Accountability and Delegation of Regulatory Powers to Agencies

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Abstract. *The problem of delegation of powers in the EU framework has become one of the main issues legal scholarship has to deal with. In its broader meaning delegation could address different phenomena: to the extent of this paper, we will deal with just one of these phenomena, namely the delegation to EU agencies of regulatory powers. The aim of this paper is to highlight some critical issues in this matter: first of all we will recall the evolution of the delegation in the case law; secondly, we will try to briefly draw a pattern for the accountability of EU Agencies' rulemaking, in the light of the US model contained in the Administrative Procedure Act. Eventually, we will address some of the problems of participation in the rulemaking and we will see how to improve the EU system in order to avoid them.*

Keywords: *Delegation – rule-making – European union – participation – agencies.*

JEL: D73, H83.

1. Introduction

Delegation constitutes a key-concept encompassed in the principal-agent theory: through delegation, the principal confers a certain number of powers upon the agent. However, this transfer of powers entails several problems related to the way the principal may be aware of the behavior of the agent and, consequently, to contrast him whether the agent acts in the interest of himself (instead of the one of the principals).

This problem is typical of all the modern democratic States experiencing the proliferation of independent agencies entrusted with regulatory powers. But this problem is faced in a supranational organization, such as the European Union (hereafter, EU), as well. In the EU context we should consider that since delegation implies an alteration of the institutional balance provided by the Treaty, it requires a very deep consideration of the constitutional implication it could raise (Türk, 2011).

In order to evaluate in a proper manner, the constitutional repercussion of the way we conceive the delegation we should begin by reflecting on the evolution in the case law of the European Court of Justice (hereafter, ECJ).

2. The fundamental core of the delegation doctrine: Meroni and Romano

The requirements in order to legitimately delegate powers originally attributed to an Institution are notably specified in the *Meroni* judgment (ECJ, 9/56 and 10/56, ECR 1957-1958, *Meroni & Co, Industrie Metallurgiche v. High Authority*, 133). In this case, the complainant contested the decision through which the High Authority delegated the powers for the financial implementation of the ferrous scrap regime to two bodies (governed by Belgian private law), assuming that this type of delegation was not foreseen in the European Coal and Steel Community (hereafter, ECSC) Treaty.

The ECJ allowed the appeal, nonetheless its reasoning was quite different from the complainant's one: the Court, having preliminarily stated that the delegation requires the transfer of the responsibility from the delegator to the delegate, held that the High Authority was entitled to delegate its powers to private bodies, in accordance with art. 3 and 53 of the ECSC Treaty. Furthermore, this delegation was subject to some limits. Firstly, the delegate cannot be entrusted with different powers from those attributed to the delegating Institution by the Treaty: so, as a corollary, all the rules governing the powers of the delegator must be applied even to the powers conferred upon the delegate. Secondly, the delegation cannot be

presumed, but it needs to be explicit. Eventually, the delegation is permissible only whether it regards powers deprived of any margin of discretion. The three just mentioned elements constitutes the fundamental core of the so-called *Meroni* doctrine, established to prevent the institutional balance provided by the Treaty from being endangered through the delegation of powers from the Institution that was empowered with them to another body. Hence, to perform a delegation compatible with the *Meroni* doctrine, only clearly defined powers may be conferred upon a private body. And more importantly, those powers should not enjoy a wide margin of discretion.

In 1980, in the Romano case (ECJ, 98/80, ECR 1981, *Romano v. INAMI*, 1241), a similar issue about delegation occurred, but with two prominent differences: the delegate was a public body and the content of the power consisted of the possibility to adopt acts having the force of law. The Court did not mention the *Meroni* judgment and, in accordance with the opinion of the Advocate General, held that the only type of delegation of powers provided by the Treaty was enshrined in art. 155 of the European Economic Community (hereafter, EEC) Treaty, whilst, on the contrary, the delegation at stake did not fall within the scope of application of this norm. Moreover, the Court significantly ruled that the delegation of the power to adopt acts having the force of law was consistent neither with art. 155, nor with the judicial system enshrined in articles 173 and 177. To put it in a nutshell, the Romano's findings led to a more restrictive approach to the delegation of powers. However, it was not clear if this judgment was meant to forbid the delegation of the power to enact legally binding acts or acts of general scope. The court used the expression "*acts having the force of law*" and this expression was interpreted in different ways. Even if the just mentioned acts have been intended as legally-binding acts (Türk, 1996), referring to the wording of the judgment in other languages and taking into account also the subsequent case law and the opinions of the Advocates General the acts having the force of law should be intended as legally-binding acts of general application (Chamon, 2016).

3. Further evolution of the delegation doctrine

At any rate, the above mentioned approach could not last forever and in fact it was gradually tempered in the late 1990s. In this regard, we should consider three phenomena facilitating this change. Firstly, the agencies began to have an increasing role in the organization of the EU due to their proliferation during the so-called second and third wave of agency formation (Egeberg and Trondal, 2017). Secondly, the powers to adopt binding decisions (or to play at any rate a central role

in institutional decision-making) have been conferred upon many agencies (Chiti, 2013). Thirdly, the ECJ has softened its standard of review with reference to those technical and discretionary powers agencies are entrusted with (Türk, 2011), implicitly admitting the conferral of such powers. Therefore, from the late 1990's jurisprudence, even if the *Meroni* doctrine was still considered fundamental, the limit of the discretionary powers began to be conceived in a less rigid manner.

The last stage of the delegation doctrine is represented by the ECJ findings in *UK v. Parliament and Council* (ECJ, C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union (ESMA)*, ECLI:EU:C:2014:18). Hereby, the Court dealt with the delegation of powers conferred upon an agency, the ESMA (European Securities and Market Authority), established within the new financial system, together with the EBA (European Banking Authority) and the EIOPA (European Insurance and Occupational Pensions Authority). These three agencies (also known as ESAs) have been entrusted with normative powers of non-legislative nature. This delegation, in UK's view, was in breach not only of both the *Meroni* and *Romano* doctrines, but even of the articles 290 and 291 of the Treaty on the Functioning of the European Union (hereafter, TFEU). Nevertheless, the UK's view was not accepted by the Court. First of all, both the AG and the judges held that the Treaty has been modified several times since the *Meroni* and Romano judgments: in particular, the integrated system of review has been entirely revised, since - after the ratification of the treaty of Lisbon - even agencies' acts may be challenged before the ECJ. Indeed, this modification has several repercussions in the delegation doctrine. At the beginning, the delegation was conceived as a means to attribute both to private and public bodies only implementing powers of non-discretionary nature, instead of the power to adopt legally binding decisions (at least the ones of general application). Nonetheless, the Court noticed how these apparently settled principles governing delegation have been partially altered over time. As regards the *Meroni doctrine*, the Court preliminarily pointed out that there were two differences between *Meroni* and the case at issue: firstly, the ESMA is a public body created by the EU legislature, whose powers are conferred according to ESMA Regulation and, secondly, those powers are bounded by various conditions and criteria. It is interesting to note that the Court had not address directly the issue of discretionary powers: however, from the ruling it emerges that the powers conferred upon the ESMA imply a certain margin of discretion and, notwithstanding this, the delegation at stake is immune from any sort of criticism. As regards *Romano*, the Court stressed out that the judicial system has been modified over time, to the point that both articles 263 and 277 TFEU "*expressly permits Union bodies, offices and*

agencies to adopt acts of general application" and, in particular, articles 263, 265 and 277 TFEU provides that acts adopted by the 'bodies, offices' and 'agencies' of the Union may be subject to judicial review by the Court: with the result that the Romano doctrine had been partially overturned (Scholten and Van Rijsbergen, 2014) and now it is self-evident that agencies could be entrusted with the power to adopt acts of general application.

4. The lack of legitimacy. A glance to the us model

We are living in an emergent politico-administrative system changing constantly and permanently in order to be adapted and to resonate to rapidly transforming environment, and in order to achieve better results, the politico-administrative systems and rule makers are opening up policy and law-making and listening more to the people it affects (Berceanu, 2019). This evolution allows us to make some remarks. Undoubtedly, the ECJ correctly pointed out that a change within the EU legal framework has occurred since 1958. This shift was probably due to the different way the institutional balance principle was conceived, turning from a static to a dynamic vision of it (Chiti, 2010): in this regard, Simoncini (2015) stated that this change in the way to conceive institutional balance happened "*by adjusting it to the need for specialization of administrative tasks within the division of competences between EU institutions in the framework of the EU multilevel governance*". However, we must consider that the expansion of the regulatory competences provided within the European Union legal framework, in defect of a parallel alignment on the institutional level, has led to the emergence of a legitimacy *deficit* (Chamon, 2011). To put it another way, the rise of this legitimacy issue derives from the simple observation that the institutional balance (even intended in a dynamic way) provided by the Treaties is stressed too much whether agencies are entrusted with too wide powers. As it has been correctly noticed by Craig (2015), wide powers – even of a technical nature – may imply the balancing of public interests, but the technical expertise of the agencies "*does not translate into specialist skills in balancing broad public interests*". Yet, it is quite clear that those public bodies different from the Institutions are not entitled to make such a balance, since the former have not the same legitimacy of the latter: hence, as long as the institutional framework provided by the treaties remains the same, we should think about a way of increasing the legitimacy of these bodies when they are entrusted with new and, moreover, wider powers in order to preserve the institutional balance of the EU. In this regard, since the problem faced in the EU is anything but new, we could refer to the experience gained in the USA. As is widely known, in the years after the crisis of 1929 we witnessed a proliferation of agencies (to a certain

extent similar to the one faced by the EU) and, consequently, an enhanced recourse to the delegation of powers to these bodies in order to manage – within the framework of the New Deal policy - the problems raised after the crisis. The increased wideness of powers conferred upon agencies led the American Bar Association (hereafter, ABA) to think about a way to limit agency's discretion, making them consequently accountable in the US system. The work of the ABA was transfused into the report of 1936, whose content warned against some risks, such as the problems linked to the combination of judicial, legislative and administrative functions in the agency and the lack of an effective judicial review against the agency action (Marchetti, 2005). The final solution was found out through the enactment of the Administrative procedure act, a statute introducing several procedural guarantees (such as participation, duty to give reason, access, etc.) applicable both to rulemaking and adjudication procedure: in other words, the ABA decided to shift from the classical democratic legitimacy to a procedural one. Granting procedural guarantees is relevant even with regards to the judicial review (Caranta, 2009), because whether these guarantees are violated, it could be possible to challenge the decision or the rule before a Court. It is perhaps worth noting that there is another argument in favor of the enhancement of participation in an attempt of reaching a procedural legitimacy. The art. 11 of the Treaty on European Union (hereafter, TEU) provides that the all the EU institutions should take into account the "voices" of both citizens and representative association, with the result that "*participation is now one of the pillars of EU democracy*" (Mendes, 2011). Hence, it is the Treaty itself that indicates participation as a means to enhance the democratic legitimacy of the entire EU.

5. The shortcomings of the US model

Having briefly mentioned the pros of a model based on procedural legitimacy such as the US one, we should take into account even its shortcomings. In this regard, it should be preliminarily noted that there are some issues to address very carefully. First of all, we should highlight that the attention given to procedural rights may lead to a particularly negative phenomenon such as the regulatory capture, *i.e.* the process by which the agencies become dominated by the companies they are supposed to control and regulate. In fact, the improvement of procedural guarantees for the participation in the administrative rulemaking of the agencies could advantage the business groups more than the civil society, since the former could organize themselves to exert their influence on the agencies, whilst the latter – being not well organized – could not be organized as well. The American political science literature is aware of the existence of this problem (see Shapiro, 2009). With respect

to the EU context, it is sufficient to take into account a field research carried out with reference to open consultations that took place in 2011 (Marxsen, 2015): from the data collected, the Author has deduced that the most active actors in the European field are business groups and, moreover, that this situation is due to the difficulty in bringing together all the voices of the EU citizens.

Another very complex issue to deal with is linked to the so-called phenomenon of ossification: more precisely, there is the risk that the excessive improvement safeguards in the procedures held before Agencies may lead to the ossification of the procedures themselves (Marchetti, 2009). In this regard, from the 90s legal scholarship has underscored that the procedural guarantees developed in the US system provided by statutes of the Congress and executive orders of the President, on the one hand, and, the hard look test developed by the American Courts (see McGarity, 1992), on the other hand, have led to a meaningful increase of the time required to enact a rule following the notice and comment procedure. However, we should draw attention to the fact that the existence of the risk of ossification is still contentious among legal scholars (see Yackee and Yackee, 2010).

Eventually, the problem of ossification have another effect, namely the increased use of soft law measures such as guidance documents instead of legally binding rules, due to the fact that the former do no fall within the scope of application of the procedural guarantees typical of the second acts, so that the use of guidance documents (or even individual decisions: see Marchetti, 2009) could represent a way to circumvent the notice and comment procedure. This problem has been detected in the USA (see e.g. Manning, 1996), even if someone has denied its relevance (Raso, 2010): in any case, it is better not to underestimate this problem and to act *ex ante*, in order to avoid that it could realize. It is worth noting that the same problem has been identified in the EU context, looking the asymmetry between the procedures for the adoption of legally-binding rules and the ones for the enacting of soft law measures (Chiti, 2013).

6. Some issues de Lege ferenda

Bearing in mind the pros and the cons of the US model and without claiming to be exhaustive, we will try to the just mentioned shortcomings taking with regard to the EU context. Actually, it has been noticed that all the agencies have an almost uniform regime of participation, even if a too rudimental one (Chiti, 2013). It is worth noting that the ReNEUAL research group have drawn up the so-called "model rules" for the administrative procedure in the EU: in particular, the Book II of these rules is dedicated to the administrative rulemaking. Unfortunately, the

drafted rules encompassed in Book II related to the administrative rulemaking do not fall within the scope of application of the resolution of the European Parliament (*Resolution 2016/279 of 9 June 2016 on a regulation for an open, efficient and independent European Union administration*). At any rate, considering the *status quo*, we should consider which elements should be enhanced in order to avoid that participation itself can shift from a tool of improving accountability to an instrument aimed at undermining the efficacy and the legitimacy of the Agencies' action. As regards to the problem of regulatory capture, a reform of the system of participation is desirable. More precisely, it could be expected an establishment of rules for every stakeholders' group participating in a procedure, especially regarding representation and democratic requirements, on the one hand, and transparency, on the other hand. Moreover, it could be necessary to hold the consultation of the participants respecting a certain proportion and so avoiding that there could be procedures participated only by interest groups in which the civil society is not represented. Paying more attention to the implementation of the principles of representation and transparency we could shape a model in which civil society organization could play a central role in the European arena (see Obradovic and Alonso Vizcaino, 2006; Smismans, 2014).

As regards ossification, the possible solution could consist of avoiding the provision of trial-type procedure (*i.e.* procedures similar to the US formal adjudication and rulemaking) and introduce a discipline more similar to the informal rulemaking based on the model of "notice and comment", to balance both speediness and legitimacy. In addition, it could be interesting the provision of expedited procedures such as the ones provided in the Model rules of ReNEUAL at article II-6. The *ratio* of this provision is to allow to address exceptional situations in a quick manner. One could think that in this way it is possible to bypass the procedural guarantee, but it is worth noting that "*an act adopted by means of the expedited procedure is valid for a maximum duration of 18 months after its adoption*" (article II-6 Model Rules ReNEUAL). Yet, this norm is important even with regard to the need to prevent EU agencies from adopting norms of soft law instead of hard law, overriding procedural guarantees.

Lastly, another point should be emphasized: as Mendes (2011b) has rightly pointed out, it is necessary a reconsideration of the way to conceive participation in the EU rulemaking, suggesting to converge towards a rights-based approach. This rights-based approach consists, briefly, in conceiving participation as a right that can be wielded and even enforced before a judge. In this way, it is possible to build an ideal bridge between both the procedures (before the Agency and before the Court), so that the participants and the judges may have materials, records, information in

order to, respectively, challenge or verify the tenability an act adopted by an Agency.

In conclusion, insofar as the accountability of the EU Agencies is considered as a target, it is necessary to shape in a new way the right of participation in the administrative rulemaking procedure before Agencies.

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