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ARTICLE

Delegated Rulemaking in the European Union Fifteen Years Post-Lisbon: Taking Stock and Forward-Looking Reflections

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Abstract

Drawing on the findings from the contributions to this Special Issue, this article maintains that, fifteen years after Lisbon, a debate on the law and politics of delegated rulemaking in the European Union (EU) is as relevant as ever. That is because the functional and procedural integration of the Member States in the EU multilevel and multi-jurisdictional legal system, supplanted by unprecedented challenges for supranational crisis management in the recent years, often led to unpredictable and often controversial configurations of delegated rulemaking. One may thus conclude that, fifteen years later, the constitutional framework put in place in the Lisbon Treaty has not been able to effectively constrain the normative development that evolved from delegated rulemaking, which often followed a different path. Hence the Lisbon Treaty provides only a partial blueprint for delegated rulemaking, leaving out rulemaking by EU agencies, regulatory frameworks and private parties, as well as increasingly composite and hybrid cooperation formulas involving EU and national executive actors. The future of EU delegated rulemaking will very much depend on the capacity to reach consensus on important meta-principles and political conceptions, such as democratisation and parliamentarisation, shaping the normative spaces generated within the *sui generis* dynamic European model of governance.

Keywords: delegated rulemaking; European administration; meta-principles; normative spaces; parliamentarisation; procedural cooperation

I. Introduction

A debate on the law and politics of delegated rulemaking in the European Union (EU) is as relevant as ever, fifteen years after the Lisbon Treaty, which was supposed to have settled the matter. This is primarily due to the fact that it is, for any legal system, difficult to provide stable configurations for normative spaces[1] in constitutional documents. Such difficulties arise due to the uncertainty as to the how formal arrangements develop over time. The normative expectations of the drafters often meet with the complex demands and practical necessities of effective administrative rulemaking, in which informal arrangements develop in an ad hoc manner supplementing or even supplanting formal structures either within the confines of formal structures or even in parallel to, and often in competition with, them.[2] This constitutional reality often requires judicial intervention

[1] See A Türk, "Legislative, Delegated Acts, Comitology & Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces" (2020) 26 European Law Journal pp 415–428.

[2] See A Bogdandy, PM Huber and S Cassese (eds), *The Administrative State, Volume I* (Oxford University Press 2017).

that has to settle institutional conflicts and provide solutions that would otherwise fall within the constitutional domain of Treaty change, endowing courts with considerable powers to shape such normative spaces.

This development is not limited to the European Union, which does, however, offer a particularly fertile ground for observing this phenomenon. This is because its constitutional structures for the adoption of delegated rulemaking are more dynamic than in stable constitutional legal systems, given the expansion over time of the Union's competences (federalisation) and the changing role of its institutional actors (democratisation). Moreover, the functional and procedural integration of the Member States in the Union's multilevel and multi-jurisdictional legal system has often led to unpredictable configurations of delegated rulemaking. What is more, the Union has gone since Lisbon through a number of "once in a lifetime" crises that has significantly increased the expectations and challenges for supranational crisis management.

The contributions in this Special Issue offer a unique blend of different perspectives from legal and political science that puts the Union's system of delegated rulemaking in its evolutionary context, provides a normative framework for analysis, and highlights recurring and new issues of a general but also sector specific nature that will enrich the debate in this field.

II. Insights from the contributions

The contribution by Guido Bellenghi and Ellen Vos provides the historical and legal perspective through which we can assess the impact of federalisation and democratisation on delegated rulemaking in the Union. The increase in the Union's competences led to a rapid expansion and diversification of Union law making, in which the vast amount of rules would no longer be adopted by the Union legislator but by the Union's executive. At the same time, the increased involvement of the European Parliament (EP) in the Union's legislative process led it to demand a greater say over the control of the exercise of such executive rulemaking, which had been dominated by the Member States smoothly integrated in the Union's executive decision-making processes through the development of the "comitology" process. Lisbon took account of this change by separating executive rulemaking into the adoption of delegated acts, in which the Union legislator would exercise control over the Commission, and implementing acts in which the Member States would exercise control, now not in the shadow of the Council, but in their own responsibility, over the Commission.

The authors question this arrangement from a number of perspectives. First, they contest the shift from institutional control to Member State control for the adoption of implementing acts. Second, they argue that the demarcation between the scope for delegated acts and that for implementing acts is constitutionally questionable in theory and blurred in practice. This leads them, third, to question the legitimacy of executive rulemaking, which provides Parliament with a rather limited role in case of politically sensitive decisions under Article 291 TFEU, which should otherwise provide for greater transparency and stakeholder participation, and does not put it on the same footing as the Council under Article 290 TFEU. Consequently, the authors argue for a return to "an integrated system for EU executive rulemaking" that existed prior to the Lisbon reform with involvement of the Member States, veto powers of Parliament and Council, as well as enhanced transparency and participatory engagement.

Following the first legal contribution, the article by Guilia Gallinella and Thomas Christiansen provides a political science perspective investigating the exercise of delegated powers in times of crises and exploring the challenges for democratic scrutiny. The authors note that over time, the Union has assumed an increasingly important role in

supranational crisis management that provided increased administrative powers for dealing with anticipated emergencies. The authors show that, contrary to the expectation that the series of recent crises, be it in respect of the sovereign debt of the Member States, the COVID-19 pandemic, or the invasion of Russia in the Ukraine, would have led to a considerable increase in delegated rulemaking and a loss of democratic control, delegated rulemaking remained "business as usual". The authors attribute this finding, firstly, to the limited Treaty competences that would have allowed the Union legislator to dramatically expand delegated rulemaking by the Commission. Instead, existing Treaty provisions have been used to provide capacity for future crisis management. Secondly, they note that even in normal times the mechanisms of democratic control do not particularly trouble the Commission's exercise of executive powers. The authors find that instances of political contestation are the exception rather than the rule, which in their view raises the question whether more effective ways need to be explored to ensure democratic scrutiny of delegated powers. For the Council, at least, the answer may more plausibly lie in the ability of the Council to shape delegated acts in expert groups and implementing acts in close co-operation with the Commission in "comitology" reducing the need for formal interventions.

A final set of contributions explores the use of delegated powers in the increasingly integrated policy area of energy regulation. In this field, the Commission shares its executive powers in a complex European network setting with an EU agency – the European Union Agency for the Cooperation of Energy Regulators (ACER) – but also national regulators and private parties that enjoy considerable operational control in the energy market. The first of those contributions by Leigh Hancher and Julius Rumpf discusses the role of judicial review in shaping the regulatory space in which terms, conditions and methodologies (TCMs), as a new category of specialised sectoral regulation, are developed and implemented. The authors query to what extent the interaction of internal review of TCMs adopted by ACER, as an EU agency, by ACER's Board of Appeal and external review by the Union courts reflects the Union's intended institutional balance. They argue that the internal and external review of TCMs adopted by ACER should be seen as opposing rather than complementary forces. Despite the nature of the process for the adoption of TCMs as bottom up, TCMs are often negotiated in the shadow of hierarchy whereby ACER plays a dominant position that is often supported by its Board of Appeal. What is more, as appeals to the Union courts do not have suspensory effect, TCMs remain in force during long periods of uncertainty as to the outcome of the court case, which may even be irrelevant, where the factual or legal situation has changed in the meantime. The authors argue that this uncertainty also affects the development of new TCMs. Furthermore, it still has to be seen whether external review by the Union courts can impose significant control over ACER.

The second of those contributions by Torbjørg Jevnaker, Karianne Krohn Taranger, Per Ove Eikeland and Marie Byskov Lindberg, complements the legal analysis by offering a political science perspective that investigates the adoption of TCMs as a form of delegated rulemaking below the level of implementing acts, within a network setting that involves industry operators, national regulators, and ACER. This aspect of delegated rulemaking should attract more attention, as it raises profound questions not only on the constitutionality of sub-delegations by the Commission to regulatory networks and/or EU agencies, but also on the conditions that allow (or disallow) the adoption of rules by a European regulatory network. It is this second aspect that the authors explore and provide important answer to. First, the authors show that a decentralised rulemaking approach, which allows Transmission System Operators (TSOs) with expert knowledge to propose and national regulators to adopt binding rules, had only been partially successful in the shadow of a hierarchical system that allows ACER, as an EU agency, to settle final disputes. This ultimately paved the way for a more centralised reform that now allows ACER to

adopt European TCMs, even though the regulatory network process remains in place for regional TCMs. Second, the authors find that the bureaucratic politics perspective, in accordance with which regulators are seeking to protect their core mission, provides on balance more convincing answers than the policy-network perspective that would focus on converging or diverging perceptions and preferences within the network of private and public actors. Third, delegated rulemaking by regulatory networks also raises the difficulty of balancing legitimacy with quality of output. ACER's involvement may increase the legitimacy of the process by adding an additional regulatory layer but raises the question of whether ACER has sufficient resources for the task. Fourth, the authors find, that while constitutionally problematic, the involvement of regulatory networks in EU rulemaking could expand European integration.

III. Constructing normative spaces for delegated rulemaking[3]

The contributions demonstrate that the constitutional framework put in place by the Lisbon Treaty has not been able to effectively constrain the development of the normative spaces that have evolved for delegated rulemaking, which has, to some extent, followed a different path either within or outside the new framework. Within the Lisbon framework, the lack of clarity as to the contours of the "essential elements" doctrine has resulted in uncertainty as to the scope of delegation from the Union legislator to the Commission, mainly under Article 290 TFEU, but also under Article 291 TFEU. Difficulties have also arisen as to the choice of delegation due to the lack of a clear boundary between what constitutes acts that supplement legislative acts under Article 290 TFEU and acts of general scope that implement Union acts under Article 291 TFEU. What is more, the unabated continuity of the practice of delegated rulemaking outside the Lisbon framework has made it clear that the Treaty only provides a partial framework for the adoption of such rules. In particular, in the absence of Article 291 TFEU as comprehensive provision for the adoption of implementing acts, rulemaking by Union agencies, regulatory networks and private parties continues to a large extent without constitutional framework or even statutory regulation.

And while an integrated approach to delegated and implementing acts, as suggested in the contribution by Bellenghi and Vos, would indeed resolve some of the issues that are currently posed, it will not eliminate all of them. It will be at some point unavoidable to address the rulemaking by Union agencies, regulatory networks, and also private actors, in the Union Treaties or at least by statutory regulation. But the disruption does not stop here. Similarly disruptive for a constitutional framework are the uncertainty of EU soft law instruments that operate on the margins of delegated rulemaking and also hybrid arrangements, whereby policies are partly regulated within Union law and partly outside of it by international agreements.[4]

What is particularly striking is the permissive attitude of the Union courts that have been reluctant to engage with clearly articulated principles to resolve the many constitutional issues that have arisen in this area. Perhaps this is because an assessment of whether the specific configurations (in terms of actors, the norms they can adopt, and the processes they need to follow) of the Union's normative spaces for delegated rulemaking are adequate in light of the space they occupy within the Union's legal system and by whom such configurations shall be determined (EU Treaties, EU legislation, inter-institutional agreements), will depend on a consensus on the relative importance of the meta-principles and political conceptions that shape normative spaces generally at each of those different levels and the appropriate role of the CJEU to resolve conflicts where such a

[3] This section is partly based on Türk, supra, note 1.
[4] See Türk, supra, note 1, at p 425.

consensus cannot be achieved, in particular bearing in mind that the judicial process itself constitutes a normative (and in some cases even a supra-normative) space.[5]

The importance of such meta-principles will be determined within the unique European model of governance that has emerged over time, without following a pre-conceived path, as a result of key political and constitutional decisions that have shaped the European integration process. The considerable transfer of competences to the European level, albeit with different intensity across policy fields, can be seen as the result of an increased belief by the Member States in, and dependence on, the capacity of the Union for the solution of cross-border problems. At the same time, national actors have actively been integrated at European level in the agenda-setting and legislative process (European Council, Council of Ministers) not only to protect their interests and ensure compliance, but also to provide the Union with a level of (input) legitimacy and resources that are currently beyond its capacity.[6]

Also the preference for a decentralised system of implementation of European legislation with only limited powers being given to the Commission for the application of competition and state aid rules[7] allowed the implementation and enforcement of European law to benefit from the administrative capacity and established legitimacy of the Member States. The European administration that has emerged from the "Europeanisation" of the national administrative systems has been described by the academic literature mainly by reference to this shift from dual to co-operative federalism,[8] as "multilevel,"[9] "mixed,"[10] "shared,"[11] "composite,"[12] "hybrid"[13] or "integrated" administration.[14] It has resulted in the functional integration of national and Union administrations, which remain organisationally autonomous, in the implementation of Union law with a high degree of procedural cooperation. While the complex interaction and co-operation of executive actors at Union level with national administrations and between national administrations, operating subject to an increased Europeanisation of national procedures and organisational rules, has increased the effectiveness of the system of application of Union law, it has also exposed many and varied challenges to the rule of law. It is difficult to allocate legal and political responsibility. The Union's judicial system, based as it is on the separation of jurisdictions, is often struggling to ensure, and be seen to ensure, effective judicial protection, while the Union's political actors have found it difficult to assert political control and accountability over executive actors which are often neither their agents nor within their jurisdictional reach.[15]

[5] Ibid, at p 427.

[6] Ibid.

[7] Early attempts by the Commission to establish a more centralised system of implementation and enforcement were rejected by the Member States, see CF Bergström, *Comitology – Delegation of Powers in the European Union and the Committee System* (Oxford University Press 2005) pp 46–47.

[8] See R Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009).

[9] See J Trondal and MW Bauer, "Conceptualising the European Multilevel Administrative Order: Capturing Variation in the European Administrative System" (2017) 9 *European Political Science Review* pp 73–94.

[10] See G Della Cananea, "The European Union's Mixed Administrative Proceedings" (2004) 68 *Law and Contemporary Problems* pp 197–217.

[11] See P Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018), at p 80.

[12] See E Schmidt-Aßmann, "Introduction: European Composite Administration and the Role of European Administrative Law" in O Jansen and B Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011).

[13] See F Coman-Kund, "Separation of Powers within the EU Multilayered System and the Challenges of Hybrid Executive Governance" in C Eckes, P Leino-Sandberg and AW Ghavanini (eds), *The Dynamics of Separation of Powers in the European Union* (Hart Publishing 2024) pp 269–288.

[14] See HCH Hofmann and A Türk, "The Development of Integrated Administration in the EU and its Consequences" (2007) 13 European Law Journal pp 253–271.

[15] Türk, supra, note 1, pp 427–28.

The construction of the Union's normative spaces has therefore to proceed from this reality. All the same, the reality and normative need for "parliamentarisation" of the Union's normative spaces necessitates greater involvement of democratic mechanisms in the Union's normative spaces, such as more effective oversight by the European Parliament, increased participation by private parties, and greater transparency. Also greater involvement of national actors, in particular of Member States' parliaments in the spirit of Article 12 TEU, possibly within more intensive cooperation models with the EP,[16] such as in the case of Europol's model of parliamentary control through the Joint Parliamentary Scrutiny Group (JPSG),[17] might be a meaningful direction to better constrain the normative spaces created by highly integrated composite or hybrid modes of delegated executive rulemaking. One has, though, to be mindful not to undercut the very foundation of the Union's governance system that currently relies to a considerable extent for its legitimacy and operational capacity on national actors within and outside the Union's legal system.[18]

Competing interests. The author declares not to have any competing interests.

[16] See Coman-Kund, supra, note 13, pp 286–287.

[17] See for an analysis of the JPSG established to improve Europol's democratic accountability, F Coman-Kund, "Holding Europol Accountable: The Promise and Limits of (Hybrid) Multilevel Accountability" in A Arcuri and F Coman-Kund (eds), *Technocracy and the Law: Accountability, Governance and Expertise* (Routledge 2021) pp 285–314.

[18] Türk, supra, note 1, at p 428.

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