanctions in the post-World War I period, see generally Nicholas Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press 2022).

[23] See in this sense Case C-134/19 P, *Bank Refah Kargaran v Council*, EU:C:2020:793, para. 47.

[24] See in this sense also Wessel, "Lex Imperfecta: Law and Integration in European Foreign and Security Policy", 1 *European Papers* (2016), 439–468, referring to 'a constitutionalisation underlining that CFSP is part of the Union's legal order.' It is inaccurate, therefore, to characterize the CFSP as a strictly 'intergovernmental' area of policy-making in coordinate their national policies, without having allocated any competence to the EU.

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Who has the initiative?	EC	EC	EC	EC, industry	EC	HR, MS	HR, MS	EC, MS
Who makes the decision?	EC	EC	EC	EC	Council	Council	Council	MS
Who can advise on decisions?		MS	Council, EP	MS				EC, MS
Who can block decisions?			Council, EP	MS				
Who can retract decisions?	EC	EC	EC	EC	EC	Council	Council	MS
Who can revoke delegation?		EC + EP + Council	EP, Council	EC + EP + Council	EC + EP + Council			EC + EP + Council

Table 1 – Overview of decision-making models

Model	Example(s)
Model 1	Competition policy
Model 2	Foreign Subsidies Regulation, Competition policy (Merger Regulation)
Model 3	Blocking Statute, Export Control Regulation, FDI Screening Regulation
Model 4	Anti-dumping Regulation, Anti-Subsidy Regulation, Enforcement Regulation, International Procurement Instrument, Deforestation Regulation
Model 5	Anti-Coercion Instrument
Model 6	Amendments to certain restrictive measures
Model 7	Restrictive measures
Model 8	FDI Screening Regulation

Table 2 - Examples of instruments

2.1 **Model 1: Commission decides alone**

Under a first model, the Commission is the only game in town. The Commission proposes measures; it conducts investigations; it adopts interim measures; it adopts final measures and it retracts them. This is the model that exists in many corners of EU competition policy.[25] To sanction cartels or abuses of a dominant

[25] Recital 22 of the Comitology Regulation, mentioned in note 41 below, confirms that '[t]he Commission's powers, as laid down by the TFEU, concerning the implementation of the competition rules are not affected by this Regulation.'

position, the Commission adopts decisions. Neither the other EU institutions nor the Member States play a direct role in this process. To be clear, both in the cartel context and the context of abuses of dominant position, the Commission must consult a committee—the Advisory Committee on Restrictive Practices and Dominant Positions—before adopting decisions. This committee issues opinions, and the Commission must take 'utmost account' of these opinions. However, in contrast to the committees we will encounter under Models 2 and 4, this committee does not consist of the executives of the Member States. Rather, its membership consists of representatives of the national competition authorities.[26] Crucially, EU law requires that these authorities be independent from the national executive.[27] For this reason, the committee is not an instrument of control by the Member States over the Commission. From a centralization-decentralization angle, the committee is a neutral factor.

Under Model 1, the main check on the Commission is internal: each decision must be adopted by the college of commissioners, which acts by consensus on the basis of the collegiality principle.[28] The collegiality principle requires that, if a commissioner cannot accept a proposed decision, he or she must resign from the Commission. Under this model, the Commission is only indirectly accountable to the EU citizenry: the Commission is accountable vis-à-vis the European Parliament, which has the power to force the entire Commission to resign by means of a motion of censure, which it can adopt by means of a two-thirds majority.[29] However, this mechanism is a nuclear option. Would the European Parliament be willing to force the resignation of the Commission over a decision to impose a fine on, say, Google, for a violation of the EU's competition rules? It is perhaps not a likely prospect.

A second instrument operates further upstream: the EP must give its consent to the appointment of each college of commissioners. In this context, the Parliament organizes US Senate-style hearings. One could imagine MEPs quizzing a competition commissioner-designate on her views on the state and future direction of competition policy. Yet here the issue is one of follow-up: once in office, it is difficult for the EP to compel the commissioner to follow through on promises made during the hearing. After all, the EP can only censure the Commission as a whole, not an individual commissioner.

That said, the commissioner responsible for competition policy does appear several times a year before the European Parliament's Committee on Economic

---

[26] Art. 14(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4.1.2003, p. 1–25 ('Regulation 1/2003').

[27] See Art. 4 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance), OJ L 11, 14.1.2019, p. 3-33.

[28] Art. 17(6)(b) TEU.

[29] Art. 17(8) TEU and Art. 234 TFEU.

and Monetary Affairs (ECON). The Parliament's website mentions that during these meetings, MEPs discuss the overall course of EU competition policy as well as individual decisions with the commissioner.[30] Whether or not these meetings are effective in holding the Commission accountable, is an empirical question that would require further examination. Existing literature suggests that the Parliament's influence on the Commission in this area should not be overstated.[31]

2.2 **Model 2: Commission decides, Member States advise**

Under this second model, the Commission adopts all of the abovementioned decisions. In contrast to the first model, however, Member States play a role in the procedure to adopt decisions: they are represented in a so-called 'Comitology' committee. This committee advises the Commission on each draft proposal.[32] The committee takes a position by means of a simple majority of its component members. If the committee advises the Commission not to adopt a proposal, the Commission must reconsider it as it must take 'utmost account' of the opinion.[33] The Commission may still opt to adopt the proposal, however; the power of the Member States is of an advisory nature only; they cannot veto the proposal. The European Parliament, for its part, plays a minor role in the decision-making process: both the Parliament and the Council can review the *vires* of the proposed decision.[34] If either of the two considers that the Commission would exceed the implementing powers that have been allocated to it, the European Parliament or the Council can signal its concerns to the Commission. If Parliament or Council do so, the Commission must review the act. Here again, the Commission cannot be stopped in its tracks: if it wants to adopt the decision, it can do so.

This model is used, for example, in the Foreign Subsidies Regulation, which sets out to tackle distortive subsidies granted by non-EU governments to EU-based companies.[35] Under this regulation, the Commission can start investigations, take investigative measures, adopt interim measures and final measures. Member

[30] https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy accessed 13 April 2023.

[31] See e.g. McGowan and Michelle Cini, 'Discretion and Politicization in EU Competition Policy: The Case of Merger Control' (1999) 12 Governance 175, 177.

[32] Art. 4 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18 (the Comitology Regulation).

[33] Ibid, Art. 4(2).

[34] Ibid, Art. 11.

[35] See e.g., Art. 11(2) of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45 (the Foreign Subsidies Regulation). Note that the use of the advisory procedure in the Foreign Subsidies Regulation is somewhat surprising, since the Comitology Regulation provides, in its Art. 2(2), that for common commercial policy measures the examination procedure must apply. However, both regulations are secondary law, which implies that the former operates as a *lex specialis* to the latter and can thus override the latter.

States can issue an opinion on the need to adopt interim and final measures, but as mentioned, they cannot block the proposal. Similarly, while strictly speaking not a Comitology committee, under the Merger Regulation the Commission must also present draft decisions to a committee of Member States—a committee informally called 'AdComm.'[36] Here, too, the committee's powers are advisory only; the Commission must take 'utmost account' of the committee's opinion, but it can choose to press ahead with its decision. In this sense, Model 2 is also a very centralized model of decision-making.

2.3 **Model 3: Commission decides, Member States and European Parliament can oppose**

Under this model, the Commission adopts a decision, and the European Parliament and the Council can each oppose the decision. The decision—known as a 'delegated act'—only enters into force if neither of the two institutions has expressed its opposition within a given timeframe—often two months. Member States can do so by qualified majority, the Parliament by ordinary majority.[37] Interestingly, this is the only procedure that grants the European Parliament genuine decision-making powers. Both Parliament and Council can oppose Commission decisions; they can revoke delegations altogether; and delegations tend to expire after a set amount of time—typically five years. Clear accountability lines thus run from the Commission towards both of the institutions endowed with democratic legitimacy in the EU as they are each in a position to prevent individual Commission decisions from entering into force.

This model is used, for example, in the framework of the Blocking Statute, the EU's new Export Control Regulation, as well as the FDI Screening Regulation. The Blocking Statute is a regulation by which the EU aimed to put in place a legislative framework to mitigate and, if possible, neutralize the extraterritorial effects of secondary sanctions imposed by the United States.[38] The Statute declares judgments and decisions by authorities that give effect to blacklisted laws to be unenforceable within the European Union.[39] The decision to add or remove such laws from the blacklist is made by the Commission, on its own initiative, following the abovementioned procedure.

Similarly, under the Export Control Regulation, the Commission can add items to and remove items from a 'common list' of goods and technologies that cannot be exported from the EU without prior authorization.[40] The decision to add or

---

[36] Art. 23(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22 (the Merger Regulation).

[37] Art. 290(2) TFEU.

[38] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, p. 1–6 (the Blocking Statute).

[39] Arts. 4-5 of the Blocking Statute.

[40] Art. 17 of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20

remove an item from the list is again taken independently by the Commission, but Parliament and Council can oppose the Commission's decision before it enters into force. They have two months to do so.[41] The delegation of powers to the Commission also expires after five years, although it will be automatically extended if neither Parliament nor Council object to such an extension.[42] Parliament and Council can also revoke the delegation at any point in time.[43]

Finally, Model 3 is used also in the FDI Screening Regulation, which empowers the Commission to label projects and programmes as being of 'Union interest.' In so doing, the Commission empowers itself to issue opinions on the security risks of investments that affect these projects and programmes of which Member States must take 'utmost account'—a requirement one step up the ladder from the usual requirement that they take the Commission's opinion into 'due consideration.'[44]

2.4 Model 4: Commission decides, Member States can oppose by qualified majority

Under this model, the Commission adopts all of the abovementioned decisions in the lifecycle of a measure. As is the case for Model 2 decisions, the Commission submits a draft decision to a comitology committee consisting of Member State representatives. However, in contrast to Model 2, in this committee Member States can block a draft Commission decision. The threshold to do so is high, however: Member States must take a position by a qualified majority.[45] If a qualified majority in favour of blocking a Commission draft decision fails to materialize, the Commission can ultimately adopt the decision. It may have to go through an appeal procedure. If it does, and a qualified majority to oppose the draft fails to materialize also at the appeal level, the Commission can adopt the decision.[46] As is the case for Model 2, the European Parliament and the Council can review the *vires* of draft decisions, but they cannot block the draft decision.[47]

This is the model that is used for the adoption of traditional trade defence measures: anti-dumping and countervailing measures, as well as decisions under the Enforcement Regulation and the International Procurement Instrument.[48]

May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11.6.2021, p. 1–461 (the Export Control Regulation).

41 Ibid, Art. 18(6).

42 Ibid, Art. 18(2).

43 Ibid, Art. 18(3).

44 Art. 8 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I , 21.3.2019, p. 1–14 (the FDI Screening Regulation).

45 Art. 5(1) of the Comitology Regulation.

46 Ibid, Art. 6(3) second para.

47 Ibid, Art. 11.

48 For anti-dumping measures, see Art. 9(4) of Regulation (EU) 2016/1036 of the European

It is used, also, in the Deforestation Regulation, where the Commission is empowered to classify third countries in terms of the risk they pose for exporting products to the EU that are not 'deforestation free.'[49]

Research tells us that for reasons of political economy it is difficult for Member States to build a coalition to block a Commission proposal.[50] That the impact of trade measures is typically heavily concentrated in only one or a couple of Member States is part of the explanation as to why Member States have a hard time reaching the required qualified majority threshold. The Member States disunited, the Commission typically gets its way.[51]

2.5 Model 5: Commission proposes, Council decides by qualified majority

Under this model, the qualified majority requirement operates in the other direction: a qualified majority is needed to adopt rather than to block a proposal. The Commission does not present a proposal to a Comitology committee as it does under Models 2 and 4. Rather, it sends it to the Council. (Politically, this is a distinction without a difference: the Comitology committee and the Council both consist of representatives of the Member States.) The Council considers the Commission's proposal and can adopt it by a qualified majority of its members. The Council may also amend the Commission's proposal by qualified majority, which is an important difference with the ordinary legislative procedure under which the Council can only adopt amendments with which the Commission does not agree by unanimity rather than qualified majority.[52]

Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 21–54 (the Anti-dumping Regulation). For the Enforcement Regulation, see Art. 4(1) of Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021, p. 1-5 (the Enforcement Regulation).

[49] Art. 29(2) of Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206-247 (the 'Deforestation Regulation').

[50] See generally Christian Freudlsperger, 'The Politics of EU Trade Defence' (SciencesPo Paris 2014) 4: '[I]n an institutional and procedural setting, which is already marked by significant Commission discretion and limited oversight on the part of Member States, the consistent political division within the Council between "Friends of TDI", opponents thereof, and swing states explains why the vast majority of Commission proposals for permanent measures are ultimately adopted by EU governments.'

[51] The adoption of trade defence measures against Chinese solar panels in the first half of the 2010s is an oft-quoted exception. See here Moens and Gijs, The EU lost a trade war with China 10 years ago. Has it learned?, <https://www.politico.eu/article/eu-lost-trade-war-china-10-years-ago-has-it-learned-electric-vehicle-subsidies/>, (last visited 21 September 2023).

[52] Art. 5(5) of Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ L, 2023/2675, 7.12.2023 (the Anti-Coercion Instrument).

This is the model used in the Anti-Coercion Instrument. The procedure to adopt countermeasures to tackle economic coercion targeted at the EU institutions or a Member State takes place in two steps: first, a decision to establish the existence of economic coercion; second, a decision to take measures to tackle the coercion. The first step would follow Model 5, whereas the second step would follow Model 4.[53] The Anti-Coercion Instrument requires the Commission to inform the European Parliament of its examination of possible economic coercion before it presents a proposal to the Council.[54] Similarly, the Parliament 'shall be informed'—although it is not clear by whom, the Commission or the Council—of acts proposed or adopted that (would) establish coercion.[55] Apart from the right to be kept informed, which we know, for example, from the treaty-making context in the CFSP, Parliament plays no role in the decision-making process.[56]

2.6 Model 6: High Representative or a Member State proposes, Council decides by qualified majority

This model tilts towards the decentralization pole: the right of initiative is allocated to each individual Member State and to the High Representative for Foreign Affairs and Security Policy (the High Representative). In contrast to all of the above models, the Commission plays only a limited role in the decision-making procedure. It can support a proposal by the High Representative, but if it does not do so, the High Representative can also make the proposal without Commission support—this despite the fact that he is also Vice-President of the Commission.[57] The High Representative is both a Vice-President of the Commission and the chairperson of the Foreign Affairs Council. The actual decision is taken by the Council, by qualified majority. The European Parliament plays no role in the decision-making procedure. Democratic accountability is ensured through the Member States, who are accountable vis-à-vis their national legislatures.

This is the model used to amend some existing restrictive measures. In a 2022 study to the European Parliament, Ramses Wessel and Viktor Szép reported that 30% of all CFSP decisions fall in this category.[58] Article 31(2) TEU allows for the possibility of adopting decisions amending existing restrictive measures by qualified majority, whereas the initial decision to impose restrictive measures must be taken by unanimity. This Treaty provision does not explain, however,

[53] See respectively Arts. 5 and 8 of the Anti-Coercion Instrument.
[54] Ibid, Art. 5(4).
[55] Ibid, Art. 5(8).
[56] Art. 218(10) TFEU.
[57] Art. 30(1) TEU. Art. 18(4) TEU makes clear that '[i]n exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.' This paragraph suggests that the High Rep can exercise its functions as chair of the Foreign Affairs Council without being bound by the collegiality principle that governs Commission decision-making, and which requires that a Member of the Commission who cannot support Commission must resign.
[58] Ramses Wessel and Viktor Szep, 'The Implementation of Article 31 of the Treaty on European Union and the Use of Qualified Majority Voting' (European Parliament 2022) 51.

where exactly the power to adopt restrictive measures ends and that to amend existing measures begins. Does adding new individuals to a sanctions list constitute an amendment to an existing (set of) restrictive measure(s), or does it constitute a new restrictive measure? Would adding a product to a list of goods that can no longer be imported into the EU constitute an amendment or a new measure? The wider the notion of 'amending' is interpreed, the more leeway for decision-making by qualified majority vote in the Council. The Commission, for its part, has in the past argued that *all* amendments of listings should take place by qualified majority vote.[59]

That said, the risk of a circumvention of the unanimity requirement through a liberal interpretation of what it means to 'amend' restrictive measures should not be overstated. While the 30% share mentioned by Wessel and Szép may very well be correct when the entire post-Lisbon period is taken into consideration, current sanctions practice remains predominantly based on decision-making by unanimity. For example, when the High Representative proposed restrictive measures against individuals affiliated with Hamas and the Palestinian Islamic Jihad in late 2023, it had proposed that the list of sanctioned individuals could be amended by qualified majority vote. The Council decided instead that amendments to the list of sanctioned individuals shall be made by unanimity.[60]

2.7 Model 7: High Representative or a Member State proposes, Council decides by unanimity

As mentioned, to adopt new restrictive measures, a Member State or the High Representative proposes, and the Council decides by unanimity, not qualified majority. The roles of both Commission and Parliament are limited: Parliament plays no direct role, whereas the Commission's role is limited to that of preparing proposals—often upon an invitation by the European Council[61] –which the High Representative subsequently puts to the Council.

If restrictive measures do affect trade or financial flows—e.g. if a measure bans the import of, say, fertilizer from Belarus into the EU—a second decision has to be adopted in addition to the initial Council decision.[62] This second decision—technically a Council regulation—does require Commission support as the pro-

[59] European Commission, 'Communication from the Commission to the European Council, the European Parliament and the Council. A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy', COM(2018) 647 final, 12.9.2018, p. 11.

[60] Art. 3(1) Council Decision (CFSP) 2024/385 of 19 January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad, OJ L, 2024/385, 19.1.2024. The anecdote was shared with me by an official of the European External Action Service.

[61] Pointing to the central role of the Heads of State and Government in EU sanctions policy, see generally Viktor Szép, 'New Intergovernmentalism Meets EU Sanctions Policy: The European Council Orchestrates the Restrictive Measures Imposed against Russia' (2020) 42 Journal of European Integration 855.

[62] Art. 215(1) TFEU.

posal to adopt the decision has to be made jointly by the High Representative and the Commission. Moreover, in contrast to the initial decision, Article 215(1) TFEU requires that the Council must 'inform' the Parliament of the regulation's adoption. And, strangely perhaps, the regulation can be adopted by qualified majority rather than unanimity. However, as the Council regulation requires a prior Council decision that is adopted by unanimity, the qualified majority threshold has little practical meaning.

2.8 **Model 8: Commission advises, individual Member States decide**

Under this final model, the European Union does not have any decision-making powers of its own. Instead, the power to adopt decisions lies with the Member States—either because the power has never been transferred to the EU, or, as has been the case for the FDI Screening Regulation, because the EU legislature opted to re-empower the Member States to act in an area of exclusive EU competence.[63] Under the FDI Screening Regulation, Member States have the final say on whether proposed foreign investments conflict with public security and order.[64] The Commission does play a role in the process—it can issue opinions—but it cannot block or approve investment projects. Perhaps because the power of the Commission in this area is not very significant, none of the other EU institutions play a role in the decision-making process. Democratic accountability is ensured at the national level, where each Member State executive answers to its national legislature.

3. ASSESSING THE EIGHT MODELS: ACCOUNTABILITY GAPS APLENTY?

The abovementioned overview gives a sense of the diversity of decision-making procedures through which the EU can adopt unilateral trade measures. This diversity is the result of a great deal of wheeling and dealing between the Member States and the Commission. Member States and the Commission hold different views on the extent to which powers should be conferred to EU institutions. These vertical or 'federal' dynamics are particularly visible in Models 7 and 8, which the EU Treaties continue to ringfence as a distinct policy area 'subject to its own specific rules and procedures' in which the involvement of the European Parliament and Commission remains limited.[65] But they are at work also in Mod-

[63] See here Thomas Verellen, 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 Legal Issues of Economic Integration 19, 24.

[64] See recital 17 of the FDI Screening Regulation: 'The final decision in relation to any foreign direct investment undergoing screening or any measure taken in relation to a foreign direct investment not undergoing screening remains the sole responsibility of the Member State where the foreign direct investment is planned or completed.'

[65] Art. 24(2) TEU. On the ring-fencing metaphor, see Paul James Cardwell, 'On Ring-Fencing the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) 64

els 2 and 4, where the Comitology system is best understood as an effort by Member States to retain control over the Commission as the latter is empowered to engage in executive decision-making.[66] In this Commission-Member States bargaining process, the question of democratic accountability does not always take centre stage, despite the fact that a commitment to democracy is a value that ought to be shared by all Member States and all EU institutions.[67] And, if it does play a role in discussions, Member States are likely to take the view that democratic accountability should be indirect, i.e. through the Council, rather than direct, through the Parliament.

That the issue of democratic accountability is not of primary concern is visible both in the centralized and the decentralized models of decision-making. In the following, I look at each category in turn in an effort to identify democratic accountability gaps. A democratic accountability gap exists when no clear accountability line(s) run(s) from the agent—typically the Commission, but under Models 6 and 7 also the Council—to (a) democratically legitimized institution(s) such as the European Parliament or the national legislatures. To be clear, democratic accountability mechanisms can take different forms and, mindful of the constitutional requirement of Commission independence, they certainly do not have to take the form of a co-decision power for Parliament and Council.[68] Indeed, to speak of a democratic accountability gap whenever the involvement of Parliament and Council falls short of full co-decision powers would come down to a wholesale rejection of the very notion of delegated decision-making, which inevitably requires a trade-off between input and output legitimacy—the latter meaning legitimacy achieved through policy effectiveness.[69]

That said, if the Article 10 TEU requirement that the EU's functioning be based on representative democracy is to have any meaning, it is nonetheless constitutionally required for the democratically elected representatives of the EU citizenry to be involved in *some* way in EU decision-making, either *ex ante* (before decisions are taken) or *ex post* (after they are taken) or both. When they have no such opportunity, a democratic accountability gap exists. This is all the more the case as it is very difficult at EU level—in contrast to the arrangements in many Member States where the executive controls the legislature—to amend the framework legislation that empowers the executive to act, as doing so typically requires (i) a

---

Northern Ireland Legal Quarterly 443.

[66] See e.g. Pollack (n 22) 114. But see Calle Håkansson, 'The Ukraine War and the Emergence of the European Commission as a Geopolitical Actor' (2023) 46 Journal of European Integration 25.

[67] Art. 2 TEU lists democracy as one of the values on which the EU is founded and which are 'common to the Member States.'

[68] Art. 17(3) third para. TEU provides that '[i]n carrying out its responsibilities, the Commission shall be completely independent.'

[69] On the distinction, see Scharpf, "De-constitutionalisation and majority rule: A democratic vision for Europe", 23 *European Law Journal* (2017), 315–334, at 315. Striking a 'balance' between independence and accountability has been an important in the literature on the legitimacy of the European Central Bank. See e.g. already Paul Magnette, 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model' (2000) 6 European Law Journal 326.

Commission proposal, (ii) a qualified majority in the Council, and (iii) an ordinary majority in the European Parliament. In particular, to require the Commission (the agent) to agree to changes to the rules that govern its own powers makes reforming those rules in the face of abuse by the agent impossible.

In the following, I look at the eight decision-making models identified in the previous section. As will become clear, both under the decentralized models (Models 5 to 8) and in the centralized models (Models 1 to 4) democratic accountability gaps can be identified.

3.1 **Decentralized models**

Under *Model 7*, the decentralized model in which the Council decides by unanimity—think of most restrictive measures—all Member States hold a veto power. Theoretically, this should ensure that each individual Member State parliament has an indirect voice in the EU decision-making process as each Member State executive in the Council can be assumed to be accountable vis-à-vis the national legislature(s). As a consequence, under this model, there ought to be no democratic accountability gap. This is the 'liberal intergovernmentalism' theory articulated by Andrew Moravscik in the early 1990s: because the EU's actions are ultimately a function of Member State preferences, there is no need to infuse EU decision-making with its own democratic legitimacy; indirect democratic legitimacy through the Member States in Council is sufficient.[70]

However, subsequent empirical literature has made clear that the abovementioned indirect voice is often more theoretical than real. National legislatures frequently do not know what is going on in the Council, which continues to operate more as a diplomatic gathering than as a democratic legislature in its own right.[71] As a consequence of this lack of transparency, it is difficult for national parliaments to hold their executives accountable for the positions they defend at Council meetings.[72] As political scientists studying both federal systems and

[70] See Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS: Journal of Common Market Studies 473.

[71] See here e.g. Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 Common Market Law Review 1673, 1675; Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 American Journal of International Law 489, 524.

[72] Stein suggested that only some national legislatures—the Danish, German and British—are/were in a position to influence if not control their ministers. See Stein (n 69) 524. Discussing the same issue, see generally Koenig-Archibugi, "The democratic deficit of EU foreign and security policy", 37 *The International Spectator* (2002), 61–73. The problem of executives teaming up and thereby sidelining their legislatures is not unique to the EU. In Canada, it is known by the term 'executive federalism', a concept that denotes processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system. See Ronald L Watts, *Executive Federalism: A Comparative Analysis* (IIGR, Queen's University 1989) 3. The issue has also been discussed in the international context. See e.g. already Kaiser, "Transnational Relations as a Threat to the Democratic Process", 25 *International Organization* (1971), 706–720.

international organizations have demonstrated, such sidelining of parliaments is inherent to this model of decision-making whereby executives negotiate and take joint decisions. German political scientist Karl Kaiser made this point in the early 1970s with regard to international decision-making. It is worth quoting him in full:

> In trying to control the results of the intermeshing of decision-making parliaments can cancel each other out. Agreements are developed in a complicated multinational process of negotiation and compromise. Because of the interpretation of sovereignty and the rights of national parliaments which prevails in Western democracies a parliament can call to account only its own national government. But each government is at least partially able to escape its responsibility to its parliament by pointing to the involvement of other governments and to their shared responsibility for common measures. The 'sovereign right' of parliament to change such an agreement or to stop its implementation is, in fact, mainly theoretical because of the costs that such actions might entail. A carefully balanced compromise could collapse, the political atmosphere could be jeopardized, or resources could be wasted. The executive can also use the complexity and special rules of multinational decision-making to block undesired intrusions by parliament or public opinion prior to the conclusion of an agreement. Under established custom it is relatively easy for the executive to suggest that such negotiations must be treated confidentially until they are concluded and that the involvement of other governments imposes particular restraints on the disclosure of their content or state of progress.[73]

The dynamic that Kaiser describes, and which Mathias Koenig-Archibugi has characterized as one of 'collusive delegation' also occurs within the EU in general, and within decision-making under Model 7 in particular.[74] Information only trickles down from the Council to national parliaments. Negotiations within the Council are complex and often take place under time pressure, making it difficult for individual parliaments to exercise control over the process.[75] There are major differences between national parliaments: some national parliaments have stronger powers, more financial resources, more expertise and more willingness to scrutinize the government than others.[76] As a result, some parliaments are more successful than others in monitoring the work of the national government within the Council. However, these differences do not detract from the structural difficulties that individual parliaments experience in influencing a collective decision-making process.

Model 8 also creates a democratic accountability gap. At first sight, the model does not look very concerning: decision-making powers and democratic accountability mechanisms both lie at the national level; there thus is no gap. However, at closer inspection, there is reason to be concerned. In the language

---

[73] Kaiser, "Transnational Relations as a Threat to the Democratic Process", 25 *International Organization* (1971), 706–720, at 714.

[74] Koenig-Archibugi, "The democratic deficit of EU foreign and security policy", 37 *The International Spectator* (2002), 61–73, at 62.

[75] In this sense, see Bono, "Challenges of Democratic Oversight of EU Security Policies", 15 *European Security* (2006), 431–449, at 441.

[76] For an empirical analysis of seven Member State parliaments, see *Huff*, Problems and Patterns in Parliamentary Scrutiny of the CFSP and CSDP, 2013.

of economists: decisions taken by individual Member States are likely to give rise to externalities. Take the FDI Screening Regulation. Under this regulation, individual Member States have the final say over proposed investments in their territories. However, an investment in Member State A that Member State A deems safe, may nonetheless create a risk to the public security of neighbouring Member State B. The FDI Screening Regulation acknowledges this cross-border dimension of public security in the European Union by setting up a coordination mechanism whereby Member States and the Commission can comment on the possible risks proposed investments pose to public security and order. However, the Regulation does not go as far as to 'Europeanize' the final decision to approve (or not) a proposed investment. The decision to leave the final say over screening decisions with the Member States rather than with an EU institution raises a problem: investments affect the citizens of Member State B, but these citizens have no control over whether the investment should go ahead or be abandoned; they are thus placed in a position of heteronomy, i.e. a position in which they are subject to the control of others.

To be clear, this externality problem is not new: it is a logical consequence of a world order consisting of sovereign states in which those outside of the geographic borders of the state typically cannot partake in the state's government.[77] However, in areas of exclusive EU competence—and the FDI Screening Regulation falls in such an area—Member States have 'transferred' parts of their sovereignty to the EU. Given this transfer, the heteronomy problem should be remedied by means of accountability mechanisms at EU level that give all EU citizens, regardless of their location, an equal say. However, the FDI Screening Regulation did not introduce any such mechanisms. Instead, Member State B merely has the opportunity to comment on the proposed investment, whereas the government of Member State A is democratically accountable only to the citizenry of that Member State.

A democratic accountability gap can also be observed under *Model 6* whereby the Council decides upon a proposal of a Member State or the High Representative by qualified majority without any European Parliament involvement. Under this model, Moravscik's argument that the EU's actions are sufficiently democratically legitimized because the EU's decisions are little more than the aggregate of individual Member State preferences in any case does not hold because the EU can take decisions that run counter the expressed interests of a single Member State. At the same time, however, there are no direct democratic accountability mechanisms at EU level: Parliament plays no role in the decision-making process, and since the Commission is not involved either, the general accountability regime we encountered under Model 1 does not apply to Model 6.

[77] It is against this mismatch between the bounded nature of democracy on the one hand, and the increasingly interconnected economic, social and environmental spheres, that cosmopolitan theories of democracy have been articulated. See e.g. David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995).

From the vantagepoint of democratic legitimacy, Model 6 is thus particularly problematic: it sidelines national parliaments by weakening the bargaining position of individual Member States without at the same time introducing direct democratic accountability mechanisms at EU level to offset the loss of indirect democratic accountability. To be clear, when it comes to the effectiveness of decision-making understood as the speed by which decisions can be taken, Model 6 may very well score better than Model 7 under which the Council decides by unanimity.[78] After all, obtaining the support of a qualified majority of Member States is easier to achieve than obtaining the support of all Member States. However, this potential increase in effectiveness comes with a more significant accountability gap under Model 6 as compared to Model 7.

Finally, *Model 5* – used in the context of the Anti-Coercion Instrument – suffers from many of the same shortcomings as Model 6. Here, too, the Council decides by qualified majority, whereas no similar power is granted to the European Parliament. At the same time, because the Council decides by qualified majority rather than by unanimity, individual Member State legislatures can be bypassed. As a result, there is neither direct nor indirect democratic accountability. That said, in comparison to Model 6, Model 5 does benefit from the abovementioned general accountability mechanisms to which the Commission is subject: the Commission's decision to adopt a proposal to establish the presence of economic coercion practiced by third country A against the EU or a given Member State will require the support of the entire college of commissioners. Furthermore, the Commission will have to answer questions to the European Parliament. And in a nuclear scenario—however unlikely—the Parliament can dismiss the Commission.

3.2 **Centralized models**

Also under the more centralized models gaps can be identified. Under *Model 1*, democratic accountability is limited to the Commission's general responsibility vis-à-vis the European Parliament. As mentioned earlier, it is an empirical question worth exploring whether such accountability is effective in practice, in the sense that the European Parliament—as co-principal along with the Council—is able to exercise influence over EU competition policy as conducted by its agent, the Commission. Research in other areas of EU law, in particular the economic and monetary union, suggests there are reasons to be concerned.[79] The EP's role in the appointment of the Commission and the EP's power to censure the Commission are blunt instruments, and it is relatively easy for the responsible

[78] The case for a shift from Model 7 to Model 6 is often made on grounds of effectiveness. This is also the angle taken by Szép and Wessel in their report to the European Parliament and the one taken by the Commission in its 2018 communication, both mentioned earlier. See respectively Wessel and Szep (n 58). And European Commission (n 67).

[79] See most recently Adina Akbik, The European Parliament as an Accountability Forum: Overseeing the Economic and Monetary Union (Cambridge University Press 2022).

commissioner to evade parliamentary questions as MEPs have few means to follow up when answers are unsatisfactory.

In a similar vein, under the models in which the Commission needs to table draft decisions to a Comitology committee (*Models 2 and 4*), there is a democratic accountability gap as the Commission reports to Member State representatives, but not to the European Parliament. With regards to the role of the Member States in the Comitology process, similar issues arise to those we encountered under the decentralized Model 7 in which the Council decides by unanimity. The Comitology process is not transparent.[80] As a result, it is doubtful that all national parliament(s) are well informed of what happens during these low-profile, technical meetings of national experts. This, in turn, makes it difficult for national parliaments to hold their executives accountable for their actions in the Comitology committees. Here again, further empirical research is needed, but there are reasons to believe that indirect democratic accountability in this area is somewhat of a chimera.

Problematic as well is the lack of European Parliament involvement to offset the lack of indirect democratic accountability through the Member State representatives. Neither in Model 2 nor in Model 4—referred to in the Comitology Regulation as, respectively, the advisory and the examination procedures—does the European Parliament play a meaningful role. Its involvement is limited to the *vires* review which allows Parliament and Council to flag to the Commission that, in its view, a proposed decision goes beyond the limits of the powers allocated to the Commission.[81] The European Parliament makes use of this tool, albeit not on trade policy issues.[82]

It is possible to imagine a world in which the Parliament makes more aggressive use of its power to review the *vires* of draft decisions also in the trade policy sphere. As Member States who challenge EU decisions before the Court of Justice demonstrate on a regular basis: often it is not difficult to translate concerns about the substance of policy measures into the language of competence, and to make the case that a measure you do not like for policy-related reasons is illegal because it is *ultra vires*.[83] Making this translation should not be considered

[80] In 2017 the Commission adopted a proposal to reform the comitology process. One of the aims was to increase transparency. See Proposal for a regulation amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM/2017/085 final, 14.2.2017. The legislative process was still ongoing at the time of writing (July 2023).

[81] Art. 11 of the Comitology Regulation.

[82] See here Merijn Chamon, *The European Parliament and Delegated Legislation: An Institutional Balance Perspective* (Hart 2022) 171, pointing out that in the post-Lisbon period until 2022 Parliament has made use of the tool around 80 times, and that almost all of the resolutions adopted had to do with highly sensitive files in food safety such as GMOs and plant production products.

[83] On the strategic use of legal basis litigation as a form of diplomacy, see Holly Cullen and Andrew Charlesworth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 Common Market Law Review 1243.

an abuse in so far as the legal arguments advanced are themselves plausible.[84] That said, even if Parliament were to make more aggressive use of this option, it remains possible for the Commission not to follow up on Parliament's concerns. As mentioned, the existing Comitology Regulation requires the Commission to take 'utmost account' of the Parliament's concerns, yet it does not allow the Parliament to block the proposal indefinitely.

In short, there are indications that Models 2 and 4, too, suffer from a democratic accountability gap. Such a gap is all the more problematic considering how difficult it is for the EU legislature to amend the framework legislation delegating implementing powers to the Commission. As mentioned earlier, when contrasted with legislative procedures in many Member States, adopting EU legislation is a process heavy on veto points. This makes it difficult for the EU legislature to override the Commission in case it disagrees with a particular decision.

Model 3 is arguably the decision-making model with the best credentials when it comes to democratic accountability. In keeping with principal-agent theory principles, under this model the institutions that delegate powers (the legislature, consisting of Parliament and Council) to the executive (the Commission) retain for themselves a degree of control over how the executive is to exercise its newly acquired powers. It is, moreover, appropriate to speak of 'control' rather than, say, 'influence' in this context as both Council and Parliament have the power to permanently block Commission decisions adopted under this model.

Given these comparatively strong democratic credentials, it is perhaps surprising that the European Parliament only rarely opposes delegated acts. And when it does, it is typically on issues of food safety, not trade policy.[85] It is worth exploring in further detail why this is the case. For the Blocking Statute, the reason is straightforward: very few delegated acts have been adopted. For the Export Control Regulation, things are different. Several delegated acts have been adopted since the Regulation's entry into force in August 2021; none of these appear to have been reviewed by the European Parliament.[86] Is this the result of a conscious decision by the Parliament not to review these delegated acts? Is Parliament in a position to make a real assessment of the merits of all of the delegated acts the Commission adopts? Does it receive the required information to do so? Does it have sufficient in-house capabilities—human-resources and otherwise—to process the required information, taking into account that the Commission adopts hundreds of delegated acts each year? Or perhaps

[84] Characterizing the Parliament's current use of the procedure as abuse of a procedure that was not intended to allow Parliament to voice disagreement with an EU policy, see Chamon (n 80) 172.

[85] The most recent resolution opposing a delegated act was adopted in February 2022. See European Parliament resolution of 15 February 2022 on the Commission delegated regulation of 5 November 2021 supplementing Regulation (EU) 2021/1139 of the European Parliament and of the Council on the European Maritime, Fisheries and Aquaculture Fund as regards the periods of time and the dates for the inadmissibility of applications for support (C(2021)7701 – 2021/2961(DEA)).

[86] A search on the European Parliament's Legislative Observatory, filtered by procedural rule 111 on delegated acts, reveals that none of the delegated acts adopted since 2021 pertain to export control.

one should not read too much into the scarcity of parliamentary resolutions opposing delegated acts, as a scarcity of resolutions does not necessarily mean Parliament does not informally influence the shaping of delegated acts. In a 2014 paper, Kevin Stack argued that Parliament can leverage its power to oppose delegated acts to informally shape such acts through negotiations with the Commission.[87] If Stack is right, Parliament would not need to take the drastic step of opposing a delegated act that has already been adopted. Here, too, further empirical research is needed.

The overall impression from the abovementioned exploration of the different decision-making models in unilateral trade policy is that there are quite a number of democratic accountability gaps. In the next and final section, I present a number of ideas to close at least some of these gaps.

4. CLOSING THE GAP: SIX PROPOSALS

Against the backdrop of the previous section in which I identified a number of democratic accountability gaps, I put forward six proposals to bolster democratic accountability in the unilateral trade policy context. None of the proposals require Treaty reform. They should be understood as pragmatic, second-best options, whereas Treaty reform would allow for a more comprehensive overhaul of democratic accountability mechanisms in EU decision-making. Moreover, the proposals aim to enhance the democratic legitimacy of decision-making while maintaining the benefits of delegation, where applicable. The aim is not to bring all models as close as possible to the ordinary legislative procedure. Rather, in keeping with the definition of accountability gaps proposed in the above, the goal is to infuse elements of democratic accountability into the decision-making process so as to ensure that *some* line of accountability runs from the agent to the principal and the agent thus does not operate fully insulated from the preferences of the citizenry.

4.1 **Proposal 1: Replace Commission implementing acts by delegated acts where decisions are of 'general application'**

Under Models 2 and 4, respectively the advisory and examination comitology procedures, the Commission tables a draft decision to a comitology committee consisting of Member State representatives. Under Model 2, the committee merely advises the Commission. Under Model 4, the committee can veto a draft decision, albeit only by a qualified majority of its members. The ensuing Com-

[87] See here Kevin M Stack, 'The Irony of Oversight: Delegated Acts and the Political Economy of the European Union's Legislative Veto Under the Treaty of Lisbon' (2014) 2 The Theory and Practice of Legislation 25. Stack questioned the democratic credentials of the then recently introduced category of delegated acts, arguing that the one-on-one negotiations between MEPs and the Commission would not reflect the Parliament as an institution.

mission decisions are known as 'implementing acts.' The EU legislature can empower the Commission to adopt implementing acts '[w]here uniform conditions for implementing legally binding Union acts are needed', Article 291(2) TFEU provides. Implementing acts can be distinguished from delegated acts, which are the acts adopted by the Commission under Model 3. As per Article 290(1) TFEU, delegated acts are 'non-legislative acts of general application' by which the Commission may 'supplement or amend certain non-essential elements of the legislative act.'

As discussed, many of the unilateral trade instruments—the Foreign Subsidies Regulation, as well as the Anti-dumping and Anti-subsidy regulations—are wielded by means of Commission implementing acts. If the EU legislature were to empower the Commission to sanction distortive foreign subsidies or dumped or subsidized imports by means of delegated acts rather than implementing acts, the democratic accountability gap under Models 2 and 4 would be closed. For under Model 3—the delegated act model—both Council and Parliament have the opportunity to oppose a delegated act before it comes into force.

Would a wholesale shift from implementing to delegated acts be constitutionally permissible? The question is not easy to answer as the distinction between implementing acts and delegated acts drawn by the Lisbon Treaty is unclear.[88] The Court of Justice held that 'the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU.'[89] However, this discretion is not complete.[90] The Court does conduct a marginal review of the EU legislature's choice to opt for either implementing or delegated acts.[91] It will, in particular, assess whether the EU legislature could 'reasonably' take the view that the Commission decisions would either supplement certain non-essential elements of the legislative act at issue (if the legislature opts for delegated acts), or add further detail in relation to the normative content of that act (if the legislature opts for implementing acts).[92] Where exactly 'supplementing certain non-essential elements of the legislative act' ends and 'adding further detail in relation to the normative content' of that legislative act begins, remains unclear, however.

---

[88] Paul Craig referred to the distinction as 'fragile'. See his 'Delegated and Implementing Acts' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 722 <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199533770.001.0001/isbn-9780199533770-book-part-26> accessed 30 September 2021. For further analysis, see Chamon (n 80) ch 4; Joachim Englisch, '"Detailing" EU Legislation through Implementing Acts' [2021] Yearbook of European Law 6–12; Carlo Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform' [2017] European Law Review 29, 678–684. Rejecting the option of replacing implementing acts with delegated acts, see Weiß (n 7) 62.

[89] Case C-427/12, *Commission v Parliament ('Biocides')*, EU:C:2014:170, para. 40.

[90] To say that the EU legislature has discretion, yet at the same time to conduct a marginal review of the exercise of that discretion, suggests there are constitutional limits to the choice, but that these limits are fuzzy, or that they will not be enforced. This is problematic from a legality perspective. In a similar sense, see Craig (n 86) 726.

[91] Ibid.

[92] Ibid, para. 52.

As the Court acknowledges by holding that the legislature has discretion in deciding between delegated or implementing acts, in practice there is an important degree of overlap.[93] Perhaps in an effort to manage this overlap, in 2019 Commission, Council and Parliament concluded an interinstitutional agreement.[94] This agreement contains non-binding criteria for the application of the abovementioned Articles 290 and 291 TFEU—respectively on delegated and implementing acts. Relevant for our present purposes is the point that, as per the agreement, delegated acts may only be of 'general application' whereas implementing acts may be of 'individual' or of 'general' application. This rule mirrors Article 290(1) TFEU, which also mentions that delegated acts are to be acts of 'general application'—a feature that is not mentioned in Article 291 TFEU on implementing acts.

What should we understand by 'general' versus 'individual' application? The notion of 'general application' features prominently in EU procedural law, and in particular the standing requirements to bring an annulment action. For a non-privileged party (i.e. an individual) to have standing, it must either be addressed by the contested EU measure, or be directly and individually affected by it.[95] If an EU measure does not individually affect a person, the measure is deemed of general application. As a consequence, the individual does not have standing to challenge the EU measure concerned. To the frustration of advocates of greater access to the EU courts, the Court of Justice continues to adhere to a narrow conception of what it means for an EU act to affect a person individually.[96] Conversely, the Court is quick to conclude that an act is of general application: whenever an individual is affected by an EU measure solely by virtue of the fact that it is part of a community whose membership is not restricted to that particular individual, the measure is deemed of general application.[97] In the state aid context—arguably the intra-EU counterpart of the Foreign Subsidies Regulation—the Court has made clear that Commission decisions authorising or prohibiting 'national' or 'sectoral' schemes of state aid are of general appli-

[93] In this sense, see also Merijn Chamon, 'The Legal Framework for Delegated and Implementing Powers Ten Years after the Entry into Force of the Lisbon Treaty' (2021) 22 ERA Forum 21, 34; Jürgen Bast, 'Is There a Hierarchy of Legislative, Delegated and Implementing Acts?' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford University Press 2016) 167.

[94] Interinstitutional agreement, Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019, 2019/C 223/01, OJ C 223/1, 3.7.2019.

[95] Art. 263 fourth para. TFEU.

[96] For an analysis of the standing requirements and efforts by NGOs to overcome them, see generally Mario Pagano, 'Overcoming Plaumann : Environmental NGOs and Access to Justice before the CJEU' (PhD Thesis, European University Institute 2022) <https://cadmus.eui.eu/handle/1814/75102> accessed 19 May 2023.

[97] In *Plaumann*, the seminal case on the issue, this meant that Plaumann, an importer of clementines, was not individually affected by a decision of the German customs authorities to refuse a request to suspend customs duties on imports of mandarins and clementines. Plaumann was an importer of clementines; yet he was not individually affected by the measure because importing clementines was a commercial activity which may at any time be practised by any person, the Court held. See Case 25/62, *Plaumann & Co. v Commission*, EU:C:1963:17, p. 107.

cation.[98] Conversely, the actual beneficiaries of individual aids granted under a system of aids of which the Commission has ordered recovery are, by that fact, individually concerned.[99] Such decisions to actually grant aid to specific companies are, in other words, of individual rather than general application.

An act is thus fairly quickly of 'general application' under EU procedural law, and, by extension, under EU law more generally. This has consequences for the abovementioned discretion that the EU legislature enjoys in empowering the Commission to act by means of delegated acts (Model 3) or implementing acts (Models 2 and 4). If many decisions can be considered to be of 'general application', the EU legislature enjoys a concomitantly large degree of discretion in choosing between delegated or implementing acts. Indeed, only those decisions that are of individual concern may never be adopted by delegated act. This suggests there is more room for the EU to operate under Model 3 (delegated acts) than is used today, even if a wholesale shift from implementing to delegated acts would not be an option due to the Treaty requirement that delegated acts be of 'general application.'

Think, for example, of a Commission decision that labels a Vietnamese subsidy scheme that benefitted an EU-based company 'distortive.' Under the Foreign Subsidies Regulation, such a decision would be adopted by means of an implementing act (Model 2). Because the decision is of general application, the legislature could have empowered the Commission to adopt this type of decision by means of a delegated act. The same would hold true for a Commission decision imposing import tariffs on Chinese cars in retaliation against Chinese economic coercion against Lithuanian exports to China under the Anti-Coercion Instrument, or a Commission decision restricting access to EU public procurement markets against Brazilian companies due to a lack of reciprocal access to Brazilian procurement markets under the International Procurement Instrument. By contrast, a Commission decision ordering a European subsidiary of Brazilian energy company Petrobras to repay subsidies received from Brazilian authorities under the Foreign Subsidies Regulation could only be adopted by means of an implementing act. The power to adopt such an implementing act could be delegated to the Commission in the delegated act by means of a subdelegation of powers.[100]

---

[98] On the former, see Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci*, EU:C:2018:873, para. 29. On the latter, see Case C-274/12 P, *Telefónica SA v European Commission*, EU:C:2013:852, paras 47-48.

[99] See here Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere' e.a. v. Commission*, EU:C:2011:368, para. 53.

[100] In support of the possibility of sub-delegation, see Bast (n 91) 170.

4.2 Proposal 2: Upgrade the role of the European Parliament in Comitology

An alternative approach to Proposal 1 would consist in providing for a stronger European Parliament role in Models 2 and 4 (i.e. the advisory and examination Comitology procedures), and Model 5 (i.e. the Council implementing act model). This approach would have the important advantage of bypassing the discussion on the dividing line between delegated and implementing acts discussed in the previous section. By strengthening Parliament's involvement in comitology procedures, the difference between Models 2 and 4 on the one hand, and Model 3 on the other, would become less significant.

However, implementing the proposal would also face hurdles. To begin with, it does not seem permissible in the post-Lisbon era to simply provide for a role for the European Parliament in the Comitology Regulation, and by doing so in one fell swoop include Parliament in the decision-making procedure for all unilateral trade instruments that are adopted under Models 2 and 4. This would not be a possibility as the legal basis for the adoption of the Comitology Regulation, Article 291(3) TFEU, only empowers the EU legislature to adopt in advance 'the rules and general principles concerning mechanisms for control *by Member States* of the Commission's exercise of implementing powers' (emphasis added). This legal basis can arguably not be used to adopt in advance rules and principles concerning mechanisms for control *by the European Parliament* of the Commission's exercise of those powers.

This obstacle should not be insurmountable, however. Rather than amending the Comitology Regulation, the EU legislature could upgrade the role of the European Parliament at the level of the individual legislative acts that empower the Commission to act by means of implementing acts. To be clear, the EU legislature cannot bypass the Comitology process altogether and set up comprehensive ad hoc control mechanisms for each of the unilateral trade instruments examined in this paper. Article 291(3) TFEU provides that the EU legislature '*shall* lay down in advance *the* rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.'[101] The mandatory language of this Treaty provision suggests opting out of Comitology altogether is not constitutionally permissible.[102]

That said, the EU legislature could refer to the Comitology Regulation and additionally grant the European Parliament a right to advise on or oppose proposed implementing acts—depending on whether we are under Model 2 or 4. Council, Parliament and Commission did agree in the 2016 interinstitutional agreement on Better Law-making that the three institutions would refrain from adding, in Union legislation, procedural requirements which would alter the mechanisms

[101] Italics added.
[102] In the same sense, see Chamon (n 80) 154–155.

for control set out in Comitology Regulation.[103] Yet would providing for European Parliament involvement necessarily 'alter' the existing *Member State* control mechanisms set out in the Comitology Regulation? Those mechanisms would continue to function as set out in the regulation. More upstream, before the Commission submits a draft implementing act to the comitology process, or further downstream, after the comitology committee has had its say, the Parliament could be offered an opportunity to either offer its opinion (in Model 2) or oppose the draft implementing act (in Model 4). Drawing additional accountability lines towards the European Parliament would not affect the already existing lines running towards the Member States, as set out in the Comitology Regulation.

A further objection against involving the European Parliament in the adoption of implementing acts (Models 2 and 4) has to do with constitutional structure. Since the Lisbon Treaty, when implementing EU legislative acts, the Commission is controlled by the Member States directly rather than by the Council. The stated reason for this shift is federal: as Member States are ordinarily responsible for the implementation of EU law, Member States should exercise oversight over the Commission as it adopts implementing acts. We see this reflected in Article 291 TFEU, which in its first paragraph holds that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.' Member State implementation is presented as the general rule, whereas implementation by the Commission is permissible only where, as per the second paragraph, 'uniform conditions for implementing legally binding Union acts are needed.' As Robert Schütze put it, Article 291 TFEU thus protects *federal* values.[104] This can be contrasted with Article 290 TFEU, on delegated acts (Model 3), which, by establishing accountability lines from Commission to both Parliament and Council, protects *democratic* values.[105] To involve the Parliament in the adoption of implementing acts would run counter the federal rationale underpinning Article 291 TFEU, as neither Council nor Parliament are involved in the implementation of EU law in the first place.

Yet this structural objection is ultimately not persuasive. While it is very much the case that implementation is ordinarily the responsibility of Member States rather than the EU, the fact remains that, by empowering the Commission to act under Models 2 or 4, the EU legislature is empowering the Commission, an EU institution, to adopt decisions. A two-step delegation of authority thus takes place: the power to implement first shifts from the Member State level to the EU level, and subsequently shifts from the EU legislature (the principal) to the Commission (the agent). As discussed, the EU is constitutionally required to function on the basis of representative democracy—see Article 10 TEU. Because of this constitutional requirement, it is necessary for the EU legislature to provide for

[103] Point 30 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

[104] Robert Schütze, '"Delegated" Legislation in the (New) European Union: A Constitutional Analysis' (2011) 74 The Modern Law Review 661, 691.

[105] ibid.

democratic accountability mechanisms to ensure that the Commission, the agent, remains democratically accountable vis-à-vis the EU legislature, its principal. In other words, while the Treaties thus expressly provide for a Member State role in the adoption of implementing acts, the overarching constitutional principle of democracy continues to require that the EU legislature remain in a position to influence how the Commission uses its implementing powers.[106]

Finally, the European Parliament's role in Model 5, used by the Anti-Coercion Instrument, can be upgraded by amending the decision-making procedures set out in the framework legislation that empowers the Council to act. What form should the Parliament's involvement take? If the Parliament were to be granted the same powers as the Council, i.e. to adopt or reject the Commission's proposal, the difference between Model 5 and the ordinary legislative procedure would become very small. Under both procedures, the Commission would adopt a proposal, and both chambers of the bi-cameral EU legislature would have to approve of the proposal for it to become law. In such an arrangement, there would be no delegation of powers, and the benefits of delegation—speedier, expertise-driven decision-making that is less susceptible to economic or partisan capture—would not be realized.

That said, the same problem already arises under Model 5 as it is currently conceived. By delegating the power to establish the existence of economic coercion to the Council, the EU legislature does not delegate powers to the executive; rather, it leaves the power to do so with a single chamber of the two chamber EU legislature. The abovementioned benefits of delegation are not achieved, and the democratic legitimacy of the ensuing decisions is diminished. This is an arrangement that lacks coherence. In the specific case of the Anti-Coercion Instrument, it also violates the Treaties, which require that delegating implementing powers to the Council can be done only in 'duly justified cases.'[107] The Anti-Coercion Instrument does not explain why delegating powers to the Council is duly justified. Two alternatives present themselves: either the existence of economic coercion is established by the EU legislature, following the ordinary legislative procedure in which Parliament and Council play their roles fully. Or the decision is delegated to the Commission, under Model 4 with beefed-up European Parliament involvement as suggested earlier.

---

[106] In this regard, it is interesting to draw a parallel with the role of Member States in the adoption of delegated acts under Model 3. Article 290 TFEU does not provide for a legal basis to empower Member States to play a role in the adoption of delegated acts. Yet in the years following the entry into force of the Lisbon Treaty, Member States have put in place a system that came to resemble the Comitology system, whereby Member State experts are involved in the adoption of delegated acts. On this development, see Tovo (n 86) 689–693. This experience tells us that we should be careful to interpret constitutional silences as constitutional prohibitions. If Member States are entitled to be involved in the adoption of delegated acts to protect *federal* values, perhaps Parliament and Council are entitled to be involved in the adoption of implementing acts to protect *democratic* values as well? However, questioning the constitutionality of Member State involvement in the adoption of delegated acts, see Schütze, '"Delegated" Legislation in the (New) European Union' (n 102) 685–686.

[107] Art. 291(2) TFEU. Mentioning the tension with Art. 291(2) TFEU, see Weiß (n 7) 58.

4.3 **Proposal 3: Upgrade the European Parliament's *ex post* oversight powers**

Moving from *ex ante* to *ex post* accountability mechanisms, a third proposal has to do with the European Parliament's oversight powers. Oversight implies an *ex post* focus, a review after the fact, that looks at policies that are or have been in effect, and which thereby allows members of parliaments to check, verify, inspect, criticize, or challenge the activities of the government and public administration.[108]

At present, the European Parliament's powers to exercise oversight over the manner in which the Commission exercises its executive powers are limited when compared to those of other, otherwise comparable legislatures. The relevant parliamentary committee—in the case of trade policy: the Committee on International Trade (INTA)—can invite members of the Commission to participate in hearings, but it cannot compel them to appear, nor can it compel them to submit information. Interestingly, Article 230 TFEU frames the appearance of the Commission before the Parliament as a right held by the Commission, to be exercised at its own discretion, rather than a duty of the Commission to be fulfilled at the Parliament's discretion. In a 2010 interinstitutional agreement concluded with the Parliament, the Commission committed that it 'shall give priority to its presence … at the plenary sittings or meetings of other bodies of Parliament', and it committed to 'ensur[ing] that, as a general rule, Members of the Commission are present at plenary sittings for agenda items falling under their responsibility.'[109] Yet, 'to give priority', or to ensure to be present 'as a general rule' are mere best-efforts obligations; they do not legally require the Commission to be present at a committee hearing. This matters, as it is precisely when the Commission may not want to be present at a hearing that its presence may be most important and that a legal obligation to appear matters most.

That the Parliament cannot legally compel the Commission to appear before it is peculiar, given that exercising oversight is part of the core missions of a parliamentary assembly—especially an assembly such as the European Parliament, which operates independently from the executive and as a counterweight to it.[110] This arrangement can be contrasted with that in the US, where Congress can subpoena anybody, including members of the executive branch, to appear before a congressional committee and to provide information. This right to information is constitutionally protected.[111] Certainly, efforts have been made to improve the flow of information towards the European Parliament. The abovementioned interinstitutional agreement is a good example. Yet, from a comparative perspective the European Parliament's powers to request informa-

[108] See here Akbik (n 77) 2.

[109] Point 45 of Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47-62.

[110] Philipp Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy' (2003) 9 European Law Journal 549, 556.

[111] Trump v. Mazars USA, LLP, 591 U.S. (2020).

tion and to compel commissioners to appear before parliamentary committees remain weak. Absent powers with teeth, it is easy for the Commission to evade accountability. Parliament can ask written and oral questions to the Commission, to which the latter must reply.[112] However, if the Parliament has only limited means to follow up on the answers given by the Commission, the usefulness of parliamentary questions as an instrument to hold the Commission democratically accountable is in doubt.[113]

Enhancing the effectiveness of the European Parliament in exercising *ex post* oversight over the Commission's activities has many aspects. One relatively straightforward intervention to strengthen the Parliament's position in this area would be to make it mandatory for members of the Commission to appear before the responsible Parliamentary committee following a request to this end by the latter. Arguably, the duty of sincere cooperation as it applies between institutions already requires the Commission to comply with such requests. It would be useful, however, to codify this obligation by means of an interinstitutional agreement between Commission and Parliament. Such an agreement would be binding on the Commission.[114]That said, this proposal also has an obvious limitation. In the US, Congressional hearings can be followed up by bills. If a bill garners sufficient support to override a presidential veto, it can become law. This allows Congress (the principal) to amend the terms of a delegation of powers to the executive, be it the President or a federal agency such as the United States Trade Representative (the agent). This is not an option in the EU, as amending the delegation requires a proposal by the Commission, which is the agent. To remedy this issue, Parliament could be granted a right of initiative.[115] This would, however, require Treaty change.

4.4 **Proposal 4: Let implementing powers expire after a set amount of time**

Under Model 3, Article 290(1) second para. TFEU requires that the basic act in which the EU legislature delegates powers to the Commission explicitly defines the duration of the delegation. For example, in the case of the Export Control Regulation, this period lasts five years.[116] However, it adds that '[t]he delegation of power shall be tacitly extended for periods of an identical duration, unless

[112] Art. 230 second para. TFEU.

[113] In her study on the role of the European Parliament as an accountability forum in the context of Economic and Monetary Union, Adina Akbik suggested that the Parliament should have greater opportunities to ask follow-up questions. See Akbik (n 77) 191. However, her suggestion should be seen also in the specific context of EMU, where more opportunities exist for Parliament to organize hearings with executive actors such as the European Central Bank.

[114] See in this sense already Case C-25/94, *Commission v Council ('FAO')*, EU:C:1996:114.

[115] This is a long-standing demand by the Parliament. See e.g. European Parliament resolution of 9 June 2022 on Parliament's right of initiative (2020/2132(INI)), < https://www.europarl.europa.eu/doceo/document/TA-9-2022-0242_EN.html> accessed 24 July 2023.

[116] Art. 18(2) of the Export Control Regulation.

the European Parliament or the Council opposes such extension not later than three months before the end of each period.'[117] The Blocking Statute follows the same approach.[118] By contrast, the Commission's power to sanction distortive foreign subsidies, or injurious dumping or subsidisation is delegated to the Commission for an indefinite time period. To be sure, the regulation requires that the Commission present an annual report to the Parliament on the implementation of the regulation, and it invites the Commission to present legislative proposals to amend the regulation if the Commission considers doing so 'appropriate.'[119] However, this requirement does not grant the Parliament much leverage over the Commission—especially since, as a general rule, the Commission alone has the prerogative to adopt legislative proposals.[120]

If the EU legislature were to decide to let the implementing powers it grants to the Commission expire every five years, without any possibility of a tacit extension, the Commission would have a real interest in paying close attention to Parliament's views on how the Commission is wielding its unilateral trade powers. As the US experience tells us, the requirement that those powers need to be renewed every five years would give Parliament an important tool to influence how the Commission wields its powers, and in doing so to ensure that the Commission remains accountable to the democratically elected Parliament.[121]

4.5 **Proposal 5: Enforce the Council's duty to share information with the Parliament in the adoption of restrictive measures**

As discussed, the European Parliament's involvement in the adoption of restrictive measures is limited. Article 31 TEU, the legal basis for the adoption of restrictive measures, does not provide for any role for the Parliament. Since in EU law the legal basis determines the procedure to be followed, and democratic considertaions do not factor into the choice of legal basis, it is not possible to argue that a constitutional principle of (representative) democracy requires that the Parliament nonetheless be involved in the adoption of such acts.[122] However, as discussed, to adopt restrictive measures that restrict trade or financial flows with one or several third countries, the Council must, in addition to the initial decision, also adopt a regulation. Article 215 TFEU is the legal basis for the adoption of such regulations. It does not provide for a co-decision power for the European Parliament either. However, as mentioned, the provision does require

[117] Ibid, in fine.
[118] Art. 11a(2) of the Blocking Statute.
[119] Art. 11(1) and (2) of the Foreign Subsidies Regulation.
[120] Art. 294(2) TFEU.
[121] On the use of sunset clauses in the US, see e.g. Curtis A Bradley, 'Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds' [2021] Journal of Legal Analysis 439, 463.
[122] See e.g. Case C-130/10, *Parliament v Council ('Restrictive Measures')*, EU:C:2012:472, para. 80: '[I]t is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure.'

that the Council 'inform' the European Parliament of measures adopted on this legal basis. Crucially, this requirement that the Parliament be kept informed is an essential procedural requirement in the meaning of Article 263 second para. TFEU.[123] As such, failure to comply with the requirement is a ground for annulment of the ensuing Council regulation.

If the requirement to inform the Parliament is to have any meaning, it should consist of more than publishing the regulation in the Official Journal or, for that matter, sending a letter to the Parliament after the adoption of the regulation by the Council. Rather, by analogy with the treaty-making context, the Council should inform the Parliament of its intention to adopt a regulation before its actual adoption, so as to allow the Parliament to debate the matter and to ensure that the Council, if it decides to adopt the regulation, is aware of the Parliament's views. To maintain a meaningful distinction between the requirement to inform the Parliament, which we find in Article 215 TFEU, and the requirement to consult the Parliament, which we find in many other areas of EU law, it would not be necessary for the Council to receive an actual EP opinion before adopting the measure.[124] By analogy with report-and-wait requirements in the United States, it would be enough for the Council to wait for a given period of time before adopting the regulation, so as to at least give the Parliament the opportunity to have a look at the draft regulation and to express its position, including by means of a resolution.[125]

None of the Article 215 TFEU regulations the Council has adopted in the wake of the Russian invasion of Ukraine make mention of any passing of information to the European Parliament. This is peculiar, given that—precisely to foreclose any risk of an action being launched before the Court of Justice—the Council typically does indicate in the preamble all of the procedural steps taken in the lead up to the decision. In the treaty-making context, this means that a decision to conclude an international agreement will mention in the preamble that the Parliament has given its consent to the agreement.[126] A search through the European Parliament's Legislative Observatory website gives a similar impression: the Parliament has not adopted any resolution expressing a position on a specific proposed sanctions package. (The Parliament did adopt general resolu-

[123] See by analogy Case C-658/11, *Parliament v Council ('Mauritius')*, EU:C:2014:2025. In this case, the Parliament brought an annulment action against a Council decision to conclude a CFSP international agreement with Mauritius. The Council had not informed the Parliament, despite the Treaty requirement that the Parliament be kept immediately and fully informed at all stages of the procedure to conclude the agreement (Art. 218(10 TFEU). The Court agreed with the Parliament and annulled the Council decision on that basis.

[124] For an example of a legal basis requiring the Council to consult the European Parliament, see Art. 21(3) TFEU on the adoption of measures concerning social security and social protection.

[125] On report-and-wait requirements in the US, see e.g. Bradley (n 123) 459.

[126] See e.g. Council Decision (EU) 2017/1247 of 11 July 2017 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party, OJ L 181, 12.7.2017, p. 1-3.

tions in which, amongst other things, it has called on the Council to maintain its sanctions policy against Russia and Belarus and to adopt further sanctions.[127])

One obvious way to strengthen the accountability lines from the EU executive—in this case the Council, not the Commission—to the European Parliament would be for the Court of Justice to enforce this information-sharing requirement. The Parliament could bring an annulment action against a Council regulation imposing restrictive measures that affect trade or financial flows. The Court could annul the decision while maintaining its effects pending the adoption of a new regulation that does comply with Article 215 TFEU's procedural requirements. The Parliament would have much to win from bringing such an action. Its powers in the context of restrictive measures are limited but real, and being properly informed is a threshold requirement for effective accountability.

4.6 Proposal 6: Endow the Commission with a power to screen foreign investments likely to affect security or public order in more than one Member State

A final proposal aims to close the accountability gap identified in Model 8. As discussed, under that model citizens of Member State A may find themselves in a position of heteronomy vis-à-vis the government of neighbouring Member State B, which takes actions that affect the citizens of Member State A without these citizens having a say in the adoption of the decision. In particular in areas of EU exclusive competence, the heteronomy problem should and can be resolved. By empowering the EU Commission to screen a proposed foreign investment that has a cross-border impact, the decision-maker would be accountable not only to the citizenry of the Member State in which the investment would be made, but also to the citizenry of the neighbouring, affected Member State. Such an empowerment could be achieved by upgrading the Commission's current role under the FDI Screening Regulation from an advisory role to that of an actual decision-maker on cases that are likely to affect security or public order in more than one Member State.[128] As is currently the case under the Merger Regulation, if the Commission gives a green light, Member States can no longer give a red light: when the investment is deemed to have an EU dimension, Member States can no longer intervene.[129] These changes can be realized by amending the FDI Screening Regulation.[130]

---

[127] European Parliament resolution of 16 February 2023 on one year of Russia's invasion and war of aggression against Ukraine, 2023/2558(RSP), OJ C 283, 11.8.2023, p. 34–39, recital 19. See most recently Resolution on the need for unwavering EU support for Ukraine, after two years of Russia's war of aggression against Ukraine, 2024/2526(RSP), available at < https://www.europarl.europa.eu/doceo/document/TA-9-2024-0119_EN.html > accessed 16 April 2024.

[128] Art. 6(3) of the FDI Screening Regulation.

[129] Art. 21(3) of the EU Merger Regulation.

[130] In January 2024, the Commission adopted a proposal to amend the FDI Screening Regulation. See Proposal for a Regulation of the European Parliament and the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European

To be sure, granting the Commission the abovementioned power to screen on grounds of 'security and public order' leaves intact each Member State's ability to block investments on *national* security grounds. 'National security' and 'security and public order' are distinct concepts in the Treaties. The FDI Screening Regulation concerns only the latter, not the former. Indeed, the regulation expressly provides that it is 'without prejudice to the sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU.'[131] Thus, an investment that has been given the green light by the Commission could conceivably still be rejected by the Member State in which the proposed investment would be made. That rejection decision, which would constitute an obstacle to free movement, would then be subject to judicial review by the national courts. The national court could in turn ask the Court of Justice whether the national rejection decision is proportionate.

If the Commission is granted a power to screen investments, it will be necessary to put in place effective accountability mechanisms at EU level. Model 4 with additional European Parliament involvement as suggested in Proposal 2 would be one option to do so. Key is to ensure that both the Member States (whether or not in Council) and Parliament have an opportunity to express themselves. This is necessary, as Parliament and Council, as EU legislature, would be the principals, whereas the Commission would be the agent.

5. CONCLUSION

Taking the unilateral turn in EU trade policy as a starting point, in this paper I explored how decisions are made in EU unilateral trade policy; I examined how decision-makers are held democratically accountable; and I put forward proposals to close the accountability gap that exists in this corner of EU foreign relations. On the first question, I proposed a taxonomy consisting of eight decision-making models placed on a centralization-decentralization spectrum. The taxonomy reveals a significant degree of diversity in decision-making procedures—especially if we include restrictive measures in the analysis along with the instruments that have been adopted on the basis of the EU's competence to conduct a common commercial policy.

On the second question, related to the democratic legitimacy of these decision-making procedures, I argued that many and indeed most of the decision-making models suffer from democratic accountability gaps. This conclusion starts from the premise that Article 10(1) TEU, which provides that the functioning of the Union shall be based on representative democracy, requires that decisions taken by EU institutions be legitimized by democratically elected bodies, either indirectly, through the Council, or directly, through the European Parliament, and

Parliament and of the Council, {SWD(2024) 23 final} - {SWD(2024) 24 final}. The Commission does not propose that it be endowed with a power to screen investments.

[131] Recital 7 of the FDI Screening Regulation.

ideally through both given that indirect democratic accountability through the Council inevitably runs into problems of heteronomy, as discussed in chapter 3.

The proposals for reform put forward in chapter 4 aim to close the democratic accountability gap. None of the proposals require Treaty change; they are, as such, easier to realize than, say, replacing Model 7 (unanimity in the Council) with Model 3 (delegated acts) in the area of restrictive measures. All six of the proposals aim to strengthen the role of the European Parliament in executive decision-making in EU unilateral trading policy while maintaining the advantages that come with delegated rulemaking, i.e., swifter decision-making based on full knowledge of the facts on the ground. In so doing, the proposals respect the Commission's mission to defend the general interest and to operate in full independence.

ASSER INSTITUTE
Centre for International & European Law

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu