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Studying power and influence in the EU: Exploiting the complexity of post-Lisbon legislation with EUR-lex

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Abstract. The Lisbon Treaty brought fundamental changes to the EU legislative landscape. It introduced a new hierarchy of acts, new types of acts, and new decision-making procedures. However, it added to, rather than replaced, existing acts and procedures. The legislative landscape is therefore arguably more complex than before. However, to political scientists, this complexity represents new opportunities to study power and influence, but these opportunities have been under-exploited so far. The article explains the complex post-Lisbon situation and uses legislative output from the period 2012–2017 to discuss how much the various types of acts and decision procedures are used in practice. The advantages and drawbacks of the EUR-lex database are discussed and a guide to navigate this database is provided. The article concludes by pointing to the potential of using the full complexity of the post-Lisbon legislative landscape and the EUR-lex database for analyzing the politics of the EU.

Introduction¹

The Lisbon Treaty brought fundamental changes to the EU legislative landscape. It introduced a new hierarchy of acts, new types of acts, and new decision-making procedures. However, it added to, rather than replaced, existing acts and procedures. The legislative landscape is therefore arguably more complex than before. However, to political scientists, this complexity represents new opportunities to study power and influence, but these opportunities have been under-exploited so far. The purpose of this article is to make the case for more use of post-Lisbon legislation to study the EU.

For many years, empirical studies of decision making in the EU had to rely on case studies. For example, Tsebelis' (1994) famous study of the European Parliament's conditional agenda-setting power relied on formal-theoretical analysis and a case study of legislation on small-car emission standards. This situation changed with the introduction of the EU's legislative databases, especially Celex (today EUR-lex). Political scientists have made good use of this opportunity. The databases have been used to address a number of important questions such as the power of the European Parliament under the consultation procedure (Kardasheva 2009), the internal workings of the Council of Ministers (Häge 2008), decision-making efficiency in the EU (Golub 1999), and the relative power of the European Parliament and the Council of Ministers under the co-decision procedure (Hagemann and Høyland 2010). In addition, the use of the databases has generated a lively debate on the relative merits of different approaches and ways of categorizing the various types of legislation (e.g., Golub 2007; Häge 2011; König 2008).

However, these debates have largely taken place before the Lisbon Treaty. This treaty brought fundamental changes to EU legislation, but did not make a clean break with the past. So, many pre-Lisbon decision procedures and types of acts live on. For political scientists, this means that there are new opportunities for using EU legislation to study power and influence in the EU. However, so far, debates about the new legislative landscape have mainly taken place among EU legal scholars, not political scientists (Bergström and Ritleng 2016; Craig and de Búrca 2015; Hofmann 2009; Mendes 2013; Peers and Costa 2012). In fact, political scientists have hardly discussed it all (but see Brandsma and Blom-Hansen 2017; Christiansen and Dobbels 2013; Kaeding and Stack 2015).

¹ The author owes many thanks to Irina Tanasescu, Elizabeth Golberg, Harald Stieber, and Gijs Jan Brandsma for helpful comments and discussions. Any remaining flaws are the author's fault.

The primary purpose of this article is to argue for the research opportunities offered by post-Lisbon legislation and the EU's legislative databases. To illustrate, three specific examples of how the post-Lisbon legislative scene may provide political scientists with more analytic leverage over their research questions can be offered.

First, Junge, König and Luig (2015) argue that when the legislature (Council and Parliament) is divided, the Commission becomes more active because legislative overrule becomes less likely. This relationship is logically dependent on the legislative decision-rule for overruling the Commission. However, since the study is based on pre-Lisbon data, there is limited variation in this decision rule. A similar study based on post-Lisbon data would have considerable variation available. The decision rule for the member states to overrule the Commission now varies between blocking minority (implementing acts, variant of examination procedure), super-qualified majority (delegated acts), normal qualified majority (implementing acts, variant of examination procedure), simple majority (implementing acts, variant of examination procedure), and no overrule possible (implementing acts, advisory procedure or no procedure). In addition, there is variation in the involvement of the European Parliament in decisions to overrule (delegated acts v. implementing acts).

Second, Hageman and Høyland (2010) study bicameral politics in the EU based on pre-Lisbon data. But the study only focuses on one legislative procedure, codecision. However, the consultation and consent procedures as well as procedures not involving the European Parliament are still empirically relevant in the post-Lisbon era. A complete understanding of bicameral politics would therefore benefit from taking all decision procedures into account.

Third, Heritier and Moury (2011) argue that the Commission and the Council may collude to circumvent the Parliament by shifting regulation from the legislative arena to the executive arena, where rules are made by the Commission acting under comitology procedures. Their study is based on pre-Lisbon data, but actors have more options open for arena shifting after the Lisbon Treaty, which introduced two delegation regimes (the delegated and implementing acts regimes) providing the Council and Parliament with different control positions. A similar study in the post-Lisbon era would therefore have more empirical variation available and thus potentially have more analytic leverage over the arena-shifting argument.

As these examples suggest, researchers can now more effectively address questions about legislative overrule, bicameral politics, and delegated rule-making in the EU. These questions are, however, only teasers; more will be discussed in the conclusion. A secondary purpose of the

article is to provide some help in navigating both the legislative landscape and the EUR-lex database.

In the following I first introduce the Lisbon ideal, the simplification of the EU's legislation pursued by the treaty reformers. Second, I evaluate the limited extent to which this ideal has been met in practice. The resulting complex post-Lisbon legislative landscape is then laid out in detail. Third, I turn to the legislative output to discuss how much the various types of acts and decision procedures are used in practice. In this context, I discuss the potentials and limits of the EUR-lex database and illustrate with the amount of legislative output from the period 2012–2017. Before concluding, I briefly discuss a type of act that raises a particular challenge for researchers: EU decisions with addressees.

The Lisbon ideal

The Lisbon Treaty introduced a new legal hierarchy. It distinguishes between legislative and non-legislative acts and introduces new types of acts; delegated acts and implementing acts. It is sometimes said to imply a three-tiered hierarchy between legislative acts and the new delegated and implementing acts. However, the exact relationship between delegated and implementing acts is far from clear and actively debated by legal scholars (Bast 2016; Bradley 2016; Craig 2016). This is not the place to settle that question, so I pragmatically illustrate the Lisbon ideal with delegated and implementing acts placed side-by-side. In this pragmatic reading, the Lisbon ideal is a two-tiered hierarchy² with legislative acts at the top and non-legislative acts at the bottom cf. Table 1.

Table 1. The Lisbon ideal of EU legislation

	Legislative acts	Non-legislative acts	
		Delegated acts	Implementing acts
Directives	Legislative directives	Delegated directives	Implementing directives
Regulations	Legislative regulations	Delegated regulations	Implementing regulations
Decisions	Legislative decisions	Delegated decisions	Implementing decisions

² Here, I am deliberately focusing on the novel parts of the legal hierarchy. The full Lisbon legal hierarchy has more tiers: Treaties and charters; general principles; legislative acts; delegated and implementing acts (Craig and de Burca 2015, 110–123).

In the following, I discuss the types of acts in the Lisbon ideal in more detail. In the next section, I discuss how incomplete the ideal is as a representation of the EU's post-Lisbon legislative landscape.

Legislative acts are acts decided by the ordinary legislative procedure or by special legislative procedures. The aim of the Lisbon Treaty was to turn the co-decision procedure into the standard legislative procedure. It was therefore renamed the ordinary legislative procedure, and its use was applied to more areas. However, in a number of instances, other procedures are still used. According to the Treaty, when these procedures are used, acts are to be adopted by the Council with the participation of the European Parliament or by the latter with the participation of the former. Collectively, they are known as special legislative procedures (TFEU, article 289). In practice these procedures are the consultation procedure (e.g. TFEU, article 118) or the consent procedure (e.g. TFEU, article 86), both well-known from the pre-Lisbon period.

Turning to delegated acts, the first type of non-legislative acts, these are a true innovation of the Lisbon Treaty. The idea of the treaty makers was to introduce a distinction between political and technical delegation and to install control mechanisms accordingly (Brandsma and Blom-Hansen 2017, 55–69). Political delegation was to be done by the new delegated acts system. Under this system, rule-making power delegated to the Commission is controlled by both the European Parliament and the Council. When the Commission adopts a delegated act, it does not enter into force until the expiry of a scrutiny period (normally two months) in which both the Parliament and the Council may veto it. More dramatically, the Council and the Parliament may also revoke delegated powers (TFEU, article 290).

The second type of non-legislative act is the implementing act, which was meant for technical delegation. While delegated acts can only be made by the Commission, the power to issue implementing acts can also “in duly justified specific cases” be delegated to the Council (TFEU, article 291). When power to adopt implementing acts is delegated to the Commission, the European Parliament and the Council may decide that the Commission must first consult a committee of member state representatives. This is known as comitology, a control system well-known from the pre-Lisbon period. Comitology committees discuss the Commission's draft implementing acts and vote on the final version. If the vote is unfavorable, the Commission may have to abandon its proposed implementing act.

The Lisbon ideal: An incomplete picture

The Lisbon ideal presented above provides a first map to navigate the post-Lisbon legislative landscape. However, the map is misleading since there are many types of acts that do not fit into its categories. The main reason is that the pre-Lisbon situation continues in a number of respects.

First, the Lisbon Treaty's distinction between legislative and non-legislative acts is seriously misleading because there are many more types of non-legislative acts than suggested by the ideal. The most dramatic example is perhaps that acts adopted by the European Parliament and the Council by the consultation and consent procedures can be either legislative or non-legislative acts depending on the exact formulation of the relevant treaty article. An act is only legislative if the expression "legislative procedure" appears in the Treaty article, which functions as the legal base of the act (Bast 2012; Craig and de Burca 2015, 113–114). However, there are many instances of Treaty articles specifying the consultation or consent procedure without stating that this constitutes a special legislative procedure. Acts adopted with such Treaty articles as legal base are non-legislative acts. Examples are provided in Table 2. The distinction between legislative and non-legislative acts may appear legalistic. But it has important real-world consequences (Bast 2016). For example, only legislative acts can delegate the power to adopt delegated acts; the requirement for the Council of Ministers to meet in public when it negotiates and decides only applies to legislative acts; and the involvement of national parliaments under the subsidiarity principle only applies to legislative acts.

Table 2. Examples of treaty bases for legislative and non-legislative acts adopted by the European Parliament and Council

	Legal base for legislative acts	Legal base for non-legislative acts
Consultation procedure	TFEU, article 81: "...measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with <i>a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.</i> "	TFEU, article 109: "The Council, on a proposal from the Commission and <i>after consulting the European Parliament</i> , may make any appropriate regulations for the application of Articles 107 and 108..."
Consent procedure	TFEU, article 19: "...the Council, acting unanimously in accordance with <i>a special legislative procedure and after obtaining the consent of the European Parliament</i> , may take appropriate action to combat discrimination based on sex, racial or ethnic origin..."	TFEU, article 329: "Authorisation to proceed with the enhanced cooperation ... shall be granted by the Council, on a proposal from the Commission and <i>after obtaining the consent of the European Parliament.</i> "

Note: Italics added

Second, even after the Lisbon Treaty, there are still a number of Treaty provisions that privilege the Council as legislator and does not provide for involvement of the European Parliament. Examples include TFEU, article 31 (common customs union), article 43 (common fisheries policy), and article 122 (economic policy). In these instances the Council decides based on a proposal from the Commission. However, this is not a legislative procedure as defined in TFEU, article 289, so these Council acts are non-legislative acts.

Third, the EU treaties may stipulate that other actors than the European Parliament and the Council may adopt acts. The most important such actor is the Commission.³ Thus, a number of treaty articles directly empower the Commission to issue acts, for example TFEU, article 105 (competition policy) and article 108 (state aid). Commission acts based on direct Treaty power are non-legislative acts, but do not fit easily into the Lisbon ideal.

Fourth, until the Lisbon Treaty, tertiary acts, i.e., acts based on power delegated in secondary acts, were issued by the Commission acting under comitology procedures, although in some cases by the Council. The ambition of the Lisbon Treaty was to create a new control structure. From now on, tertiary regulation was to be done by the new delegated and implementing acts. However, the Treaty left an alignment issue: What to do with all the provisions in existing secondary acts, which specified that control of the Commission's delegated powers was to take place by the old comitology procedures? Should they be left in place, or should they be aligned to the new delegation regimes? A new 2011 comitology regulation provided a partial solution: Pre-Lisbon comitology procedures were automatically changed into the new comitology procedures under the implementing acts regime (Regulation 2011/182, Article 13). However, this held with one exception: the regulatory procedure with scrutiny. The Commission considered this particular pre-Lisbon comitology procedure similar to the new delegated acts regime, so it proposed automatic alignment to the new delegated acts regime. However, this turned out to be controversial, and inter-institutional negotiations dragged on for years and are still not settled at the time of writing. The main issue is that the member states are not ready to give up ex-ante comitology control for the ex-post control mechanisms in the new delegated acts system (Brandsma and Blom-Hansen 2017, 88–92). Therefore, the regulatory procedure with scrutiny is still used in a number of cases. Acts adopted under this procedure are tertiary non-legislative Commission acts—but neither

³ Other actors include the European Central Bank (e.g., TFEU, article 132).

implementing nor delegated acts. Thus, again, we have a type of act that does not fit easily into the Lisbon ideal.

Finally, in a number of instances, secondary legislation from the pre-Lisbon period empowers the Commission to adopt acts without comitology control. Since there is no comitology procedure involved, there is no alignment issue in relation to the delegation regimes introduced by the Lisbon Treaty. These legal bases are therefore likely to remain in place for a considerable amount of time and only gradually align with the implementing acts regime as the need to revise the basic acts arise. Again, we have a type of act that does not square well with the Lisbon ideal.

We are now ready to provide a more complete picture of the post-Lisbon EU legislative landscape. This is done in Table 3.⁴ The main point is that the types of acts and decision-making procedures are more plentiful than ever. This should provide food for thought for political scientists because it represents a fertile empirical testing ground for many theories of power and influence in the EU.

⁴ Table 3 is still a simplification. It does not include very rare types of acts, e.g., acts adopted by the European Central Bank (TFEU, article 132) and legislative acts adopted by the European Parliament with the consent of the Council (e.g., TFEU, article 223).

Table 3. The post-Lisbon EU legislative landscape

	Decision procedure
I. Legislative acts	
Acts decided under the ordinary legislative procedure	Commission proposes; European Parliament and Council co-decide
Acts decided under a special legislative procedure: Consultation	Commission proposes; Council decides after consulting the European Parliament
Acts decided under a special legislative procedure: Consent	Commission proposes; Council decides after consent by the European Parliament
II. Non-legislative acts based on Treaty provisions	
Acts decided under the consultation procedure	Commission proposes; Council decides after consulting the European Parliament
Acts decided under the consent procedure	Commission proposes; Council decides after consent by the European Parliament
Council acts (Council acting without the European Parliament)	Commission proposes; Council decides
Commission acts	Commission decides
III. Non-legislative acts based on provisions in secondary acts (tertiary regulation)	
Delegated acts	Commission decides, but is subject to ex-post veto by European Parliament and Council
Commission implementing acts	Commission decides after approval by comitology committee; or Commission decides without comitology control
Council implementing acts	Commission proposes; Council decides
Commission acts adopted under the regulatory procedure with scrutiny (pre-Lisbon comitology)	Commission decides after approval by comitology committee, but is subject to ex-post veto by European Parliament and Council
Commission acts adopted without comitology control and based on pre-Lisbon secondary acts	Commission decides

Note: The Table excludes some rarely used types of acts, cf. footnote 4.

How much are the EU's decision-making procedures used?

This section provides an introduction to the relative importance of the EU's types of acts and decision-making procedures. This is done by overviews of the number of acts adopted under the respective procedures in the six-year period 2012–2017.⁵ I focus on binding acts (directives, regulations, decisions) and exclude non-binding acts (recommendations and opinions) and make a gross count of all binding acts.⁶

⁵ EUR-lex contains documents from the entire history of the EU, so longer time periods can easily be investigated.

⁶ That is, the tables include *all* binding acts, also acts that are sometimes excluded because they are considered unimportant, e.g., corrigenda (acts correcting linguistic errors). Depending on their research question, researchers may prefer to limit their counting according to some relevance criterion. However, a relevance criterion should be applied

The overviews are based on searches in EUR-lex, the official legislative database of the EU. The database is run by the EU's Publications Office. The first version of CELEX, the predecessor of EUR-lex, became operational in 1971. It was opened for public access in 1980, but only in French and not with full coverage of EU law. An internet version was launched in 1997. Work on EUR-lex began in the late 1990s and was meant to be an integrated service built around CELEX providing access to all EU legal documents (Düro 2009). After the turn of the millennium, EUR-lex was merged with CELEX and later with PRE-lex, a database that made it possible to follow documents through the legislative process. Today, EUR-lex is therefore the EU's main legal database.⁷ It provides free access to the *Official Journal* of the European Union, to EU law, to preparatory acts and to the decision-making procedures of acts.

In the following, oversights of the annual number of acts adopted under the EU's various decision-making procedures are provided. Sometimes it takes a creative approach to identify acts in EUR-lex. Therefore, this section (and the online appendix) also serves as an introduction to using the EUR-lex database. The following tables are built upon the category of acts developed above in Table 3. To keep things manageable, the presentation is divided into three separate tables corresponding to sections I-III in Table 3.

Table 4 shows the number of legislative acts in the period 2012–2017. Identifying legislative acts is relatively straightforward in EUR-lex (see online appendix for guidance). Two things stand out in Table 4. First, the ordinary legislative procedure has indeed become the most common legislative procedure, although it may be less dominant than commonly thought. The special legislative procedures are still used, but less frequently. Second, the EU's legislative activity took a rather dramatic turn downwards with the Juncker Commission, which took over from the Barroso Commission in late 2014. Thus, there is some evidence to suggest that Juncker delivered on his promise to “focus on the 'big things'... [and] not present proposals that do not contribute to these priorities” (Commission 2014, 2).

carefully. Corrigenda may be a potential candidate, but other types of acts should also be considered, e.g., correcting acts (acts that correct non-linguistic errors), amending acts, some types of decisions, and time-limited acts.

⁷ Although EUR-lex is the EU legal database with the broadest interinstitutional approach, it is not the only EU legislative database. Indeed, the main institutions all have their own databases: the European Parliament's legislative observatory OEIL (<http://www.europarl.europa.eu/oel/home/home.do>), the Council of Ministers' document register (<http://www.consilium.europa.eu/en/documents-publications/public-register/>), and the Commission's register of documents (<http://ec.europa.eu/transparency/regdoc/?language=en>).

Table 4. Number of legislative acts, 2012–2017

	2012	2013	2014	2015	2016	2017
Acts decided under the ordinary legislative procedure	316	627	259	59	69	74
Acts decided under a special legislative procedure: Consultation	143	474	210	4	7	5
Acts decided under a special legislative procedure: Consent	1	14	11	4	3	3

Source: EUR-lex

Note: See online appendix for the exact EUR-lex search commands used to identify the acts.

Turning to non-legislative acts based on Treaty provisions (section II in Table 3), identifying the different types of acts is more challenging. There is no quick command in the EUR-lex search function that allows an unambiguous identification. Therefore, some creativity is necessary (see online appendix for guidance). Table 5 shows how numerous treaty-based non-legislative acts are in the period 2012–2017. It may come as a small surprise that this type of act, which is rarely mentioned in the literature, is in fact quite numerous. However, again, we see a drop in legislative activity in 2015 when the Juncker Commission took over from the Barroso Commission—although less clearly so than in the area of legislative acts.

Table 5. Number of non-legislative acts based on Treaty provisions, 2012–2017

	2012	2013	2014	2015	2016	2017
Non-legislative acts decided under the consultation procedure	8	16	15	14	12	5
Non-legislative acts decided under the consent procedure	31	52	89	25	37	37
Council acts (Council acting without the European Parliament)	134	218	224	108	91	83
Commission acts	6	17	20	18	20	13

Source: EUR-lex

Note: See online appendix for the exact EUR-lex search commands used to identify the acts.

Turning finally to acts based on provisions in secondary acts (section III in Table 3)—also known as tertiary acts—delegated and implementing acts are relatively straight-forward to identify in EUR-lex, while both Commission acts adopted under the regulatory procedure with scrutiny and Commission acts based on pre-Lisbon secondary acts and adopted without comitology control are challenging (but see online appendix for guidance).

As is evident from Table 6, tertiary acts bring us to the most numerous acts in the EU. The first type of tertiary act is the delegated act, the genuinely new type of act introduced by the Lisbon Treaty. As Table 6 shows, delegated acts had a slow start. Until around 2014–2015, they were not used very much. This is mainly because the member states were reluctant to delegate powers to the Commission in this way. They did not like to exchange well-known ex-ante comitology control for the new ex-post veto option. Therefore, they objected whenever the Commission proposed delegation provisions in secondary acts that made use of the new delegated acts system. This controversy quickly turned into one of the most vehement interinstitutional battles in the post-Lisbon period (Brandsma and Blom-Hansen 2017).

The next type of tertiary act is the implementing act. This type of act was also introduced by the Lisbon Treaty, but is well-known from the pre-Lisbon period. As is evident from Table 6, implementing acts are by far the most numerous type of act in the post-Lisbon legislative landscape.

The two final types of tertiary acts are left-overs from the pre-Lisbon period. They do not attract a lot of scholarly attention, but as Table 6 shows, they are not empirically irrelevant.

The most striking result in Table 6 is perhaps just how numerous tertiary acts are. In a purely quantitative sense, EU legislation is all about tertiary legislation. It is also noteworthy that, in contrast to secondary legislation, there is no discernable drop in legislative activity in 2015 when the Juncker Commission took over from the Barroso Commission. Tertiary regulation seems more robust to changes in political leadership.

Table 6. Number of non-legislative acts based on provisions in secondary acts (tertiary regulation), 2012–2017

	2012	2013	2014	2015	2016	2017
Delegated acts	39	70	196	147	175	227
Commission implementing acts	1,171	1,951	1,428	1,260	1,216	1,157
Council implementing acts	127	234	211	121	68	114
Commission acts adopted under the regulatory procedure with scrutiny (pre-Lisbon comitology)	127	126	157	118	120	128
Commission acts adopted without comitology control and based on pre-Lisbon secondary acts	381	394	415	398	390	420

Source: EUR-lex

Note: See online appendix for the exact EUR-lex search commands used to identify the acts.

A special challenge: Decisions with addressees

All statistics about EU legislation based on the EUR-lex database come with one important caveat: EUR-lex is incomplete as regards decisions with addressees. Decisions constitute one of the EU's three binding legal instruments (directives, regulations, and decisions). A decision may be of general application, or it may have a specific addressee. In the latter case, it is binding only on the addressee (TFEU, article 288). An addressee can be a member state, a company, an individual, or a plurality of these actors. Decisions of general application must be published in the EU's *Official Journal*, whereas decisions specifying an addressee must be notified to the party concerned. It may also, but need not, be published in the EU's *Official Journal*.

Since the *Official Journal* is the main source of EUR-Lex content, not all decisions with addressees are included in EUR-lex. Therefore, all statistics on EU legislation that are based on EUR-lex and that include decisions should come with this proviso. This also goes for the tables presented in the preceding section.

It is difficult to gauge the extent of this problem. Some might argue that decisions with addressees are largely irrelevant for political scientists because they deal with mundane details. However, is this true? There are at least three ways to address this question. The first is to look at substance. Do these decisions deal with important issues? Sometimes the answer is clearly yes. One example is the Commission's decision 2017/1283 addressed to Ireland. Here, the Commission declared Ireland's tax breaks to the multinational company Apple illegal under EU state aid rules and ordered Ireland to recover the lost tax revenue; a record sum of €13 billion. This was an important decision not only because of the sums involved, but also because it may pave the way for tax evasion to be addressed by the EU's competition rules.

The second way is to look at the addressees. On average, decisions to a single addressee are probably not so important for political scientists. However, sometimes, decisions are addressed to several parties. For example, a decision may be addressed "to the Member States", in which case the difference to a decision with general application is blurred.

The third way is to ask how numerous decisions with addressees are. If there were only few such decisions, the problem would be manageable. Based on data made available by the Commission, this question can be evaluated for the years 2015–2017 as far as Commission decisions are concerned.⁸ Table 7 shows that the nature of the problem varies across types of Commission decisions. The most dramatic discrepancy between published and not-published

⁸ Decisions with addressees can also be made by the Council (acting alone) or the Council and the European Parliament.

decisions concerns Commission implementing decisions. Every year, about 200-300 of these decisions are published in the EU's *Official Journal* (and then included in EUR-lex). However, as Table 7 shows, there are almost ten times as many Commission implementing decisions with addressees. For the other types of Commission decisions in Table 7, the problem is also evident, but it is not as serious.

Table 7. Number of Commission decisions, 2015–2017

	2015	2016	2017
1. Commission implementing decisions published in <i>Official Journal</i>	269	288	273
2. Full number of Commission implementing decisions with addressees	2,150	1,948	2,271
3. Commission delegated decisions published in <i>Official Journal</i>	9	6	5
4. Full number of Commission delegated decisions with addressees	2	0	1
5. Other Commission decisions* published in <i>Official Journal</i>	390	414	452
6. Full number of other Commission decisions with addressees	1,019	612	390

* Commission decisions with a legal basis in treaties, or Commission decisions taken under the regulatory procedure with scrutiny, or Commission decisions adopted without comitology control and based on pre-Lisbon secondary acts. Source: Line 1, 3, and 5: EUR-lex (see online appendix for the exact EUR-lex search commands used to identify the acts). Line 2, 4, and 6: Numbers kindly made available by the Commission upon request by the author.

In sum, decisions with addressees may be substantively important, may apply to a wide range of actors, and are numerous. The fact that EUR-lex only includes a small minority of them is a problem that political scientists should take seriously and handle carefully in their research.

Conclusion: A fertile, but complex, empirical testing ground

The Lisbon Treaty did not make a clean break with the past. This means that it added to, rather than replaced, existing decision procedures and types of acts. This may appear bewildering. However, for political scientists, the post-Lisbon legislative landscape represents a fertile empirical field. The various decision procedures and types of acts combined with the free access to EUR-lex constitute a unique data source.

It is not difficult to think of questions that may be addressed more systematically with these data. One set of questions deal with the legislative arena. As a baseline, the EUR-lex database can be used to paint a full-scale descriptive picture of all types of EU legislation and their distribution across, e.g., policy areas. But more analytic questions can also be addressed. What is the relative power position of the European Parliament and Council? The two institutions are commonly thought to be equals because of the expanded use of co-decision. However, as this article has made clear, much legislation is still done according to other procedures. How does the EU's

legislative activity develop over time? Given the multitude of types of acts, this question is more complex to answer than it appears at first sight. How much does decision-making efficiency depend on decision procedure? Speed versus inclusion and deliberation is a classic dilemma. How much are the Commission's proposals changed during the course of the legislative process? The full scale of EU legislation in the EUR-lex database makes it possible to address all these questions in a large-N set-up.

Another set of questions deal with delegation. When do the member states and the European Parliament delegate power to the Commission? The EUR-lex database makes it possible not only to paint a full-scale descriptive picture of, say, the use of delegated and implementing acts across policy areas and time, but also to investigate theories of delegation that posit that delegation is caused by factors such as complexity, conflict and decision rules (Franchino 2007). Other more specific delegation puzzles can also be analyzed. Can and does the European Parliament use its hard-won control rights over delegated legislation in practice? The Parliament fought hard for the delegated acts regime, but controlling technically complex delegated legislation is difficult, time-consuming, and not always electorally rewarding. Are the Commission's delegated powers best controlled by ex-ante or ex-post mechanisms? The implementing and delegated acts systems represent two very different approaches to control of executive power. Their relative effectiveness can be evaluated by the EU post-Lisbon legislative experience.

Political scientists already address these questions in skillful and creative ways. However, the post-Lisbon legislative landscape—the full range of legislative procedures, the full range of types of acts—combined with the EUR-lex database represents an underexploited resource for addressing them even better.

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Online appendix: Identification of acts in the EUR-lex database

This appendix explains how the tables reported in the article “Studying power and influence in the EU: Exploiting the complexity of post-Lisbon legislation with EUR-lex” have been created by extracting data from the EUR-lex database. For each table, some advice is given on how to identify the acts in EUR-lex. This is followed by the exact search commands that have been used to extract the data.⁹

A1. Legislative acts (Table 4)

Identifying legislative acts is relatively straightforward in EUR-lex since it is possible to search for all acts decided under a given legislative procedure.

EUR-lex search commands used in Table 4 (underlined parts depend on year of search):

Acts decided under the ordinary legislative procedure: Domain: “EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Ordinary legislative procedure (COD), Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

Acts decided under a special legislative procedure: Consultation: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Special legislative procedure — EP consulted (CNS), Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

Acts decided under a special legislative procedure: Consent: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Special legislative procedure — EP consent required (APP), Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

A2. Non-legislative acts based on Treaty provisions (Table 5)

Identification of non-legislative acts decided under the consultation and consent procedure require some creativity. However, standard formulations in the acts can be exploited. The citations in the preamble to these acts explain in standardized terms that the European Parliament has been consulted or given its consent (European Union 2015, 26–27). Thus, identification can be done by selecting acts decided by a non-legislative procedure and specifying that the expression “having regard to the opinion of the European Parliament” or “having regard to the consent of the European Parliament” must be in the text of the acts. As regards treaty-based non-legislative Council acts (Council acting without the European Parliament), identification in EUR-lex requires even more creativity. But again, standard formulations in the acts can be exploited. However, this time, one needs to search for non-legislative acts that do NOT include the expressions “having regard to the opinion of the European Parliament” or “having regard to the consent of the European Parliament” in the preamble of the act. The final type of treaty-based non-legislative acts is Commission acts

⁹ Names of decision procedures and types of acts may change if the treaties are changed. In this case, search words would need to be adapted.

adopted with a legal basis in the treaties. These acts can be identified in EUR-lex by searching for acts that have their legal basis in treaties and that are adopted by the Commission.¹⁰

EUR-lex search commands used in Table 5 (underlined parts depend on year of search):

Non-legislative acts decided under the consultation procedure: Domain: “EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Non-legislative procedure (NLE), Author: Council of the European Union, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Results containing: "having regard to the opinion of the European Parliament" In text, Search language: English”

Non-legislative acts decided under the consent procedure: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Non-legislative procedure (NLE), Author: Council of the European Union, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Results containing: "having regard to the consent of the European Parliament" In text, Search language: English”

Non-legislative Council acts (Council acting without the European Parliament): “Domain: EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Procedure reference: Non-legislative procedure (NLE), Author: Council of the European Union, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, remove results containing: "having regard to the opinion of the European Parliament" In text, OR: "having regard to the consent of the European Parliament" In text, Search language: English”

Commission acts: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis treaty: All treaties, Form: Decision, Regulation, Directive, Author: European Commission, Date: Date of document, From: 01/01/2012, To: 31/12/2012, remove results containing: delegated In title, OR: implementing In title, Search language: English”

A3. Non-legislative acts based on provisions in secondary acts (tertiary regulation) (table 6)

Identifying delegated and implementing acts is relatively straight-forward in EUR-lex. However, the third type of tertiary legislation, Commission acts adopted under the regulatory procedure with scrutiny, is more challenging. But, again, standard expressions in the acts’ preambles can be exploited. Thus, as a matter of standard practice, the final recital in an act that has undergone comitology control explains that the act is formulated in accordance with the opinion of the consulted comitology committee (European Union 2015, 36). So, these acts can be identified by searching for acts that (1) contain the expression “in accordance with the opinion of”; (2) are authored by the Commission; (3) are not implementing acts. Since it cannot be completely ruled out that the recital in question in some cases may be formulated in a slightly different way, this method may not be 100 per cent watertight. However, the results correspond well with the reported annual number of measures adopted by the regulatory procedure with scrutiny in the Commission’s annual comitology reports.¹¹ The final type of tertiary act is Commission acts based on pre-Lisbon

¹⁰ This search does not identify the Commission’s authorizations of state aid, which are done by so-called letter decisions, only some of which are published in the Official Journal and then as communications.

¹¹ The annual comitology reports (officially named “Report from the Commission on the working of Committees during 20xx”) are available at the online Comitology Register (<http://ec.europa.eu/transparency/regcomitology/index.cfm>). The annual number of measures adopted by the regulatory procedure with scrutiny according to the comitology reports are: 2012: 167; 2013: 171; 2014: 165; 2015: 129; 2016: 116. A complete correspondence between the numbers in EUR-lex and the comitology reports cannot be expected due to different methods of periodization and due to decisions with addressees being included to different degrees.

secondary acts and adopted without comitology control. These acts also require some creativity to identify in EUR-lex. Again, one way forward is to exploit standard formulations in the preambles of the acts. However, this time, one needs to search for tertiary acts adopted by the Commission whose text does NOT include the expression “in accordance with the opinion of” and that are not delegated or implementing acts.

EUR-lex search commands used in Table 6 (underlined parts depend on year of search):

Delegated acts: “Domain: EU law and related documents, Subdomain: Legislation, Form: Delegated directive, Delegated decision, Delegated regulation, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

Commission implementing acts: “Domain: EU law and related documents, Subdomain: Legislation, Form: Implementing regulation, Implementing directive, Implementing decision, Author: European Commission, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

Council implementing acts: “Domain: EU law and related documents, Subdomain: Legislation, Form: Implementing regulation, Implementing directive, Implementing decision, Author: Council of the European Union, Date: Date of publication, From: 01/01/2012, To: 31/12/2012, Search language: English”

Commission acts adopted under the regulatory procedure with scrutiny: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis secondary legislation: All, Form: Decision, Regulation, Directive, Author: European Commission, Date: Date of document, From: 01/01/2012, To: 31/12/2012, Results containing: "in accordance with the opinion of" In text, remove results containing: implementing In title, OR: delegated In title, Search language: English”

Commission acts adopted without comitology control: “Domain: EU law and related documents, Subdomain: Legislation, Legal basis secondary legislation: All, Form: Decision, Regulation, Directive, Author: European Commission, Date: Date of document, From: 01/01/2012, To: 31/12/2012, remove results containing: "in accordance with the opinion of" In text, OR: delegated In title, OR: implementing In title, Search language: English”

A4. Decisions with addressees (table 7)

Identification of Commission decisions in EUR-lex is straightforward and requires no special guidance.

EUR-lex search commands used in Table 7 (underlined parts depend on year of search):

Commission implementing decisions: “Domain: EU law and related documents, Subdomain: Legislation, Author: European Commission, Type of act: Implementing decision, Date: Date of document, From: 01/01/2015, To: 31/12/2015, Search language: English”

Commission delegated decisions: “Domain: EU law and related documents, Subdomain: Legislation, Type of act: Delegated decision, Date: Date of document, From: 01/01/2015, To: 31/12/2015, Search language: English”

Other Commission decisions: “Domain: EU law and related documents, Subdomain: Legislation, Author: European Commission, Type of act: Decision, Date: Date of document, From: 01/01/2015, To: 31/12/2015, remove results containing: delegated In title, OR: implementing In title, Search language: English”

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