1. Delegation versus implementation: a deconstruction of the promise of the Lisbon Treaty

Attila Vincze

I. INTRODUCTION

It is well known that delegation of legislative powers may be justified by a number of reasons such as expediency, experience, expertise, and efficiency, and will thereby most importantly draw on two key rationales: “to reduce decision-making costs, … or to enhance the credibility of policy commitments”. In the former case – aiming to reduce the cost and improve the quality of decision-making – the pivotal challenge will typically lie in safeguarding consistency between the policies enacted by the delegator and the bureaucracy’s implementing acts. In the latter case, adding to the credibility of the delegator’s (long-term) commitments will regularly imply a certain degree of autonomy for the delegates to act on their own policy preferences. Both types of delegation are, however, to be understood neither as components of a theoretically clear-cut dichotomy nor as universal patterns, apt to explain each and every governance structure in the very same manner.

Indeed, some of these reasons seemed to justify the emergence of delegated legislation in the 1960s as the comitology system was set up praeter legem to face the challenge of the legislative sclerosis. While the

1 This chapter is based on a presentation made by the author with Dr Claudia Fuchs. The author is very grateful for Dr Fuchs’s impetus and our productive discussions.


young European integration project, eager to live up to its regulatory impetus, needed to ensure activity and manoeuvrability, the Council of Ministers, formally entrusted “with the law-making function”, was not seen fit to adopt all the necessary rules.4

Although the same ideas and patterns of justification that arose in the nation states are also used in the European Union, this often “happens without taking into consideration its unique nature and the differences between a nation state and a supranational organization”.5 This internal tension was to be perceived as the newish, yet constitutionally not completely impeccable, practice of delegation and found its blessing under the Köster jurisprudence, paving a twofold path of legitimacy: the ECJ acknowledged the general distinction between “measures directly based on the Treaty itself and derived law intended to ensure their implementation”, both by referring to “legal concepts recognized in all the Member States” and by highlighting that the “institutional balance” was not distorted as long as the “basic elements of the matter to be dealt with” had been adopted under the procedure set out in the Treaty.7

Since then there has been set up a plethora of different procedures and methods to enact tertiary (implementing and delegating) acts,8 creating a system synonymous with unaccountable, non-transparent and

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undemocratic decision-making. Criticisms were more and more justified for two obvious reasons.

First, the rise of the European Parliament as an at least somewhat democratic element in the EU institutional system structurally changed the institutional balance originally designed for two players (Commission and Council) representing supranational and national governmental interests.9

Second, as the powers of the European Community widened in the fairway of its comprehensive internal market programme, comitology became much more than a simple tool for administrative cooperation in only scarce and purely technical matters, such as coal and steel production or setting the wheat intervention price. The Commission gained a decisive say in issues of political preferences, which meant that the delegation of these questions to a technocratic elite became more and more disputed.

The unique nature and the singular features of its law-making function require a more open conceptual framing in order to capture how EU executive power is held to public account. Nonetheless, the interest in the concept of legislative delegation and in putting the mechanisms of delegating decision-making powers to the executive (administration) in relation to their specific functional rationale(s) has played a substantial part in grasping the complex system of implementation of EU policies ever since the comitology system was set up praeter legem in the 1960s as a mode of exercising implementing powers by the Commission.

There had been some earlier attempts to address these shortcomings, particularly in the shape of the second comitology decision in 1999 and its later amendments,10 empowering the Parliament to a certain extent to exercise control over the use of implementing authority by the Commission.11 However, these reforms did not touch upon the framework of Article 202 EC Treaty, and failed to fully equip the Parliament with a position equal to that of the Council. Hence, after the fiasco of the Constitutional Treaty, the Lisbon Treaty clearly aspired to make some real progress by introducing a whole new hierarchy of legal acts and, for

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the first time, establishing a typology of tertiary non-legislative acts. Indeed, the newly found distinction between “delegated acts” (Article 290 TFEU) and “implementing acts” (Articles 291 TFEU), at least at the first glance, seemed to provide for a clear legal division and, in doing so, set the base for an overall rationalization of the manifold modes and forms of executive rule-making power in the EU. Or at least, that was the promise.

Basically, there should have been a clear distinction between measures that are “quasi-legislative” in nature (delegated acts) and those that may be regarded as purely executive (implementing acts). Although there had been some doubts regarding the clarity of this dividing criterion, the ECJ held in the 2014 Biocides case – and has confirmed in its subsequent jurisprudence – that “the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU”, and expressed containment as to the scope of judicial scrutiny, limiting it “to manifest errors of assessment”. Thus, to put it in other words, the Court recognized that “there is an objective border between the two species of delegation, but only legislators can establish where it is placed, and the Court can interfere with their decision only if

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13 See also Dmitri Zdobnõh in Ch. 2 in this book regarding the case law on Arts 290 and 291 TFEU. Although he comes to a different conclusion regarding the possibility and desirability of differentiating between delegated and implementing acts, we share his dissatisfaction with the rationales of differentiation in the present case law.
14 Yet, according to their formal position, delegated acts are non-legislative, given that they are not adopted by legislative procedure; see Arts 289(3) and 290(1) TFEU.
17 Case C-427/12, Commission v Parliament and Council, ECLI:EU:C:2014:170, para 40; also see Case C-88/14, Commission v Parliament and Council, ECLI:EU:C:2015:499.
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they make a blatant mistake”. Taking into consideration the promise made by the Lisbon Treaty, it is not surprising that the case law was labelled as “judicial minimalism” or even “lazy pragmatism”.

Nonetheless, the differentiation between “implementation” and “delegation” according to Articles 290 and 291 TFEU is not as obvious as it looks at the first glance and it allows much more manoeuvring than one might think (see section II below). This is of course evident if one takes into consideration that a delegation of legislative powers is not a simple technical issue, but it must reflect the core ideas of democratic accountability and legislative supremacy of the very polity. Hence, one cannot simply transfer ideas and patterns of delegation from the nation state to a supranational entity without considering that the EU itself is still an international organization exercising the powers conferred to it. So, the EU does not simply delegate inherent legislative powers as national legislators do, but actually subdelegates its powers conferred by the Member States (see section III below). Consequently, the dispute concerning the scope of application of the different tertiary acts, and of their eventual distinction, is not the real problem but a symptom of an underlying problem, and, if one wants to find out what the real disease is, one has to work backwards from these symptoms (see section IV below), like House MD (a character from the television series of the same name).

II. IS THERE A REAL DIFFERENCE BETWEEN “IMPLEMENTATION” AND “DELEGATION”? 

At first glance, the scopes of application of Articles 290 and 291 TFEU respectively appear to be mutually exclusive, and the core line of

20 Case C-427/12, Commission v Parliament and Council, ECLI:EU:C:2014:170, para 23. The plea of mutual exclusivity nonetheless loses rigor, as far as the ECJ states that there might be further forms of delegations under EU law. See Case C-270/12, United Kingdom v Parliament and Council, ECLI:EU:C:2014:18, paras 78–79: “Accordingly, for the purpose of addressing the third plea in law, the Court is called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single
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division seems to be – at least theoretically – plainly drawn. The structure and wording of the provisions display two separate kinds of executive rule-making that each draw on a different legal basis. Moreover, the powers of the institutions involved vary according to the legal basis in play, which particularly holds true for the divergent powers of the Parliament and of the Member States. Hence, one could persuasively argue that legal certainty requires that the legislative choice between these alternatives shall be founded on objective and “clear factors that are amenable to judicial review”, and indeed, there are some cases that may clearly be attributed to delegation or implementation. Nonetheless, there are still a large number of ambiguous cases, and several criteria have been put forward on how to distinguish “delegation” from “implementation” according to the Lisbon scheme. Some put forward the textual anchor points of the Treaty provisions (see section 1 below), others the scope of discretion residing with the delegatus (see section 2 below), and others the role of delegated and

legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature. It should be noted in that regard that, while the treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists”. Cf. also Jörg Gundel, “Art. 291 AEUV”, in Matthias Pechstein, Carsten Nowak, and Ulrich Hade (eds), Frankfurter Kommentar zu EUV, GRC und AEUV (Mohr Siebeck, 2017) para 9.


implementing acts in the institutional system (see section 3 below). None of these, however, is as instructive as one may have hoped.

1. Textual Anchor Points

Any search for a conclusive guide on how to distinguish between “delegation” and “implementation” will naturally start with the choice of wording in Articles 290 and 291 TFEU respectively. After all, emphasis is clearly being put on the different expressions in next-door provisions, which at least strongly suggests the relevance of textual coordinates to extrapolate the divide of the phenomena concerned.

Following a “formalistic” approach, delegated powers are intended to formally “amend” or “supplement” a primary act of legislation, because the legislative act is too ambiguous, and therefore not ready to be applied. Consequently, delegation in the sense of Article 290 TFEU necessarily presupposes some (even if small or even insignificant) amendments – be it that the text of the legislative act is formally changed (“amended”) or that “supplementing” normative measures are issued without changing the text of the basic act – a criterion that is said to offer the advantages of simplicity of application, and of predictability.26 Yet, as Paul Craig persuasively pointed out, we have to be aware of a substantial language problem that notably blurs the dividing line between delegation and implementation. For one, while the term “amend” is generally understood to comprise any change made to the content of a legislative act, the notion “supplement” extends the Commission’s ability not only to formally modify (amend) the legislative act, but also to add non-essential elements to this act.27 Because any secondary measure – including delegated as well as implementing acts – will as a matter of

principle always “involve some addition to the basic or primary act”, this leads to the unrewarding result that the key question, which of these cases shall (and shall not) in concreto be covered by the term “supplement”, and which falls under “implementation”, basically remains unanswered.²⁸ In addition, referring to the technique chosen by labelling only secondary measures that lead to an insertion into the text of the legislative act as “amendments”, while speaking of “supplements” solely in cases where the normative measures enacted are not physically included in the basic act,²⁹ would – albeit supposedly being beneficial to regulatory clarity and transparency – only recast the underlying problem without, in view of the discussion above, substantively contributing to the search for criteria on how to segregate the modes of conferral of power provided by Articles 290 and 291 TFEU. To further complicate matters, the ECJ itself seems to conceptualize two different kinds of delegated powers: one of simply fleshing out some details and one formally amending the parent act if the Commission was empowered to do so,³⁰ which, of course, reiterates the vagueness of textual differentiations.

²⁹ See Case C-286/14, European Parliament v Commission, ECLI:EU:C:2016:183, para 53, holding that “for reasons of regulatory clarity and transparency of the legislative process, the Commission may not, in the context of the exercise of a power to ‘supplement’ a legislative act, add an element to the actual text of that act. Such an incorporation would be liable to create confusion as to the legal basis of that element, given that the actual text of a legislative act contains an element arising from the exercise, by the Commission, of a delegated power which does not entitle it to amend or repeal that act”; see also Opinion of AG Mengozzi, Case C-88/14, European Commission v European Parliament and Council of the European Union, ECLI:EU:C:2015:304, para 43.
³⁰ See Case C-286/14, Parliament v Commission, ECLI:EU:C:2016:183, para 45–46: “As regards the guidelines on delegated acts, the Commission explains, … that, where the legislature confers a power to supplement a legislative act on the Commission, it decides not to legislate comprehensively and merely establishes the essential elements, while leaving it to the Commission to ‘flesh out’ those elements. By contrast, … in the context of the exercise of the power to amend a ‘legislative act’, states that the Commission is to make formal changes to a text by adding new non-essential elements or by replacing or deleting such elements. The differences established in the preceding paragraphs between the two categories of delegated powers referred to in Article 290(1) TFEU preclude the Commission from being granted the power to determine the nature of the delegated power conferred on it”.

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There is, however, a second caveat as to the disjunctive value of the choice of wording in the Treaty provisions. Implementation in the strict sense (via implementing acts) appears – at first glance – as a subservient category to delegation (resulting in delegated acts), or even as a manifestation of humble execution of the legislative intention, requiring even less genuine creativity than delegated rule-making. Executive rule-making according to the logic of Article 291(2) TFEU will be necessary only if uniform conditions for implementing legally binding Union acts are needed. If we take Article 291(1) TFEU and the principle of subsidiarity into account, these uniform conditions, however, seem to be required solely if the execution of EU legislation is so different among the Member States that it cannot be tolerated. Thus, if the differences are or may be so extravagant that uniform conditions are indicated, the underlying legislative act of the Union will most likely be so ambiguous, uncertain, or confusing that some (small or even insignificant) elements need to be clarified, supplemented, or amended. If “amendment” indeed covers “any change made to the content of that act, whether it be the deletion, addition or replacement of any element thereof”, there is no longer too big a difference between Articles 290 and 291 TFEU because, ultimately, both provisions undoubtedly intend to make the legislative act ready to be applied as precisely as possible.

Third, complementing the mentioned reservations against the weight of the textual argument, former case law, dealing with the term “implementation” in Treaty provisions, regularly abstained from engaging too deeply in grammatical aspects. On the contrary, the ECJ had been very

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31 As John Locke puts it in his Second Treatise on Civil Government (first published 1689, hereinafter quoted by the student edition of CUP, 1960): “When the executive power is placed anywhere other than in a person who also has a share in the legislature, it is visibly subordinate and accountable to the legislature” (p 152). “The same holds for the federative power, because it and the executive are both powers that have been delegated by the legislature and are subordinate to it”. See also Alexander Balthasar, Die Beteiligung im Verwaltungsverfahren (Verlag Österreich, 2009) 230.

32 The former case law used expressions evoking this picture; cf. Case C-122/04, Commission v Parliament and Council, ECLI:EU:C:2006:134, para 44; “implementing aspects already clearly defined”.


generous towards the Commission where it has invoked its powers to implement secondary legislation by rule-making,\(^35\) and it will thus come as no surprise that the Court in its case law has also chosen to refrain from an in-depth grammatical analysis when reflecting upon the line of distinction between delegated and implementing acts.

### 2. The Scope of Discretion

Another criterion to differentiate between delegation and implementation typically revolves around the assertion that a delegation of rule-making authority “necessarily implies – at least where the intention is to confer powers to supplement a basic act with additional rules or provisions – the transfer of a discretionary power from the legislature to the delegate”.\(^36\)

Following this reasoning, where such a regulatory discretion is lacking, there is a mere executive function and thus the measure has to be classified as an implementing measure. This “substantive” argument reiterates the epoch old case law according to which an implementing regulation is subordinate to the basic regulation,\(^37\) and leads back to the traditional scheme of differentiation between management and regulatory procedure.\(^38\)

The idea that “executive function is, generally speaking, characterised by a discretion narrower than that attaching to the delegated regulatory function”\(^39\) is, however, a very attractive one, as it implies a limited

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\(^37\) Case 38/70, Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1971:24, para 10. This idea was reiterated by the ECJ in Case C-65/13, Parliament v Commission, ECLI:EU:C:2014:2289, para 45: “it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements” (emphasis added).


government humbly carrying out the will of the people. Yet, generally speaking it is not only out of date but in particular hardly applicable to the EU.

First, in legal theory it has been persuasively put forward that the scope of discretion is not a question of existence or non-existence, but one of greater or lesser freedom of choice, which inherently requires a grey zone. Moreover, implementation and delegation are, from a structural perspective, different stages of a dynamic norm creation process, serving the same objective: fleshing out further details of an incomplete legal norm. A new legal norm is being created in both cases, and the outcome is at the same time not only determined by the empowering act but to some extent also by the created act itself. Delegated as well as implementing acts are thus both determined partly by the empowering act and partly autonomously shaped by the decision-making authority itself, and one can hence only speak of nuances but not of categorical differences.\(^{40}\)

Second, it is a kind of naivety to think that the executive branch of government simply carries out legislation without any power to influence the outcome.\(^{41}\) This picture has always been somewhat exaggerated stemming from an over-optimistic (and not seldom also inappropriate) ideal of the rule of law framed for criminal than for administrative law as the latter has always implied some margin of discretion of the decision-making authority.

Third, “implementation” according to Article 291 TFEU refers to two different phenomena: general and individual measures. Member States apply EU law, and in this sense implement the European legislation by individual measures, or they enact general norms (not necessarily acts of parliament), and in doing so, they make use of choice “of form and methods” as they are required to do so by Article 288(3) TFEU. The latter implementing measures presuppose a regulatory discretion not basically different from that discretion stated to be characteristic for


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delegating acts. Moreover, Article 291(2) TFEU is only to be triggered as far as the national implementing measures are intolerably divergent, and this variation among the Member States cannot be justified even in the light of the principle of subsidiarity. These significant divergences among the Member States may only exist if the Member States have *ab ovo* a wide discretion similar to a discretion of a “regulatory” nature.

Fourth, Article 290(1) TFEU narrows the so called “regulatory discretion” insomuch as the legislative act explicitly has to define the objectives, content, scope and duration of the delegation. The question is how to conceptualize these expressions. They may be constructed broadly, encompassing important procedures or covering implied terms, and may, of course, also be interpreted strictly and read very narrowly, as the German public lawyers tended to do after the Second World War in an attempt to minimize discretion to an illusionary component.

All in all, as the ECJ accurately held in the *Visa reciprocity* case, neither the existence nor the extent of discretion conferred on the decision-making authority can per se be perceived as being convincing guidelines for determining whether the act to be adopted falls under Article 290 or Article 291 TFEU.

3. Architectural Differences?

Not least, it has also been put forward that Articles 290 and 291 TFEU are set out to protect different constitutional values: according to Robert Schütze, Article 290 TFEU is allegedly designed to safeguard democratic values, whereas Article 291 TFEU is supposedly constructed to protect federal values. AG Cruz Villalon framed this very tempting idea as follows: “we should not lose sight of the fact that, ultimately, the distinction between delegated acts and implementing acts does not depend only on the difference between legislation (even if it is delegated) and implementation, but also on the fact that delegated acts are the product of the exercise of a normative competence belonging to the European Union itself, whereas implementing acts are the result of

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the (subsidiary) exercise by the Commission (or the Council) of a competence that belongs predominantly to the Member States.\(^{47}\)

Both of them speak of the same idea: delegation means empowering the Commission, and hence affects the institutional balance or the democratic component depending on whom we quote; implementation means enacting tertiary acts encroaching on the autonomy of the Member States, and hence, it has a federal flavour.

This criterion is, however, appealing only at first sight. Besides the problem of the democratic nature of the EU supranational governance, and hence, how far the criterion of protecting democratic values may even reach, the federal principle does not appear unambiguous.\(^{48}\)

Although the TFEU and earlier scholarship suggest the idea that the administrative spheres of the Member States and the EU are separate, and EU legislation is carried out either by the Member States or by the Commission, this picture has considerably changed over the last few decades, and there are more and more forms of cooperation between the different layers of administration.\(^{49}\) A differentiation based on these principles becomes even more complicated if we take into consideration that there might be more forms of empowerment than those described in Articles 290 and 291 TFEU.\(^{50}\)

Looking back at the starting point of judicial attention devoted to the comitology system, the famous Köster case dealt with supplementary legislation enacted by the Commission, carried out by German authorities.\(^{51}\) Would we say that democratic values were affected by these secondary measures, hence leading – from today’s perspective – to the application of Article 290 TFEU? Or did the measures affect federal values, provoking – in today’s system – the applicability of Article 291 TFEU? Or, putting it by the words of GA Cruz Villalon, were supranational or intergovernmental modi of exercising power affected? In most


\(^{49}\) Cf. Wolfgang Weiß, Der europäische Verwaltungsverbund (Berlin, 2010); Eberhard Schmidt-Allmann and Bettina Schönendorf-Haubold (eds), Der Europäische Verwaltungsverbund (Tübingen, 2005).

\(^{50}\) Case C-270/12, United Kingdom v European Parliament and Council (ESMA), ECLI:EU:C:2014:18.

cases, both of these values are likely to be touched upon in some way or another. Therefore, it is hard to make an abstract distinction between which of these principles is affected, given that EU legislation is carried out in a system of executive federalism. Moreover, there is the further caveat: the EU is still missing a really democratic element because the Parliament is not a real assembly, nor is the Commission a real federal government.

What is more, our concepts of delegation and implementation are basically transferred from national constitutional theory to the European Union. However, there are significant differences. In the Member States, delegation means, in very simple terms, that the ordinary, democratically elected legislator empowers the executive branch to flesh out some further details of an act of parliament. In the eclectic governance of the EU none of these elements really fits. There is not an ordinary legislator, but, within the complex institutional system of the EU, there are a number of different legislative processes for different policy areas in order to balance out the diverse institutional and governmental interests. Therefore, it would be illusory\textsuperscript{52} to think that there might be one clear-cut concept of delegation if there is no such principle for legislation. The “ordinary legislative procedure” under Article 294 TFEU therefore gives the impression that there is “normal” legislation and a “regular” executive power like that in the Member States, and therefore a “normal” delegation of powers may occur similar to that in the Member States. It is indicative that there is no unambiguous terminological difference between an implementing regulation and its parenting act as both will be called a “regulation”, a “directive” or a “decision”. Due to the architectural idiosyncrasies of the EU, there is no clear-cut distinction between execution, implementation and delegation,\textsuperscript{53} as it is recognized and established in the constitutional orders of the Member States, and therefore it is far-fetched to believe that the scope of application of

\textsuperscript{52} See Herwig CH Hofmann, Gerard C Rowe, and Alexander H Türk, \textit{Administrative Law and Policy of the European Union} (OUP, 2011) 223, who emphasize that given that the Treaties provide a carefully crafted institutional balance, in which the various organs are given specific powers for carrying out their tasks and the representation of their institutional interests, delegation constitutes a break with the constitutionally established order in the distribution of competences.

\textsuperscript{53} Christoph Möllers, “Durchführung des Gemeinschaftsrechts. Vertragliche Dogmatik und theoretische Implikationen”, EuR (2002) 483–516, at p 493, arguing that, contrary to national law, each act of implementation of EU law requires an act of delegation, and, consequently, pointing out the misleading use of the term delegation.
Articles 290 and 291 TFEU may be distinguished by those principles of democracy and federalism. Therefore, it might be useful to take a closer look at whether there is a (sufficiently homogenous) concept of “delegation” at all, and whether that concept might be applied also to the EU.

III. “A LEGAL CONCEPT RECOGNIZED IN ALL THE MEMBER STATES”?

As has already been mentioned, the ECJ claimed very early on that delegation of legislative powers is recognized in all the Member States, and therefore it was possible also to import this concept into the EU.\(^{54}\) The statement of the Court was true in a very simple and superficial sense, namely that there was – and still is – a need for expedient and flexible rule-making in all Member States, and therefore there are various techniques of empowering the executive.\(^{55}\) A comparative enquiry may, however, easily come to two different conclusions: one may say, as the ECJ did, that the foremost important issue is that there is common core, namely the widespread and undisputed fact of executive rule-making power among the EU Member States; nonetheless, one may also convincingly propose that there are profound technical differences among the Member States which, moreover, are of constitutional significance.\(^{56}\)

As a kind of deviation from the standard model of legislation, executive rule-making, for its part, is always secondary and subservient to the legislature, and hence its scope, limits, procedures and further technicalities lead back to the core elements of the very constitutional system concerned.\(^{57}\) Thus, there are some obvious differences as to the

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delegation of power between the EU and its Member States: first there is neither a common concept within the Member States, nor can any of these concepts be transposed to the EU, as the Member States have already delegated certain powers to the EU by joining it. Consequently, it is akin to the concept of the nation state, raising the conceptual question of transferability of secondary law-making techniques.

Under the British public law doctrine, the executive (except in some very limited cases) is “constitutionally forbidden to make law except with the express authority of Parliament”. Nonetheless, Parliament may delegate far-reaching powers, and may even empower the government to modify parliamentary statutes. Yet, the exercise of these powers is always subject to parliamentary (political) scrutiny and may be revoked at any time.

According to the German Basic Law, the parent act must specify not only the content, purpose, and scope of the powers conferred (Article 80 Basic Law), but, in federally sensitive cases, the government must seek the consent of the Bundesrat, the Federal Council, in order to make statutory instruments. The first set of rules limits the scope of powers to be delegated, making unconstitutional any unlimited and unforeseeable transfer of legislative power, and the second aims to uphold the federal system of political accountability.

58 These are the so-called prerogative Orders in Council, which are a type of primary, as opposed to delegated, legislation; cf. Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, CUP, 2011) 483–485. Executive power is, however, conceptualized as subordinate to legislation, and hence, prerogative power cannot change primary legislation. For a recent summary see *R (Miller and another) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017).


60 If the parent act explicitly says so (so-called Henry VIII clause), cf. e.g. the Deregulation and Contracting Out Act 1994, which conferred power on ministers to amend or repeal by ministerial order primary legislation that was considered to impose unnecessary burdens on business. Cf. further Lord Rippon of Hexham, “Henry VIII Clauses”, 10 Statute Law Rev (1989) 205–207.

61 The legislative powers delegated to ministers or to the Queen in Council are basically exercised in the form of statutory instruments in compliance with the Statutory Instruments Act 1946, which may require a statutory instrument to be laid before Parliament after being made. The core idea is to uphold parliamentary sovereignty and the accountability of the government.
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The Austrian Constitution generally (without any further specific statutory provision) empowers administrative bodies to enact implementing measures in order to flesh out some details of an Act of Parliament (Article 18(2) Austrian Constitution).62

Although the French Constitution empowers the executive not only to make rules by virtue of parliamentary delegation, but even without such empowering parent act, these wide executive powers nonetheless reflect the French semi-presidential system in which the President is not only directly elected, but also has meaningful political powers regarding the government.

Without going into further detail, delegating legislative powers is neither one singular concept nor a simple and expedient way of rule-making, but it has to respect the constitutional balance of a given polity. Rather, as has been observed on a regular basis, the explanatory value of the idea of delegation needs to be carved out in the particular context of the respective relations of delegation in which it is embedded. It may thus be of analytical help only in view of the constitutional characteristics of the legal system concerned, and needs to be applied with due regard to the forums and mechanisms that have emerged as a matter of institutional practice.63

A parent act does not simply transfer political legitimacy64 to enact rules and issue statutory instruments, but also finds its limits and conditions in the political system and has to sensibly reflect the ways and means of political and legal accountability.65 It is therefore questionable whether these modes of delegation, which always also embody core aspects of the respective political culture, are – in their functioning and rationale(s) – as easily transferable as the ECJ insinuated in its Köster jurisprudence.

Moreover, the EU is not a national (state) but a supranational political entity sui generis, onto which the Member States once delegated (transferred or conferred) part of their sovereign (legislative) powers, and any kind of delegation means that these previously delegated powers will be delegated once more, so there is a so-called “double-delegation” or subdelegation. The proper question for the ECJ in the Köster case in 1970 should have been whether and to what extent a subdelegation is allowed in the Member States.

Moreover, any transfer of a concept of delegation from national constitutional law must also reflect the political nature of the EU, the unique characteristics of transferred powers, and the fact that the European Parliament is not democratically elected in the narrower sense, nor does the Commission have any standing close to a national government (neither its appointment nor its responsibility reflect its political impact). It would be much easier to find parallels to national constitutional concepts of delegation if there were also clear concepts of legislative and executive powers in the EU. Here is a consequence of the difference between separation of powers at national level and institutional balance at EU level.

Hence, the whole debate around implementing and delegated powers is a symptom of a much greater problem: the unsolved political constitution of the EU. As the Lisbon Treaty tried to avoid becoming mired in the political question of the nature of the EU, and created a fudge constitution with unsolved issues of political leadership, political accountability and proper political processes, this confusion is now reflecting the genuine nature of the EU (“dilatory formal compromise” or in German original “dilatorische Formelkompromisse”). Delegation of powers to a quasi-executive administration without having clear benchmarks of proper ways of accountability, legally and politically speaking, cannot work, and all the discussion around the distinctions between the scope of

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68 The collective responsibility of the Commission according to Art 17(8) TEU is, taking into consideration of the transactions cost, a very unlikely nuclear option.

69 Carl Schmitt, Der Hüter der Verfassung (Berlin-Leipzig, 1931).
application of Articles 290 and 291 TFEU simply reflect this deep-rooted conflict, on the one hand, and, on the other, misses the point that the powers of the EU are delegated powers, and hence a further delegation is constitutionally very sensitive ("delegatus delegare non potest"). Sub-delegation is not completely excluded in any Member State; however, it underlies specific justifications and accountability mechanisms different from those of "normal" delegation. The context of subdelegation has been correctly captured in the Meroni case law,71 which in the meantime seems to have been abandoned.72 Moreover, this kind of subdelegation leads to a tertiary act enjoying supremacy over the law enacted by the delegator itself, which is not only unusual in any domestic legal order, but appears contradictory to the idea of delegation in which the delegator typically has the upper hand.

IV. GOING FULL CIRCLE: THE DIFFERENTIATION BETWEEN “QUASI-LEGISLATIVE” AND “EXECUTIVE” FUNCTION OF RULE-MAKING POWER PUT IN CONTEXT

The introduction of Articles 290 and 291 TFEU, despite all the critique regarding the difficult differentiation between delegated and implementing acts, has been understood as an important step towards a clearer and a more profound concept of how to perceive rule-making powers within


the EU. Yet, traditional debates dealing with the scope of executive rule-making powers and their limits, particularly regarding the delegation of powers to EU agencies and the margin of the Commission’s discretionary powers, have by and large been kept separate and only gradually seem to unfold their various ways of interrelation and their relevance within the overall topic. Indeed, both the delegation debate as regards EU agencies and the debate on EU administrative discretion may also be seen as integral parts of the concept of distributing executive rule-making power in the EU, and in their specific manner may provide some meaningful criteria for linking institutional characteristics of the respective executive authority with legitimacy claims and – in return – help to define base-lines regarding the relevance of the topos of institutional competence within a framework of executive rule-making power governed by the principle of institutional balance. Against this background, we would like to argue for a broader understanding of the topic of legislative choice between Articles 290 and 291 TFEU.

This delegation has a double meaning: first the Member States conferred powers on the EU by the Founding Treaties bearing in mind that they will be primarily executed in a finely architectured balance among the EU institution, in this respect the main governing principles being those of conferral and subsidiarity; second, there is a delegation from the ordinary European legislator to the Commission, or to the committees – or, in recent times, to the agencies.

In this respect, delegation powers to the Commission and to the agencies highlight the same problem from a different perspective, and it is hard to speak of delegation of legislative powers to the Commission without having in mind the Meroni regime.73 The two regimes are interconnected, as they are rooted in the same problem of subdelegation, and it is difficult to expect hard rules in one regime without hardening the conditions in the other. Therefore, any attempt to differentiate between Articles 290 and 291 TFEU remains a noble lie as far as the European agencies act on much more dubious legal grounds. It makes virtually no sense to attempt to make a distinction between delegation and implementation if this may easily be circumvented by establishing agencies doing the same under another name (“What’s in a name? that which we call a rose, By any other name would smell as sweet”: Shakespeare, Romeo and Juliet, Act II).

Delegation versus implementation

Furthermore, in the ESMA judgment the Court strongly relied on a technocratic rationale when it distinguished the transfer of powers to ESMA from delegation and conferral of rule-making power to the Commission under Articles 290 and 291 TFEU. This logic stems from a decade-long understanding of European governance as being of expert-driven, technocratic character, in which humble “professional expertise” is suggested to outbalance competing (and in the long run devastating) national interests, and is legitimated by this characteristic. The ESMA simple “copes with adverse developments which threaten financial stability” and pursues the objective of financial stability. No further questions seem to be necessary. This perspective suggests that a neutral (technocratic) agent acting “for the greater good” in the utilitarian sense of the word does not need any further justification, which is very similar to the output legitimacy of “expertocracy”.

However, if we look at the constitutional regimes of the Member States, delegation requires more than acting for the greater good, it needs accountability. Either legally by taking the words “objectives, content, scope” seriously, and in doing so, nullifying any secondary legislation not meeting these requirements, or politically, requiring a real parliamentary scrutiny and extension of the powers of the parliaments on a European and/or national level. There is an obvious tension within the governance of the EU: a need for distinction of implementation and delegation, on the one hand, and doing something very similar to delegation by establishing agencies, on the other. Probably any tightening of the conditions regarding which measures may be adopted as delegated legislation and which count as implementation would have an adverse effect on the legislative freedom of establishing agencies. It would be difficult to tighten the conditions for the one form of delegation and not to do the same for the other one.

Moreover, if implementation according to Article 291 TFEU is really about the uniform application of EU law in the Member States, it should reflect the principle of subsidiarity, and it should only be triggered as far as the execution of EU law shows extravagant differences among the Member States, and not as a back-up regime if and when the European legislator omits to delegate law-making powers. This argument deserves

74 Case C-270/12, United Kingdom v European Parliament and Council (ESMA), ECLI:EU:C:2014:18, paras 82, 85.
76 Case C-270/12, United Kingdom v European Parliament and Council (ESMA), ECLI:EU:C:2014:18, para 85.
more attention if one takes into consideration that any tertiary act enacted pursuant to Article 291 TFEU is part of the EU law, and as such enjoys supremacy over domestic law. In the words of Joseph Weiler, this would be the dual character of supranationalism:77 if the Member States did not expressly empower the Commission to enact tertiary acts, the Commission might still enact them by evoking Article 291 TFEU and rely on the supremacy of the EU law.

This might raise worries if evoking these powers would not require a strict scrutiny of subsidiarity.

V. CONCLUSIONS

A differentiation between delegation and implementation was meant to achieve legal clarity regarding tertiary acts of the Union. This is clearly not the case, as the ECJ is very flexible regarding the applicability of Articles 290 and 291 TFEU. This has been heavily criticized, and some principles have been put forward on how to make clear a distinction between the two: linguistic distinctions, discretionary distinctions, and distinctions based on architectural principles. Nonetheless, as has been shown, none of these governing principles leads to an unambiguous result.

Moreover, it is not easy to transpose legal principles of delegation from domestic law to the supranational entity of the EU, as delegation does not simply mean an empowering of the executive branch, which has no clear contours in the EU anyway, but, as a deviation from the standard law-making process, has to reflect the very political entity. In the case of the EU, there are a number of competing principles: those of conferral, subsidiarity, and supremacy from a legal point of view, and supranationalism and intergovernmentalism from a political point of view.

Moreover, if one looks at the bigger picture, any attempt at differentiation between delegation and implementation has to take into account the flexible regime of delegating powers to EU agencies that are often justified by simple technocratic arguments.

The problems around delegation and implementation should not be seen as technical questions of pure legal interpretation but also as

reflecting the undetermined political constitution of the EU, the unclear distinction between executive and legislative branches, the Janus head of the Commission as political body and technocratic agent. They are thus symptoms of a much greater unsolved problem.