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participation in executive EU
lawmaking

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The possibility for stakeholders, as well as other interested parties and citizens, to participate in the law-making process is a vital part of any democratic system. Most political systems have some provisions for stakeholder consultations ahead of the creation of new laws. In some systems, stakeholder's rights to be consulted have even been perceived important enough to be written into the constitution. The European Union is no different in this respect.

Laws, however, come in different shape and forms. Often it is parliaments that adopt new laws, after a proposal from the executive. In this respect, the European Union generally works like a bicameral system, with the European Commission proposing new laws (regulations and directives) and the directly elected European Parliament and the indirectly elected Council of the EU adopting the laws. In the EU, a system for open public consultations with stakeholders in this process has also developed over time.

In addition, most systems also allow for the executive to adopt new laws on delegation from the formal lawmaker. Sometimes referred to as *executive lawmaking*, this process is normally surrounded by strict rules on when and how this can be done. However, the process for securing stakeholder input is not always as formalised in executive lawmaking as it is for the ordinary legislative procedure.

Also in this respect, the European Union is no different. The Parliament and the Council can delegate powers to the Commission to adopt legislative acts, and more than three quarters of all EU legislation is made up of such acts (Yordanova & Zhelyazkova, 2020, p. 345). The EU also has provisions for stakeholder participation in this process, but they are arguably not as formalised as for the Union's ordinary legislative procedure.

With the adoption of the Lisbon Treaty in 2009, one new type of such laws was introduced in the EU: delegated acts. Upon their introduction, scholars were divided on the issue of whether

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this would increase or decrease stakeholder influence in the process. While some argued that stakeholder's capacity to shape the content of the acts might improve (Stack 2014, p. 61), others believed that the introduction of delegated acts would lower the "standards of transparency for the public" (Peers & Costa 2012).

More than a decade after their introduction, we still know very little about who was right in this debate. From a democratic perspective, as Joana Mendes has pointed out, this question is of very high political relevance and "ought to place the legitimacy of the procedures followed for the adoption of these acts at the core of the discussion of the legitimacy of the Union" (2016, p. 238). It is therefore surprising that no systematic studies have been made to analyse the development of stakeholder participation when the Commission adopts delegated acts.

Lately, stakeholders in the EU have started to raise concerns themselves, echoing the more sceptical view. Three connected worries have been voiced in particular: that there has been an increased tendency over time to delegate lawmaking powers, that the acts have increasingly become more "political" than "technical", and that this has resulted in a corresponding decrease in stakeholder possibilities to have a say in the process (See for instance COSLA 2014; Svenskt Näringsliv et al 2021; Teknikföretagen 2021, p. 8; Robert 2019, p. 17).

The purpose of this study is therefore to provide an exploratory overview of stakeholder participation in EU delegated acts. By creating an original database consisting of all delegated acts adopted since 2010 (a total of 1.254 acts), we mapped the possibilities for stakeholders to have a say in the process for each act. This allowed us to analyse and draw conclusions about the frequency of consultations by the Commission, the frequency of stakeholder participation in the Commission's expert groups, and the differences between various sectors or issue areas. It also allowed us to tentatively indicate whether these acts, in fact, seem to become more "political" over time.

The results showed that there is seemingly room for improvement, in particular at some Directorates-General. It also seems that stakeholders have quite different possibilities to gain insight into the process and voice opinions, depending on which sector they have an interest in. We found several question marks that open up for further research and highlight the importance of more knowledge about stakeholder participation in the process of adopting delegated acts.

What are delegated (and implementing) acts?

The powers delegated to the Commission to supplement, amend or implement legislation are laid out in The Treaty on the Functioning of the European Union. The Treaty stipulates that legislative acts may "delegate power to the Commission to adopt non-legislative acts to supplement or amend non-essential elements of legislative acts", thereby creating delegated acts (TFEU Art 290). The term "non-legislative act" is used to signal *how* the law is made, not to suggest that these acts are not legally binding (Bergström 2016).

The Treaty also states that, where uniform conditions for implementing legally binding acts are needed, those acts can confer implementing powers to the Commission to create implementing acts (TFEU Art 291). Delegated and implementing acts are thereby distinct forms of EU secondary legislation, designed to issue detailed rules to supplement, amend or implement existing pieces of legislation (normally regulations and directives).

Both delegated and implementing acts, in their current form, were introduced in the Lisbon Treaty. Through the Treaty, the comitology system and the rules and procedures under which draft implementing acts are submitted to committees by the Commission, were reformed. The Treaty additionally introduced the instrument of delegated acts, which are scrutinised directly by the European Parliament and the Council of the EU and thus fall outside the scope of comitology (Christiansen & Dobbels 2013, p. 43).

Although the procedures to adopt the two types of acts are slightly different, there is no clear-cut line between the uses of the two types of acts. Their definitions overlap and they have essentially the same legal force. Therefore, the choice between the two types is largely at the discretion of the EU legislature (Bast 2016).

Whilst the Commission's role is central in the preparation, drafting and adoption of the delegated acts, the European Parliament and the Council have the ability to veto an act if they object to it. A veto by either of these institutions revokes the delegated act. When no veto is cast, the delegated act enters into force (Article 290 (2) TFEU).

In order for the Commission to adopt a delegated act, the "parent act" (normally a regulation or directive) must define the objectives, content, scope and duration of the delegation of power. The delegation of legislative powers to the Commission will typically be used when the "parent act" has to be adapted to take account of technical or scientific progress (EUR-Lex 2022). In general, therefore, these acts are assumed to contain technical or "non-essential" issues, rather than issues of a more political nature.

However, this distinction contains a big grey zone. As Cécile Robert has pointed out, any seemingly technical or scientific decisions will still involve the arbitration between interests, principles, and values. And they may affect stakeholders and citizens in different and opposing ways. They may consequently require decisions that strike a balance and all this is characteristic of *political* work in a democracy (Robert 2019, p. 18). Or, as Kevin Stack has put it, "virtually any implementation involves weighing conflicting interests" (Stack 2014) and is thereby political.

The Court of Justice of the EU has made clear that it has the competence to discern between "essential" and "non-essential" elements of implementing legislation (Stack 2014, p. 66). The Court has also attempted to formulate a definition of "essential", saying that the "essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature" (judgment of 5 September 2012, Parliament v Council, C-355/10, paragraph 65). In at least one case the Court has also found

that delegation wrongfully had taken place on an essential issue (judgement of 11 May 2017, C-44/16 P, *Dyson v Commission*).

Stakeholder participation in delegated acts

With the introduction of delegated acts, new questions arose around stakeholder participation within them. As in all democratic systems, stakeholder participation is an important aspect of EU law-making and the Commission has a general duty to carry out broad consultations to ensure transparency and coherence within EU action (TEU Art 11). This ambition was further specified in relation to delegated and implementing acts as part of the Better Regulation Agenda, which introduced a new system for systematic consultations in 2015. The importance of stakeholder input into the EU's law-making process was highlighted and portrayed as an essential element to policy preparation (European Commission, 2021a; 2021b; Listorti et al., 2020; Christopoulou, 2022).

The Better Regulation Agenda lays out the guiding rules of procedure for stakeholder participation in delegated (and implementing) acts. Between the creation and adoption of a draft delegated act, the Commission shall provide a four-week feedback period during which stakeholders, other interested parties, and citizens can voice their position on the proposed act (European Commission 2021a, p. 448). These four-week feedback periods are the only type of consultations that are open to anyone interested and they are normally published at the Commission's Have-your-say website.

Some exceptions exist however, giving the Commission a certain degree of discretion. For example, the Commission can skip the feedback period if it finds that it would bring little added value or if EU Agencies or other bodies have prepared the draft acts and already conducted sufficient consultations before the act was submitted to the Commission (European Commission 2021a, pp. 448-452).

Furthermore, the Commission may also choose to conduct various forms of ad-hoc consultations or targeted consultations with specific stakeholders. However, according to the Commission's better regulation toolbox, using the four-week feedback periods should be the default approach and "targeted or public stakeholder consultation does not replace the feedback [period]." It furthermore says that feedback should also be collected for "very technical acts" (Chapter 7 section 4.5).

There are also other means for (more limited) stakeholder participation (European Commission 2021a p. 29). Member state experts must be consulted in the preparation of draft delegated acts, and this is most often done through meetings with expert groups (European Commission 2021a, p. 353). The Commission may choose to also include for instance non-governmental stakeholders in the expert groups, either as members or observers. Expert groups thus provide an additional, but uncertain opportunity for stakeholder participation.

Why is stakeholder participation important?

It is not particularly controversial to claim that stakeholders' right to participate in legislative work belongs to the core of a healthy democracy. Even legal interpretations of the *UN Declaration on Human Rights* and the *UN Convention on Civil and Political Rights* are clear; international law calls for the right to participate in political decision-making between elections, before the laws are made (Golmohammadi 2015). In a functioning democracy, there is thus something of an obligation for the state to recognize and guarantee the opportunity for citizens and stakeholders to participate in legislative processes.

There are several reasons to take stakeholder participation seriously. The first and foremost reason is that it positively affects the *quality of democracy*. Various consultation procedures can increase the opportunity for decision-makers to make legitimate decisions based on knowledge of opinions among those affected by the decisions.

Various consultation procedures can also contribute to a broader public conversation. They can, as the Swedish Government Offices puts it, "promote broad civic participation in the social debate and thus be important for democracy" (Regeringskansliet 2009). There is also an educational function. With active stakeholder participation, there is an opportunity to create wider attention and thus also wider knowledge in society about politics, which in turn can increase understanding of the political decisions that are made. The participation of civil society in particular tends to be noted by many democracy researchers for its educational role (see more in Strömviik 2020).

A related argument is that well-functioning consultation procedures increase the possibility of accountability. When citizens can follow and scrutinize ongoing decisions, it is easier to hold the decision-makers accountable for the laws that have been introduced.

In addition to these democracy-related benefits, decision-makers' collection of information from society can positively influence the *quality of legislation*. Many decisions are directly dependent on broad expert knowledge and in-depth knowledge of how the decisions will impact society. In many areas, a continuous influx of such knowledge is required for decisions to be effective.

In addition, there is likely to be a *socio-economic dimension* in relation to early consultations. With early access to information about changing conditions, the companies and businesses concerned can better plan, adapt, and in some cases get better opportunities to expand.

For many of these reasons, EU scholars have for decades looked into the Commission's public consultations from a stakeholder perspective in connection with the ordinary legislative procedure (for an overview, see for instance Greenwood 2017). However, so far there seems to have been very little interest in the equivalent when it comes to delegated and implementing acts. We still know very little about the real possibilities for stakeholder participation when

these acts are adopted and this study aims to help close that gap and open up for new follow-on research.

How we traced stakeholder participation

We chose to focus on delegated acts and set out to create an original dataset by combining information reported by the Commission on all such acts adopted within the period 2011-2021. Our aim was to first map the general trends in the use of delegated acts. Second and third, we wanted to trace stakeholder participation through consultations and within expert groups. Fourth and last, we wanted to explore the possibility to find indications that the issues regulated by delegated acts might over time have become more politically salient. Across all these dimensions, we furthermore wanted to know if the situation was different in different sectors or issue areas, thereby affecting various stakeholders to varying degrees.

In order to trace the increase over time, we used the adoption dates of each delegated act. To distinguish between policy areas, we used the lead Directorate General for each act as a proxy. Both the changes in frequency over time, and the differences between policy areas, could be traced for the whole period (2011-2021).

The second set of questions related to the possibilities for stakeholders to participate in EU law-making through consultations and feedback mechanisms. For the purpose of this analysis, consultations were split into two categories: four-week stakeholder feedback periods that were held in line with the Better Regulation Agenda (see European Commission, 2021a), and all other types of stakeholder consultations.

This distinction was made because feedback periods are the most homogenous type of stakeholder consultations that are held directly in relation to specific delegated acts, providing the most standardised and open opportunity for stakeholders to participate in the decision-making process. Other types of consultations are more heterogeneous in scope and are referred to varyingly by the Commission, making them difficult to categorise more precisely. These consultations were therefore grouped together to serve as an indicator that some stakeholders have been provided with other opportunities to participate in the policy process that were not included in the four-week feedback period. This group of consultations thus additionally includes targeted and ad-hoc consultations, which are not as inclusive as, for example, the 4-week feedback periods. Consultations held within this category do therefore not necessarily indicate that all stakeholders were given equal chance to voice their position.

The information was gathered from the interinstitutional register of delegated acts, the Commission's 'Have Your Say' website, and the explanatory memoranda attached to the legal text of each delegated act. Due to issues of data inaccessibility of years prior to 2017, the analysis focused on the years 2017-2021.

The third set of questions revolved around the possibilities for stakeholders to participate through the Commission's expert groups. We included all types of groups listed on the register of Commission expert groups and similar entities as they all fulfil the same purpose within the decision-making process behind delegated acts. Due to data inaccessibility for the period 2011-2016, only the period 2017-2021 was included in the analysis.

We determined membership of the groups based on the official list of members as stated in the register. Membership was thus taken as static, meaning that no differentiation was made between individual meetings of the same expert group. Whilst some discrepancies are possible in attendance between individual meetings, determining participation based on individual expert meetings was not a feasible task.

The members of the groups were subsequently categorised in two ways. We wanted to both determine when and how often non-governmental stakeholders were included in the expert groups, and what kinds of non-governmental stakeholders were the most prominent.

We used the Commission's own classification of members of expert groups, where members are split between five categories: Individuals appointed in personal capacity (Type A); Individuals appointed to represent a common interest (Type B); organisations (Type C); member state authorities (Type D); and other public entities (Type E) (see for a more detailed description: European Commission 2016a, pp. 5-6).

The group 'organisations' (Type C) was of special interest to us as it constitutes the central group of non-governmental stakeholders used in expert groups. This group is further sub-categorised into ten categories: academia/research; banks; companies; law firms; NGOs; professional's organisations; consultancies; trade and business associations; trade unions; and others (European Commission 2016b, pp. 17-19). In our analysis, we also conflated these subgroups into 'commercial' and 'non-commercial' interests. The commercial interests include: banks, companies, and trade and business associations. The non-commercial interests include all other sub-categories of organisations.

An additional variable was created to cover the observers (as opposed to members) within the expert groups. As observers, stakeholders can to some degree be said to be included in the decision-making process, but to a lower degree than members of expert groups. Here the aim was to see whether any organisations (Type C) were present as observers.

The information was gathered from a variety of sources including: the interinstitutional register of delegated and implementing acts; the register of Commission expert groups and similar entities; and the legal texts and explanatory memoranda of the acts themselves.

The final question we wanted to explore was whether the issues covered by delegated acts have become more politically salient over time. The concept of political salience is however difficult to operationalise in the context of delegated acts as there is no consensus on where to draw the line between salient and non-salient issues.

We chose an indirect and highly uncertain way: to indicate possible salience by looking at the number of responses that stakeholder feedback periods receive. This is based on the assumption that when an act is politically salient for stakeholders, a larger number of stakeholders could be inclined to voice their position on that act. Whilst this indication is limited in that it only includes those acts for which a four-week stakeholder feedback period was indeed held, it remains a tentative indicator of salience. However, no firm conclusions can be drawn on these trends as the indicator itself includes too many uncertainties. Results based on this measurement should not be taken as a definitive proof of an increase or decrease in acts that cover salient issues. However, the findings could be taken as an initial indication of a possible trend.

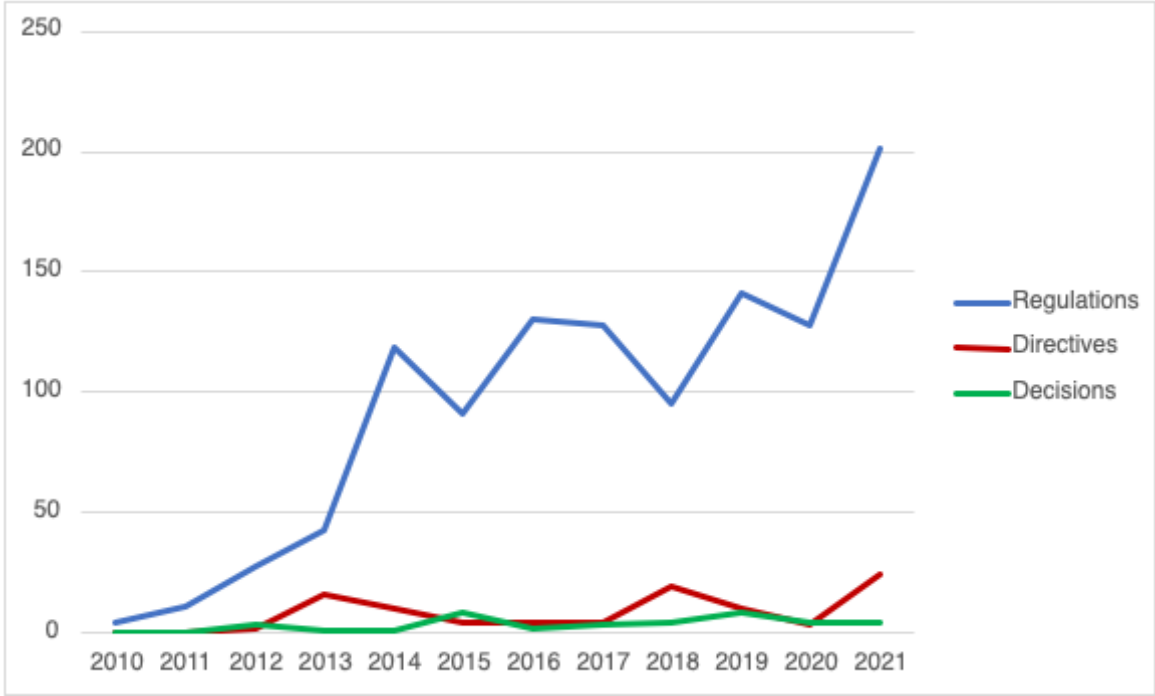
Information on the number of responses to feedback periods was gathered from the Commission's 'Have Your Say' web-portal and the explanatory memoranda of the delegated acts' legal texts. The analysis focused on the period 2017 through 2021 due to data inaccessibility of earlier years.

To summarise, all the data we used as basis for our analysis was gathered from the Commission's own reporting. Whilst this reporting was overall seemingly consistent and reliable, some variation existed in the accessibility of information and the detail with which it is presented. This means that missing data persisted in some variables and that for some parts of the analysis the period of 2011-2016 had to be excluded due to sparse reporting of information by the Commission. We purposefully excluded acts adopted in 2022, as information on 2022 as a whole is still incomplete.

Stakeholder participation in practice

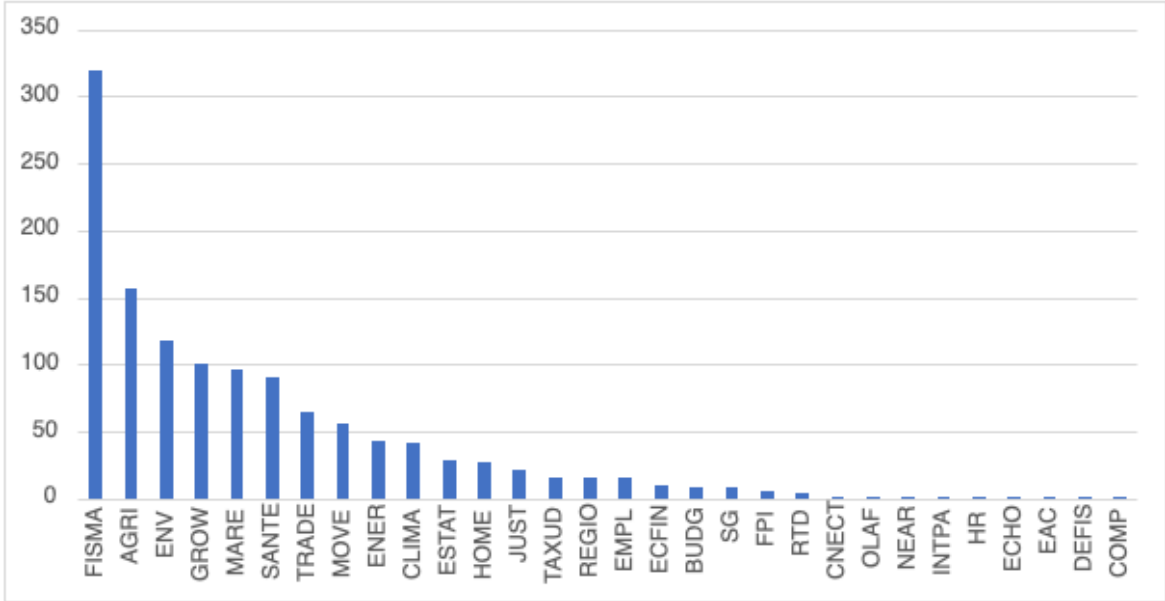
Overall, the use of delegated acts has increased quite dramatically over the last decade (see Figure 1). In total, we found 1.254 acts from the period 2010 to 2021. The first few years, there were fewer than 50 acts per year, while in 2021 there were over 200 delegated acts. The lion's share of the acts come in the form of regulations. This increase in use suggests that the question of stakeholder participation is also becoming increasingly important.

Figure 1. Increases in different types of delegated acts over time



Organised into different issue areas, we noted that there are a few Directorates-General that are responsible for the majority of the acts (see Figure 2). This also suggests that stakeholders in some areas (most of all in the finance sector, agriculture, environment, maritime affairs and fisheries, and all those affected by market conditions for industry, entrepreneurship and small and medium enterprises) are more prone to have their affairs regulated through delegated acts than others.

Figure 2. Number of delegated acts from different Directorates-General



Source: Number of acts (from 2010 through 2021) listed for each Directorate-General in the EU Interinstitutional register of delegated and implementing acts (retrieved April 2022)

For the acts adopted from 2017 through 2021, the average time from initiation (the date when the Commission said it had started the planning) to adoption was 451 days.

Opportunities to participate during feedback periods (etc)

When looking at the frequency of acts that had been subjected to the four-week feedback period, we found that only 43 percent of acts were accompanied by a feedback period between 2017 and 2021. If we also include other types of (non-open and thereby less inclusive) consultations, including ad-hoc consultations, the total amounts to 72 percent.

There are also notable differences between policy areas. Among the Directorates-General that had over 20 acts between 2017 and 2021, the high scoring DGs were: CLIMA (74%); ENV (79%); ENERGY (67%); GROW (59%); SANTE (63%); and AGRI (55%). All other DGs scored below 50 percent. Notably low-scoring DGs were: FISMA (25%); HOME (25%); MARE (6%); and TRADE (6%). A full list is provided in appendix 1.

In order to check if the Commission's relatively low use of four-week feedback periods may be explained by a tendency to use other types of more selective consultations, we also looked a bit closer at this. When it comes to the more targeted ad-hoc consultations, a number of DGs stand out. DG CLIMA scores high on both the four-week feedback period and public consultations, and scores very low on ad-hoc consultations, indicating a preference for more official streams of public stakeholder involvement. The same can be said for DG ENV and DG GROW. On the opposite end are DGs such as FISMA, MARE and HOME, which have a relatively low percentage of feedback periods, but have a high percentage of ad-hoc consultations.

It seems in general that the same DGs that score low on the four-week feedback period also score low on other types of consultations. There was however one exception. DG FISMA, with only 25 percent of acts subjected to a four-week feedback period, rose to 89 percent of acts having been subjected to some sort of consultation when we included all types of consultations. DG FISMA seems often to use pre-determined banking and market stakeholder groups. To some extent, this also goes for other DGs. DG MARE, for instance, often consults with various regional pre-determined maritime stakeholder groups. This suggests that different DGs have different habits when it comes to allowing for stakeholders – whoever they are – to have a say in the process. A full list of is provided in appendix 1.

Since the Commission can also determine that an open feedback period is not necessary if an EU agency has been preparing the act, we also attempted to find traces of agency involvement to see if this could explain the relatively low level of consultations. In about 20 percent of the acts, we could trace an agency involvement (see appendix 2). Here, however, one Directorate General stood out dramatically: 84 percent of these acts came from DG FISMA. Thereby, the use of EU agencies to prepare the acts cannot in general explain the lack of four-week feedback periods, although it helps to explain the low level of feedback periods from DG FISMA. From the documentation we had access to, we could not in any systematic way establish if, and in that case how, the agencies had at all conducted any type of stakeholder consultations. There

are however others who have suggested that EU agencies' tendency to consult stakeholders varies quite a bit, and that EU agencies with regulatory competences tend to involve stakeholders to a larger extent than in other areas (Arras & Braun 2018, p. 1259).

Delegated acts can also be adopted by an urgency procedure, during which a four-week feedback period may be more difficult to organise. In order to establish if the lack of consultations could be explained by the use of such procedures, we also checked how frequently they occurred. We only found 24 acts (out of the 777 acts) that had been adopted with an urgency procedure, and while none of them had been subjected to the four-week feedback period the relative rarity of these acts suggests that they cannot explain the overall low level of consultations.

Opportunities to participate in expert groups

Another way for (selected) stakeholders to get insight and provide opinions in the Commission's process of drafting delegated acts is through the participation in the Commission's expert groups (and/or similar groups). When tracing the process behind the acts, we found that expert groups seemed to have been involved in the majority of delegated acts (80.6%). Another way to put it though, is that almost one in five acts seemed not have been discussed in an expert group.

Here, notably high-scoring Directorates-General were Environment (ENV), Migration and Home Affairs (HOME), Climate (CLIMA), Health and Food Safety (SANTE), and Agriculture (AGRI). On the other hand, low scoring Directorates-General include Financial Stability (FISMA), Energy (ENER), and Trade (TRADE). A full list is provided in appendix 3.

DG FISMA stands out yet again, including expert groups only in 34 percent of their delegated acts. This is in part related to DG FISMA's high use of agencies (see above). In about 70 percent of the acts from DG FISMA for which we could not trace an expert group meeting, we did instead find an agency involvement. This also means that to a large degree, it is FISMA's high agency involvement that accounts for most (but not all) of the acts with no expert group meeting. This does however raise a new question: are preparatory work in agencies and pre-defined stakeholder groups seen by some DGs as a "replacement" for the inclusion of expert groups and four-week feedback periods?

In terms of frequency, the expert groups met an average of 2.4 times per delegated act. Among the DGs that had more than 10 acts in total, four Directorates-General held on average more than 3 meetings per act (DG AGRI, FPI, HOME and SANTE).

Surprisingly few of the expert groups that were attached to the delegated acts had members or observers from non-governmental stakeholders (Type C). These organisations can include a variety of stakeholders such as: NGOs, companies, trade associations, banks, research institutes, and many other types of organisations. For less than 20 percent of the acts did the expert groups include such stakeholders. In just over 11 percent of the cases did we find Type

C (non-governmental stakeholders) members, and in less than 9 percent of them did we find Type C observers. Most expert groups included only governmental experts from member states.

Here, the differences were quite extreme between various issue areas. While DG CLIMA stands out as very open to stakeholder membership (93.3% of cases with Type C as members), others almost never included non-governmental stakeholders as members. In the bottom we found for instance DG AGRI, DG MARE and DG TRADE with zero Type C members, closely followed by for instance DG ENV and DG FISMA. When including Type C observers (as opposed to members), for instance DG ENV and DG GROW came out a bit better in comparison, but the overall picture was that the expert group route to influence is not a particularly common occurrence. A full list is provided in appendix 4.

A closer look at the types of non-governmental stakeholders that were present (in the relatively few cases when they were present) showed a bias in favour of commercial interests in relation to NGOs and others. See Table 1.

Table 1. Share of Type C members split between Commercial, NGO, and Other per Directorate General

DG/Policy area	Type C – Commercial Share	Type C – NGO Share	Type C – Other share	Total N of cases
CLIMA	77.53%	18.45%	4.03%	28
ENER	88.89%	11.11%	0.00%	1
FISMA	59.83%	23.08%	5.56%	1
GROW	80.97%	11.51%	17.69%	2
MOVE	59.10%	16.99%	7.53%	13
SANTE	63.87%	23.79%	23.91%	20
Total	71.25%	17.44%	11.31%	70

We also tried to determine whether the expert groups met before or after the closing of the four-week feedback period. Holding an expert group meeting after the feedback period would allow the group to take stakeholder feedback into account. Unfortunately, for a large share of the acts we were not able to trace the timeline with any certainty, which left us only with 205 acts for which we found information. In almost 70 percent of these, the last expert group meeting had been held before the end of the feedback period.

Out of the 150 acts that had not been discussed in an expert group, only seven (i.e. less than 5 percent) had been subjected to the four-week feedback period. In other words, there was a fair share of acts that had neither been discussed in an expert group nor had been open for the public to comment on. When we included all types of consultations, we still found that one in five acts, for which there had not been an expert group meeting, had also not been subjected to any kind of consultations that we could trace.

Political salience

While we can consequently say that there is a fair share of delegated acts that have not been preceded by a particularly open process from a stakeholder perspective, the question of their possible political salience is more difficult to answer. If these acts are increasingly perceived to contain more than technical details and “non-essential elements,” the functioning of the consultations with stakeholders becomes even more important.

There is however no easy or clear-cut way to determine which of the delegated acts that contain more or less “political” issues, or if this has changed over time. As pointed out above, most issues could arguably be seen as political, and analysing the details of many hundred acts is a daunting task.

We therefore had to settle for finding an indicator that *could* signal increased political salience over time. We reasoned that acts that received many replies during the four-week feedback period could also contain a higher degree of political salience than those with few or no replies. For presentation purposes, we quite arbitrarily grouped the acts into four groups, from no salience to high salience.

A crispy clear trend was however not visible, although there were some interesting findings (see Table 2). The share of acts that received one or less replies has decreased, from over 40 percent in 2017 to less than 20 percent in 2021. And the share of acts that received ten or more replies has increased, from 37 percent in 2017 to over 50 percent in 2021.

Table 2. Feedback responses over time (% within each year)

Year	No salience (0-1 responses)	Low salience (2-9 responses)	Medium salience (10-31 responses)	High salience (32+ responses)	Total
2017	19 (41.3%)	10 (21.7%)	12 (26.1%)	5 (10.9%)	46
2018	21 (38.2%)	24 (43.6%)	9 (16.4%)	1 (1.8%)	55
2019	24 (31.6%)	24 (31.6%)	16 (21.1%)	12 (15.8%)	76
2020	14 (26.9%)	12 (23.1%)	19 (36.5%)	7 (13.5%)	52
2021	20 (19.4%)	29 (28.2%)	42 (40.8%)	12 (11.7%)	103
Total	98 (29.5%)	99 (29.8%)	98 (29.5%)	37 (11.1%)	332

Quite a few Directorates-General had adopted acts that generated 32 or more replies (i.e. possibly high salience). DG AGRI, CLIMA, MOVE and SANTE had the highest share (of their individual totals) of such acts, but also DG CNECT, ENER, ENV, FISMA, and GROW had a fair share of their acts generating a high response rate. A full list is provided in appendix 5. When we also included the acts that had more than 10 replies, DG ENERGY had the highest share of medium and high salience acts (over 90 percent of their total number of acts with a feedback period).

On the other side of the spectrum we found that DG JUST, DG HOME and DG ESTAT had not had any acts that generated more than 9 replies. It is however worth remembering that all these figures build only on the acts that had a feedback period in the first place.

With such a large share of acts receiving quite a few replies during the feedback period, we also found it worth taking a closer look at how many of these acts that had also been discussed in expert groups that contained non-governmental (Type C) experts (as either members or observers). As shown in table 3, three out of four acts with medium or high salience had been discussed in expert groups without any Type C experts present.

Table 3. Feedback responses and Type C experts (cross-check)

	No Type C in the expert group meeting	Type C included in the expert group meeting	Missing values	Total cases
No salience (0-1 responses)	74 (75.5%)	21 (21.4%)	3 (3.1%)	98
Low salience (2-9 responses)	69 (71.1%)	27 (27.8%)	1 (1.0%)	97
Medium responses (10-31 responses)	71 (74.7%)	24 (25.3%)	0 (0.0%)	95
High salience (32+ responses)	27 (77.1%)	8 (22.9%)	0 (0.0%)	35
Total	241 (74.2%)	80 (24.6%)	4 (1.2%)	325

Conclusions

As we have showed, the use of delegated acts has increased in a fairly steep curve in the last decade. This means that the question of stakeholder participation has also become an increasingly important and pressing concern.

In many ways, however, this study has raised more questions than answers. We showed, first, that only 43 percent of the delegated acts had been subjected to the four-week feedback period called for the Commission's Better Regulation Agenda. More than half of the acts, in other words, were never open to the public for comments ahead of their adoption. Another 29 percent of the acts had been subjected to some other form of more targeted consultations.

We do, however, not know why the figure is so low. When we controlled for other types of more targeted consultations, for agency preparation, and for the use of the urgency procedure, there were still quite a few acts for which we could not find any traces of stakeholder consultation in the Commission's own reporting. One question for future research would therefore be: why is such a low share of the acts subjected to publicly open consultations through the four-week feedback period, despite the wordings in the Better Regulation Agenda? And, when an agency had prepared the act, how was the agency securing open stakeholder feedback?

There were also quite dramatic differences between different Directorates-General. Within for instance trade and maritime affairs there were very few open consultations, while opportunities for the public to provide opinions were quite high in for instance the areas of climate and environment. This also raised new questions, such as: why are some Directorates-General choosing to consult the public while others keep the process closed and only conduct targeted or ad-hoc consultations?

We also found that one in five acts seemed to have been adopted without an expert group meeting. Most of these acts had also not been subjected to a four-week feedback period. To a large extent (but not entirely), this seems to be explained by agency involvement in the preparatory work. This again raises questions about how the EU agencies work openly to secure stakeholder feedback.

For those acts that had been discussed at one or more expert group meeting(s), only just over 11 percent had non-governmental stakeholders as members in the group. In another 9 percent of them did we find non-governmental stakeholders as observers. Most expert groups included only governmental experts from member states.

Also here, there were big differences between different issue areas. While 93 percent of DG CLIMA's acts had been discussed in expert groups with non-governmental stakeholders as members, DG AGRI, DG MARE and DG TRADE had no acts at all that had been discussed in expert groups with non-governmental stakeholders as members. Also DG ENV and DG FISMA scored very low. This, in turn, also raised new questions: why, for instance, are some DGs quite generous in inviting non-governmental stakeholders to the expert groups while others are not?

We also noted that the expert group meetings often seemed to take place before the end of the four-week feedback period, raising questions about the possibility for the experts to take the stakeholder feedback into account in their discussions.

Finally, we tried to tentatively approach the issue of how politically salient the acts are by using the number of replies during the four-week feedback period as an indicator. We found that the share of acts that received at most one reply has decreased over time, while the share of acts that received ten or more replies has increased. This may signal that there is an increasing number of acts that contain more political issues than before, but there may also be other explanations to the increasing number of replies.

All in all, this exploratory study has hopefully opened up for further debate and future research, and also pointed to some (of many) important follow-on questions. For the democratic functioning of the EU, stakeholder participation in the Union's executive lawmaking is much too important to ignore.

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Appendix 1

Use of consultations					
DG/Policy Area	4-week feedback period	Any type of consultation (excl. Ad-Hoc)	Ad-Hoc consultations	Any type of consultation (incl. Ad-Hoc)	Total cases
AGRI	49 (55.1%)	49 (55.1%)	20 (22.5%)	53 (59.6%)	89
BUDG	0 (0.0%)	0 (0.0%)	2 (50.0%)	2 (50.0%)	4
CLIMA	23 (74.2%)	24 (77.4%)	5 (16.1%)	26 (83.9%)	31
CNECT	2 (100.0%)	2 (100.0%)	1 (50.0%)	2 (100.0%)	2
COMP	0 (0.0%)	1 (100.0%)	1 (100.0%)	1 (100.0%)	1
DEFIS	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
EAC	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
ECFIN	2 (33.3%)	2 (33.3%)	2 (33.3%)	4 (66.7%)	6
EMPL	0 (0.0%)	0 (0.0%)	1 (12.5%)	1 (12.5%)	8
ENER	14 (66.7%)	17 (81.0%)	15 (71.4%)	17 (81.0%)	21
ENV	61 (79.2%)	66 (85.7%)	4 (5.3%)	66 (85.7%)	77
ESTAT	17 (89.5%)	17 (89.5%)	6 (31.6%)	17 (81.0%)	19
FISMA	41 (24.7%)	127 (76.5%)	117 (70.5%)	147 (88.9%)	166
FPI	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4
GROW	40 (58.8%)	43 (63.2%)	11 (16.2%)	44 (64.7%)	68
HOME	5 (25.0%)	5 (25.0%)	14 (70.0%)	18 (90.0%)	20
INTPA	1 (100.0%)	1 (100.0%)	0 (0.0%)	1 (100.0%)	1
JUST	1 (5.6%)	7 (38.9%)	7 (38.9%)	7 (38.9%)	18
MARE	4 (6.3%)	4 (6.3%)	53 (82.8%)	55 (85.9%)	64
MOVE	18 (37.5%)	24 (50.0%)	17 (35.4%)	29 (60.4%)	48
NEAR	1 (100.0%)	1 (100.0%)	0 (0.0%)	1 (100.0%)	1
REGIO	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	6

SANTE	47 (62.7%)	48 (64.0%)	36 (48.9%)	58 (77.3%)	75
SG	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3
TAXUD	4 (40.0%)	4 (40.0%)	6 (60.0%)	6 (60.0%)	10
TRADE	2 (6.1%)	2 (6.1%)	3 (9.1%)	5 (15.2%)	33
Total	332 (42.7%)	444 (57.1%)	321 (41.3%)	560 (72.1%)	777

Appendix 2

The use of agencies per Directorate General

Policy area/DG	No agency involvement	Agency involvement	Total
COMP	0 (0.0%)	1 (100.0%)	1
ENER	19 (90.5%)	2 (9.5%)	21
FISMA	34 (20.5%)	132 (79.5%)	166
GROW	65 (95.6%)	3 (4.4%)	68
JUST	12 (66.7%)	6 (33.3%)	18
MOVE	39 (81.3%)	9 (18.8%)	48
SANTE	70 (93.3%)	5 (6.7%)	75
Other DGs	380 (100.0%)	0 (0.0%)	380
Total	619 (79.7%)	158 (20.3%)	777

Appendix 3

Expert group involvement per Directorate General

DG/Policy area	Cases with no expert group involved	Cases where an expert group met at least once	Missing values	Total
AGRI	2 (2.2%)	86 (96.6%)	1 (1.1%)	89
BUDG	0 (0.0%)	4 (100.0%)	0 (0.0%)	4
CLIMA	1 (0.7%)	30 (96.8%)	0 (0.0%)	31
CNECT	0 (0.0%)	2 (100.0%)	0 (0.0%)	2
COMP	1 (100.0%)	0	0 (0.0%)	1
DEFIS	0 (0.0%)	1 (100.0%)	0 (0.0%)	1
EAC	0 (0.0%)	1 (100.0%)	0 (0.0%)	1
ECFIN	2 (33.3%)	4 (66.7%)	0 (0.0%)	6
EMPL	0 (0.0%)	8 (100.0%)	0 (0.0%)	8
ENER	8 (38.1%)	13 (61.9%)	0 (0.0%)	21
ENV	0 (0.0%)	77 (100.0%)	0 (0.0%)	77
ESTAT	0 (0.0%)	19 (100.0%)	0 (0.0%)	19
FISMA	109 (65.7%)	57 (34.3%)	0 (0.0%)	166
FPI	0 (0.0%)	4 (100.0%)	0 (0.0%)	4
GROW	6 (8.8%)	62 (91.6%)	0 (0.0%)	68
HOME	0 (0.0%)	20 (100.0%)	0 (0.0%)	20
INTPA	0 (0.0%)	1 (100.0%)	0 (0.0%)	1
JUST	7 (38.9%)	11 (61.1%)	0 (0.0%)	18
MARE	5 (7.8%)	59 (92.2%)	0 (0.0%)	64
MOVE	0 (0.0%)	48 (100.0%)	0 (0.0%)	48
NEAR	0 (0.0%)	1 (100.0%)	0 (0.0%)	1
REGIO	0 (0.0%)	6 (100.0%)	0 (0.0%)	6

SANTE	1 (1.3%)	74 (98.7%)	0 (0.0%)	75
SG	0 (0.0%)	3 (100.0%)	0 (0.0%)	3
TAXUD	1 (10.0%)	9 (90.0%)	0 (0.0%)	10
TRADE	7 (21.2%)	26 (78.8%)	0 (0.0%)	33
Total	150 (19.3%)	626 (80.6%)	1 (0.1%)	777

Appendix 4

Involvement of Type C experts in cases with expert group involvement per Directorate General.

DG/Policy area	No expert Type C included as member or observer	Expert Type C included as member	Expert Type C included as observer	Missing data	Total
AGRI	85 (98.8%)	0 (0.0%)	1 (1.2%)	0 (0.0%)	86
BUDG	4 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4
CLIMA	2 (6.7%)	28 (93.3%)	2 (6.7%)	0 (0.0%)	30
CNECT	2 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2
COMP	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0
DEFIS	1 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
EAC	1 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
ECFIN	4 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4
EMPL	8 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	8
ENER	12 (92.3%)	1 (7.7%)	0 (0.0%)	0 (0.0%)	13
ENV	53 (68.8%)	1 (1.3%)	23 (29.9%)	0 (0.0%)	77
ESTAT	19 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	19
FISMA	55 (96.5%)	2 (3.5%)	0 (0.0%)	0 (0.0%)	57
FPI	4 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4
GROW	21 (33.9%)	13 (21.0%)	20 (32.3%)	8 (12.9%)	62
HOME	20 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	20
INTPA	1 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
JUST	11 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	11
MARE	59 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	59
MOVE	24 (50.0%)	20 (41.7%)	4 (8.3%)	0 (0.0%)	48
NEAR	1 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1
REGIO	6	0	0	0	6

	(100.0%)	(0.0%)	(0.0%)	(0.0%)	
SANTE	69 (93.2%)	5 (6.8%)	3 (4.1%)	0 (0.0%)	74
SG	3 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3
TAXUD	9 (100.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	9
TRADE	23 (88.5%)	0 (0.0%)	0 (0.0%)	3 (11.5%)	26
Total	497 (79.4%)	70 (11.2%)	53 (8.5%)	11 (1.8%)	626

Appendix 5

Feedback responses per DG

DG/PolicyNo area	Low salience (0-1 responses)	Medium salience (2-9 responses)	High salience (10-31 responses)	Total
AGRI	15 (30.6%)	10 (20.4%)	17 (34.7%)	49
BUDG	-	-	-	-
CLIMA	4 (17.4%)	11 (47.8%)	5 (21.7%)	23
CNECT	1 (50.0%)	0 (0.0%)	0 (0.0%)	2
DEFIS	-	-	-	-
EAC	-	-	-	-
ECFIN	0 (0.0%)	1 (50.0%)	1 (50.0%)	2
EMPL	-	-	-	-
ENER	0 (0.0%)	1 (7.1%)	11 (78.6%)	14
ENV	18 (29.5%)	28 (45.9%)	11 (18.0%)	61
ESTAT	15 (88.2%)	2 (11.8%)	0 (0.0%)	17
FISMA	6 (14.6%)	10 (24.4%)	18 (43.9%)	41
FPI	-	-	-	-
GROW	18 (45.0%)	8 (20.0%)	10 (25.0%)	40
HOME	5 (100.0%)	0 (0.0%)	0 (0.0%)	5
INTPA	0 (0.0%)	0 (0.0%)	1 (100.0%)	1
JUST	1 (100.0%)	0 (0.0%)	0 (0.0%)	1
MARE	2 (50.0%)	0 (0.0%)	2 (50.0%)	4
MOVE	3 (16.7%)	6 (30.0%)	7 (38.9%)	18
NEAR	0 (0.0%)	1 (100.0%)	0 (0.0%)	1
REGIO	-	-	-	-
SANTE	7 (14.9%)	18 (38.3%)	15 (31.9%)	47
SG	-	-	-	-
TAXUD	2 (50.0%)	2 (50.0%)	0 (0.0%)	4
TRADE	1 (50.0%)	1 (50.0%)	0 (0.0%)	2
Total	98 (29.5%)	99 (29.8%)	98 (29.5%)	332 (11.1%)

