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TOWARDS A LEGAL FRAMEWORK FOR THE DELEGATION OF POWERS IN THE EU LEGAL SYSTEM

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Contents

Abstract

The thesis aims at analysing the delegation of powers in the EU legal system and at defining the characteristics and limits which embed this legal mechanism in the light of the constitutional principles of this legal system. The research, thus, develops a definition of delegation of powers which, building from the legal traditions of the Member States and considering the peculiarities of the EU institutional framework, is suitable to this legal system and it identifies the forms of delegation emerged in this context, namely the delegation to the European Commission pursuant to Articles 290 and 291 TFEU, to the Council of the EU, to the European Central Bank and to EU agencies. Together with the evolution, the structure and the powers delegated to these institutions and bodies, the legal framework applicable to these different systems of delegation is examined, focusing on the rules and the case law relating to the enabling act, the procedures for the exercise of the delegated powers, the position of the acts in the hierarchy of norms, and their judicial review.

The research identifies, beyond the peculiarities of each delegation system, common principles and dynamics which show how the delegation of powers is bound to abide by a coherent legal framework horizontally applicable to the different forms of delegation. In particular, firstly, the enabling act shall respect the prerogatives of the legislator who is required to establish the essential elements of the matter. Although there are uncertainties in the exact definition of "essential elements" which the recent case law has partially clarified, this principle determines the existence of a reserved domain of the legislator where delegation is not admissible. Secondly, the enabling act has to specify the delegated powers, clearly identifying the limits so that an effective control on the *ultra vires* exercise of the delegation is possible. In this regard, the more precisely the enabling provision is drafted, the more intensive the judicial review on the legality of delegation may be. Thirdly, the issues relating to the legal basis are analysed, remarking how the use of Article 114 TFEU for the delegation to the Commission and the EU agencies is problematic despite the position of the Court. Finally, the absence of a specific *Delegationsnorm* for some forms of delegation is discussed, highlighting the peculiarities of the understanding of the principle of legality in the EU legal system.

While the limits in the enabling act show considerable homogeneity across the forms of delegation, the subsequent exercise of the delegated powers is embedded in different procedures, resulting in the adoption of acts which partially diverge in their form and in their position within the hierarchy of norms. With the exception of the delegation under Article 290 TFEU, the control mechanisms appear not to follow the identified chain of delegation, but to reflect the composite structure of EU institutional framework. In this sense, according to the nature of the delegated powers, they are the expression of the institutional balance between the institutional actors in its Member-States-oriented interpretation.

Finally, the judicial control exercised by the Court is recognised as *condicio sine qua non* for the legality of the exercise of the powers by the delegate.

The analysis of the application of the limits and principles identified in the different forms of delegation, however, revealed a number of issues and a certain patchiness in their actual enforcement, shedding light on the blind spots in the democratic control of these phenomena and on the controversial tendencies emerging in practice. In particular, recent trends emerging in connection to the delegation of powers under Articles 290 and 291 TFEU, the absence of specific control mechanisms and procedures for the delegation of powers to the Council, the specific issues related to the delegation to the European Central Bank, and the problematic constitutional position of the EU agencies lacking a fully-fledged legal basis and clear role in primary law, determine a partial inadequacy of the existing legal framework.

Therefore, in the light of the described issues, the thesis ends with some recommendations for strengthening the existing legal framework, with particular regard to the express provision of the delegation of powers to EU agencies in the text of the Treaties and to the development of a common legal framework for the different forms of delegation which fully safeguard the respect of the rule of law and the institutional balance in the EU legal system.

Sintesi

La tesi mira ad analizzare l'istituto giuridico della delegazione di poteri nell'ordinamento dell'Unione europea ed a definire le caratteristiche e i limiti che tale fenomeno è tenuto a rispettare alla luce dei principi costituzionali di questo ordinamento. Lo studio, pertanto, elabora una definizione di delegazione di poteri che, sulla base delle tradizioni giuridiche degli Stati membri e alla luce delle peculiarità istituzionali dell'UE, sia applicabile a questo ordinamento giuridico e individua le forme di delegazione emerse in questo contesto, in particolare la delegazione a favore della Commissione europea ai sensi degli Articoli 290 e 291 TFUE, del Consiglio dell'UE, della Banca centrale europea e delle agenzie dell'Unione. Oltre ad una disamina dell'evoluzione, struttura e natura dei poteri delegati alle diverse istituzioni e organismi, è esaminato il quadro giuridico applicabile a ciascun sistema di delegazione, analizzando il diritto positivo e la giurisprudenza pertinente in relazione all'atto di delega, alle procedure per l'esercizio dei poteri delegati, alla posizione degli atti nella gerarchia delle fonti e al controllo giurisdizionale degli stessi.

La ricerca riconosce, al di là delle peculiarità attinenti a ciascun sistema di delegazione, principi comuni e dinamiche che dimostrano come la delegazione di poteri sia retta da un quadro giuridico coerente e applicabile orizzontalmente alle diverse forme di delegazione. In particolare, l'atto di delega è tenuto, in primo luogo, a rispettare le prerogative del legislatore che solo è legittimato a stabilire gli elementi essenziali della materia. Nonostante le incertezze sulla precisa definizione di "elementi essenziali" che la recente giurisprudenza ha in parte mitigato, questo principio determina l'esistenza di un ambito riservato al legislatore in cui la delegazione è preclusa. In secondo luogo, l'atto di delega deve stabilire in maniera specifica i poteri delegati, identificando chiaramente i limiti in modo da consentire un controllo effettivo, anche giurisdizionale, sull'esercizio *ultra vires* della delegazione. In questo senso, maggiore è la precisione nella definizione dei poteri delegati, più intenso può essere lo scrutinio della Corte nel giudizio di legittimità della delegazione. In terzo luogo, le problematiche attinenti alla base giuridica sono analizzate, rilevando come l'uso dell'Articolo 114 TFUE per la delegazione di poteri alle Commissione e alle agenzie sia problematico nonostante l'avvallo della Corte. Inoltre, l'assenza di una specifica *Delegationsnorm* per alcune forme di delegazione è discussa, rilevando la peculiarità della concezione di principio di legalità nell'ordinamento giuridico dell'UE.

Mentre l'analisi dei limiti applicabili all'atto di delega dimostra una sostanziale omogeneità, la disamina dei limiti e dei controlli sull'esercizio dei poteri delegati ha fatto emergere la diversità delle procedure, della forma e della collocazione gerarchica degli atti risultanti dalla delegazione. Ad eccezione della delegazione ai sensi dell'Articolo 290 TFUE, i meccanismi di controllo, infatti, non appaiono seguire la catena di delegazione delineata, ma riflettono la struttura composita del quadro istituzionale dell'UE. In questo senso, a seconda della natura dei poteri conferiti, sono espressione dell'equilibrio istituzionale tra le istituzioni coinvolte, nella sua accezione comprendente gli Stati membri. Infine, il controllo

giurisdizionale degli atti derivanti dalla delegazione è riconosciuto come *condicio sine qua non* per la legittimità di questo istituto giuridico.

L'analisi della applicazione dei limiti e principi individuati nelle diverse forme di delegazione, tuttavia, presenta criticità e lacune che sollevano dubbi sull'effettivo rispetto dei principi di legalità e di equilibrio istituzionale. In particolare, le recenti tendenze emerse in relazione all'esercizio dei poteri delegati ai sensi degli Articoli 290 e 291 TFUE, l'assenza di specifici controlli procedurali in relazione alla delegazione al Consiglio, nonché gli specifici problemi relativi alla delegazione alla Banca centrale europea e la problematica posizione delle agenzie prive di una base giuridica e un chiaro ruolo istituzionale in diritto primario, determinano una parziale inadeguatezza del quadro giuridico esistente. Pertanto, alla luce delle criticità emerse, la tesi termina con alcune raccomandazioni per il rafforzamento del quadro giuridico esistente, in particolare con riferimento ad un'espressa previsione della delegazione alle agenzie nel testo del Trattato e allo sviluppo di un quadro giuridico comune alle forme di delegazione che garantisca pienamente il rispetto delle esigenze di democrazia e legittimità nell'ordinamento dell'UE.

Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
BEREC	Body of European Regulators for Electronic Communications
BSE	Bovine spongiform encephalopathy
CAP	Common Agricultural Policy
CdT	Translation Centre for the Bodies of the European Union
CEDEFOP	European Centre for the Development of Vocational Training
CEPOL	European Police College
CFSP	Common Foreign and Security Policy
CFSP	Common Foreign and Security Policy
CHAFEA	Consumers, Health, Agriculture and Food Executive Agency
CPVO	Community Plant Variety Office
CSDP	Common Security and Defence Policy
DG	Directorate General
EACEA	Education, Audiovisual and Culture Executive Agency
EAR	European Agency for Reconstruction
EASA	European Aviation Safety Agency
EASME	Executive Agency for Small and Medium-sized Enterprises
EASO	European Asylum Support Office
EBA	European Banking Authority
EC	European Community
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
EDA	European Defence Agency
EEA	European Environment Agency
EFCA	European Fisheries Control Agency
EFSA	European Food Safety Agency
EFSF	European Financial Stability Facility
EIGE	European Institute for Gender Equality
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Medicines Agency
EMA	European Medicines Agency
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction

EMSA	European Maritime Safety Agency
EMU	European Monetary Union
ENISA	European Network and Information Security Agency
ERA	European Railway Agency
ERCEA	European Research Council Executive Agency
ESAs	European Supervisory Authorities
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ESRB	European Systemic Risk Board
ETF	European Training Foundation
ETF	European Training Foundation
EU	European Union
EUIPO	European Union Intellectual Property Office
EU-LISA	European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
EUMC	European Monitoring Centre on Racism and Xenophobia
EU-OSHA	European Union information agency for occupational safety and health
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
FRA	European Union Agency for Fundamental Rights
Frontex	European Agency for the Management of Operational Cooperation at the External Borders
GSA	European GNSS Supervisory Agency
INEA	Innovation and Networks Executive Agency
JHA	Justice and Home Affairs
MEPs	Members of the European Parliament
OHIM	Office for Harmonization in the Internal Market
OLAF	European Anti-Fraud Office
PJCCM	Police and Judicial Co-operation in Criminal Matters
REA	Research Executive Agency
SARS	Severe Acute Respiratory Syndrome
SCA	Special Committee on Agriculture

SRB	Single Resolution Board
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Introduction

1. The Relevance of the Delegation of Powers

This thesis aims at analysing the legal mechanism of the delegation of powers in the EU legal system from a comprehensive perspective, examining the notion, the structure and the legal implications of delegating powers to different institutional actors of the European Union. The purpose of the analysis is to shed light on the fundamental issues raised by delegation in the EU and to present the applicable principles which could help the understanding and the evolution of the different phenomena within the parameters of a coherent framework, going beyond the fragmentation that currently characterises the delegation of powers.

In the last century, delegation by institutions legally vested with certain powers to other bodies, often not directly elected or accountable (so-called "non-majoritarian" bodies),[1] has become a widespread phenomenon both at the national and at the EU level, playing an increasingly important role in the governance of a significant number of policy domains.[2] Indeed, in most Western political systems, the technological, social and economic transformations put significant pressure on the traditional democratic institutions and procedures, which, due to their slowness and complexity, often appeared ill-equipped to meet the needs of efficient and effective public action.[3] Consequently, more powers have been delegated, for example, from parliaments to governments, or independent agencies have been created to carry out certain administrative tasks. The reasons behind this tendency relate traditionally to the required expertise in highly technical and complex matters which the elected assemblies generally lack,[4] together with the policy stability which the delegated bodies can guarantee over time.[5]

The EU legal system is no exception in relation to this tendency. In particular, at the EU level the progressive expansion of the competences exercised by the Union and the growing complexity of its legislation have stimulated the recourse to the delegation of powers, creating processes and

[1] MAJONE Giandomenico, "Europe's Democratic Deficit: A Question of Standards", 4 *European Law Journal* (1998), p. 15.
[2] THATCHER Mark and STONE SWEET Alec, "Theory and Practice of Delegation to Non-Majoritarian Institutions", 25 *West European Politics* (2002), p. 1.
[3] IANCU Bogdan, *Legislative Delegation. The Erosion of Normative Limits in Modern Constitutionalism*, (Springer-Verlag Berlin Heidelberg, 2012), p. 7.
[4] MAJONE Giandomenico, "The Rise of the Regulatory State in Europe", 17 *West European Politics* No. 3 (1994), pp. 77-101.
[5] VOS Ellen, "EU Agencies and Independence", in RITLENG Dominique (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2015), p. 206.

bodies not envisaged in the original Treaties,[6] but which have become an inescapable reality in the practice of EU administration. Accordingly, academic and public debate has recognised this phenomenon in the remarkable increase of the rule-making activities of the European Commission through the comitology system[7] as well as in the mushrooming of European agencies, which have more than tripled since 2000.[8] Due to the complex issues it raises, the delegation of powers represents one of the most relevant and interesting subjects in the evolution of EU law. The need for delegation and the advantages it entails are widely acknowledged and have also been used to justify the increased use of this mechanism also by the EU Institutions.[9] However, in spite of its undeniable benefits, this issue remains very problematic in the light of some core principles of EU law, such as democracy and the rule of law.

2. The *Problématique* of the Delegation of Powers

The delegation of powers represents a controversial theme in many legal systems, requiring a careful balance between the need for an effective administration and the democratic principles on which the nation-States are based.[10] In State legal systems based on the rule of law, the exercise of rule-making powers needs to have a constitutionally sound legal basis, which situates the rules thus enacted in a hierarchy of legal norms and respects the separation of powers between the branches of the government.[11] According to the traditional principles of representative democracy, rule-making should be carried out through the legislative process by duly elected institutions that are accountable to the people, which is considered the ultimate source of legitimacy and sovereignty.[12] However, the complexity and the urgency of the matters to be regulated often make it difficult to manage them through primary legislation and, therefore, it is necessary to delegate this task to the executive branch of the government.[13]

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[6] LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), p. 23.
[7] *Inter alia*, VOS Ellen, "The Rise of Committees", 3 *European Law Journal* No. 3 (1997), pp. 210-229; BERGSTROM Carl Frederik and RITLENG Dominique (eds.), *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016).
[8] SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The Limits of Agencification in the European Union", 15 German Law Journal No. 7, p. 1225. See, *inter alia*, RITLENG Dominique (ed.), *op. cit.* (2015), p. 6; VOS Ellen, "EU Agencies: Features, Framework and Future", *Maastricht Faculty of Law Working Paper* No. 3 (2013), pp. 1-40.
[9] See European Commission, *The European Governance. A white book*, COM (2001) 428 def./2, *OJ* 12.10.2001 p. 1-29.
[10] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 111.
[11] HARLOW Carol, "The Limping Legitimacy of EU Law-making: A Barrier to Integration", 1 *European Papers* No. 1 (2016), p. 31.
[12] SMISMANS Stijn, *Law, Legitimacy and European Governance. Functional Representation in Social Regulation*, (Oxford University Press, 2004), p. 7.
[13] CRAIG Paul, *op. cit.* (2012), p. 140.

However, the outsourcing of regulatory powers from elected institutions to non-majoritarian entities poses major problems as regards ensuring the legitimacy of the norms thus enacted and controlling the activities of delegated entities. The conferral of such powers to non-majoritarian bodies represents a derogation from the principle of separation of powers and, hence, it should be regarded as an exception from the constituted order, to be admitted under strict conditions.[14] Moreover, the delegation of powers implies the risk that the delegate may exceed the powers delegated[15] and enact rules which are not legitimate nor representative of the people. In order not to upset the constitutional structure of the polity, the exercise of such powers has to be ultimately linked to the decision and the oversight of bodies democratically elected, embedding their action in a precise legal framework. Therefore, limits and controls to be applied in this domain are often developed at the constitutional level and enforced by judicial authorities in a coherent way in order to guarantee the respect of fundamental democratic principles.[16]

Likewise, in the EU legal system, a similar dilemma is acknowledged, and it is even intensified by the peculiar institutional structure and the practices which have been developed for the implementation of EU laws, policies and programmes. The extremely complex decision-making process of the European Union and the *sui generis* legitimacy of its institutions make it more difficult to find a simple chain of delegation and of accountability for the delegated activities,[17] requiring that different aspects be taken into consideration in its assessment.

Firstly, several institutional actors are involved in the conferral of powers to non-majoritarian bodies, each carrying a different source of legitimacy and different interests: from the proposal of the Commission to the voting in the Parliament and in the Council, every element has an impact on shaping the powers and the controls imposed on the delegated bodies.[18] The modalities and the degree of involvement of the different actors may vary and, in addition to the traditional model of delegation, from the legislature to the executive, other forms of delegation are envisaged in the

[14] Ibidem.
[15] HARLOW Carol, *op. cit*. (2016), p. 33.
[16] For a comparative analysis, see IANCU Bogdan, *op. cit.* (2012).
[17] CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution,* (Oxford University Press, 2009), p. 37. With regard to the notion of accountability, we will adopt the notion proposed by Bovens, considering accountability as a "relationship between the actor and a forum, in which the actor has the obligation to explain and justify his or her conduct, the forum can pose questions and pass judgments, and the actor might face the consequence." See BOVENS Mark, "Analysing and Assessing Accountability: A Conceptual Framework", 13 *European Law Journal* No. 4 (2007), p. 447. See also MULGAN Richard, "Accountability: An Ever-expanding Concept?", 78 *Public Administration* (2002), pp. 555-573, cited in ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), p. 2; BUSUIOC Madalina, "Accountability, Control and Independence: The Case of European Agencies", 15 *European Law Journal* No. 5 (2009), p. 607.
[18] DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2007), pp. 789–805.

EU practice.[19] Secondly, in the EU legal system, which is generally considered a *sui generis* system,[20] the existence of a principle of separation of powers is controversial and, even accepting its existence, arguably it takes different forms and modalities from those of the nation-States.[21] Consequently, the definition of the nature of the powers conferred and the distribution of powers between Institutions needs a specific analysis in relation to the balance among institutional actors. Thirdly, the multi-level structure of the European legal system requires that not only the horizontal dimension, relating to the balance between Institutions at the EU level, but also of the vertical one, pertaining to the relationship with the Member States, be considered.[22]

However, despite the peculiarities of the system, the exercise of rule-making powers ultimately has to comply with the principles of democracy and the rule of law, on which the European Union is based according to Article 2 TEU and which the Court defined as "the constitutional charter" of the European Union.[23] In this regard, it is important to recall that Article 10 TEU sets forth the principle of representative democracy as the foundation of the functioning of the Union, whereas according to Article 11 TUE citizens and representative associations, by appropriate means, shall have the opportunity to make known and publicly express their views, creating an open, transparent and regular dialogue with the Institutions. Therefore, in EU primary law, there is a strong call for democratic legitimacy in the exercise of decision-making powers, which also comprises the activities of the delegated bodies. Indeed, in EU law, assuring the democratic legitimacy of acts issued pursuant to a delegation is even more important since, by the operation of the principle of primacy and direct effect, these acts adopted by EU non-majoritarian bodies prevail even in relation to laws enacted by directly elected national parliaments.[24]

Nevertheless, in this respect, the issue of delegation as experienced so far, such as the comitology system or the conferral of powers to autonomous agencies, is far from unproblematic. The lack of accountability and transparency of the committees in charge of the control of the delegated activities of the Commission, composed by not elected national experts, has been strongly

[19] CURTIN Deirdre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", 13 *European Law Journal* No. 4 (2007), p. 528.
[20] See, *inter alia*, CURTIN Deirdre, *op. cit.* (2009), p. 33.
[21] LENAERTS Koen, "Some Reflections on the Separation of Powers in the European Community", 28 *Common Market Law Review* (1991), pp. 11-35; BALLMANN Alexandre, EPSTEIN Albert and O'HALLORAN Sharyn, "Delegation, Comitology and the Separation of Powers in the European Union", 5 *International Organisation* (2002), pp. 551-574; CONWAY Gerard, "Recovering a Separation of Powers in the European Union", 17 *European Law Journal* No. 3 (2011), pp. 304-322; HAIBACH Georg, "Comitology: A Comparative Analysis of the Separation and Delegation of Legislative Powers", 4 *Maastricht Journal of European and Comparative Law* No. 4 (1997), pp. 373-385.
[22] See EVERSON Michelle, MONDA Cosimo, VOS Ellen (eds.), *European Agencies in between Institutions and Member States*, (Wolters Kluwer, 2014).
[23] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, para. 23.
[24] As remarked in relation to the acts adopted by the Commission by DE WITTE Bruno, "Direct Effect, Primacy and the Nature of the Legal Order", in CRAIG Paul and DE BURCA Grainne, *The Evolution of EU Law* (Oxford University Press, 2011), p. 360.

criticised[25] and, in spite of the recent improvements, causes intense debate among scholars.[26] Similarly, the creation of European agencies without a clear legal basis and guarantees in the Treaties[27] leaves open questions about the legality of the conferral of relevant powers to these agencies.[28] With the growing number of agencies and of the powers attributed to these agencies, concern arose about the risk that they could become "uncontrollable centres of arbitrary power"[29] and, increasingly, the need for more control and accountability of these entities was pointed out.[30] Similar concerns were also raised by the EU Institutions, in particular the European Commission, which underlined that "in order to strengthen the legitimacy of Community action, it is important to establish and delimit the responsibilities of the Institutions and agencies",[31] while the European Parliament stressed that the need to establish parliamentary control over these bodies "touches on a core principle of representative democracy, which consists in examining the legality and expediency of the choices made by the executive power."[32] Overall, the delegation of powers to non-majoritarian bodies represented a fertile ground for the "democratic deficit" criticisms of the EU system.[33]

In light of these considerations, it appears to be clear that in EU law the delegation of powers to different institutional actors also raises significant problems in relation to fundamental principles of EU law, requiring an in-depth analysis of each of the delegation phenomena in relation to these principles. In particular, the delegation of unlimited or uncontrolled powers to institutions and bodies can alter the role of the main institutions in the rule-making activities and in the controlling powers,[34] upsetting the balance established in the Treaty and, eventually, the actual democratic

[25] *Inter alia*, PEERS Steve and COSTA Marios, "Accountability for Delegated and Implementing Acts after the Treaty of Lisbon", 18 *European Law Journal* No. 3 (2012), p. 435.
[26] See, *inter alia*, MENDES Joana, "The Making of Delegated and Implementing Acts, Legitimacy beyond Institutional Balance", in BERGSTROM Carl Frederik and RITLENG Dominique (eds.), *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 246.
[27] VOS Ellen, *op. cit.* (2015), p. 212.
[28] See EVERSON Michelle, "European Agencies: Barely Legal?", in EVERSON Michelle, MONDA Cosimo, VOS Ellen (eds.), *European Agencies in between Institutions and Member States*, (Wolters Kluwer, 2014), p. 49.
[29] EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), p. 183.
[30] *Inter alia*, GERARDIN Damien, "The Development of European Regulatory Agencies: Lessons from the American Experience", in GIRARDIN Damien, MUNOZ Rodolphe and PETIT Nicolas, *Regulation through agencies in the EU: a new paradigm of European governance* (Edward Elgar, 2005), p. 231; VOS Ellen, "Reforming the European Commission: What Role to Play for EU Agencies?", 37 *Common Market Law Review* (2000), pp. 1113-1134.
[31] European Commission, *Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies,* COM (2005)59 final, p. 2.
[32] European Parliament, Report on a strategy for the future settlement of the institutional aspects of Regulatory agencies, 2008/2103(INI), available at http://www.europarl.europa.eu (last accessed 20.02.2018). See also European Parliament, Resolution of 21 October 2008 on a strategy for the future settlement of the institutional aspects of Regulatory Agencies, (2008/2103(INI)).
[33] RITLENG Dominique (ed.), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press, 2015), p. 1. See also MAJONE Giandomenico, *op. cit.* (1998), pp. 5-28.
[34] SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), p. 1234.

foundations of the EU secondary non-legislative acts. Arguably, a clear understanding of the constitutional limits and principles to be respected in the delegation of powers to different institutional actors represents an essential element in the assessment of the legitimacy of delegation.

3. The Research Question

Arguably, the different delegation phenomena require a systematic assessment in the light of the limits and conditions established in the legal system, clarifying the common principles from the specific provisions governing the actual conferral and exercise of delegated powers. Previous studies have demonstrated how both the delegation to the European Commission and to EU agencies are motivated by similar needs, such as the need for expertise and policy stability.[35] Yet, the evolution of the rule-making by the European Commission, the Council and the agencies have followed different paths and are regulated by different sources. The Court of Justice, when confronted with this question, has developed independent lines of case law on the legality and limits of the different forms of delegation.[36] While in some cases the limits are clearly enunciated by the Treaties, in other cases the case law implies the limits in a more nuanced way.

However, in spite of the actual divergences between the rules applicable to delegation, it is questionable whether, from a deeper analysis, these rules aim to preserve the same principles, such as the principle of legality and the institutional balance, and thus determine similar requirements. Therefore, it will be investigated whether such similar requirements may be considered to constitute a minimum, yet coherent, regime applicable horizontally to the forms of delegation of powers identified. Clearly, such an endeavour is not to be seen as a sterile *reductio ad unum* of the complexities of the EU institutional framework, but as the recognition of the need for a comprehensive understanding of the delegation mechanism in EU law, in order to provide useful guidance in the evolution of the different delegation phenomena. From this perspective, considering that the transfer of unlimited and uncontrolled powers to institutions and bodies affects the democratic legitimacy and accountability of secondary non-legislative rule-making, it will be analysed what are the constitutional limits and the fundamental principles to be respected for a legitimate delegation of powers in the EU legal system. Therefore, there will be a critical reflection on the role of the delegation of powers in the EU institutional balance and in the

[35] See, *inter alia*, HERITIER Adrienne, MOURY Catherine, BISCHOFF Carina and BERGSTROM Carl Friederik, *Changing Rules of Delegation. A Contest for Power in Comitology,* (Oxford University Press, 2013), p. 10; and CRAIG Paul, *op. cit.* (2012), p. 142.

[36] *In primis*, Case 25/70, *Köster, Berodty & Co. v. Einfuhr und Vorratsstelle fur Getreide und Futtermittel*, judgment of the Court, 17 December 1970; Cases 9 and 10/56*, Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, EU:C:1958:7 and EU:C:1958:8.

composition of the EU executive. In other words, what are the legal conditions for the delegation of powers? What kind of powers can be delegated? How is the discretion of the delegated entities controlled in the exercise of their powers?

The answer to these questions is even more compelling after the entry into force of the Lisbon Treaty, which has reformed the institutional framework profoundly and, especially, the regime for the delegation of powers in the EU legal system. Inspired by the need to establish a clearer separation of powers and hierarchy of norms in the EU, the Lisbon Treaty has introduced a categorisation of legal acts, which was meant to simplify the legal framework for secondary rule-making. However, almost ten years after its entry into force, the distinction between the new categories of delegated and implementing acts remains controversial. Therefore, the significance and the actual application of this reform is still open to debate since many issues remain unsettled and certain relevant phenomena still lack a clear constitutionalisation in primary law. From the analysis and the comparison of the different forms of delegation and the specific problems that might arise in terms of democratic legitimacy, a more general picture may emerge, under which each of them can find a clearer definition and meaning, helping to overcome the fragmentation of the EU secondary non-legislative rule-making and of the actions by the EU executive in general.[37]

4. The State of the Art

There is extensive literature on the different forms of delegation, whose historical development, judicial assessment and accountability issues have been analysed accurately. Nevertheless, the bulk of the studies currently available tends to focus on one particular phenomenon of delegation, such as the delegation to the European Commission or to the agencies and tends to compare them only through short references,[38] without an exhaustive description of analogies and differences. Therefore, a unitary concept and framework for the delegation of powers in general has not been developed properly at the EU level. Indeed, there are some relevant exceptions of authors attempting to carry out a comprehensive analysis of the issue before the adoption of the Lisbon Treaty.[39] However, a clear understanding of the dynamics and principles of the delegation of

[37] On the need of a fundamental rethinking of the concept of delegation embracing the different phenomena, see also VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* No. 1 (2014), p. 44.
[38] Such as, *inter alia*, in HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), pp. 482-505; CHAMON Merijn, "Clarifying the Divide between Delegated and Implementing Acts?", 42 *Legal Issues of Economic Integration* No. 2 (2015), pp. 175-190; BRADLEY Kieran St. C., "The European Parliament and Comitology: On the Road to Nowhere?", 3 *European Law Journal* No. 3 (1997), pp. 230-254.
[39] See LENAERTS Koen, *op. cit.* (1993); GAUTIER Yves, *La délégation en droit communautaire,* PhD thesis (Université de Strasbourg, 1995), who however excludes EU agencies from the analysis.

powers after the introduction of the Lisbon Treaty is lacking, since the evolution and limits of the different delegation phenomena have been generally studied in a separate and fragmented way.[40]

Moreover, the substantial modifications to the EU institutional structure and to the delegation system brought about by the Lisbon Treaty need to be assessed in the light of the subsequent application by the institutions and, especially, by the Court of Justice. In this respect, considering the issues and dynamics that emerged in the recent practice, the implications for the delegation of powers to the Commission and the Council in this context remain very controversial. As also recognised in the 2016 State of the Union's speech, assessing the democratic legitimacy of existing procedures for the adoption of delegated and implementing acts is still a priority for the EU.[41] At the same time, the developments in the case law concerning the powers conferred on the agencies, especially the *Short Selling* judgment, and their recent empowerment in sensitive and highly contentious domains where the EU is facing the most pressing challenges, such as the financial and the migration crises, call for a novel assessment of the topic. In parallel, again in relation to the financial crisis, new forms of delegation emerged, in particular in favour of the European Central Bank, calling for an analysis which embraces the delegation phenomena in EU law more comprehensively.

Building from the existing literature and having particular regard for the case law of the Court of Justice,[42] the research will reflect on the criteria and principles limiting the discretion and guiding the exercise of the delegated powers in all these various delegation phenomena. Therefore, the delegation of powers to the Commission, to the Council, to the ECB and to EU agencies will be analysed, pointing out the common principles beyond the specific provisions. Indeed, such a general legal framework for the analysis of the legality of the delegation of powers would contribute positively to the debate about the democratic legitimacy of secondary rule-making and, ultimately, about the democratic foundations of the EU legal system.

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[40] With the exception of SCHUTZE Robert, "Delegated Legislation in the (new) European Union: A Constitutional Analysis", 74 *The Modern Law Review* No. 5 (2011), pp. 661-693; SCHUTZE Robert, "Constitutional Limits to Delegated Powers", in ANTONIADIS Antonis, SCHUTZE Robert and SPAVENTA Eleanor, *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart Publishing, 2011a), pp. 23-49. These reflections, however, refer to the first years of application of the Lisbon reform.

[41] See JUNKER Jean-Claude, *State of the Union. Letter of Intent to President Martin Schulz and to Prime Minister Robert Fico*, 14 September 2016, p. 31. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123 of 12.5.2013, pp. 1-14.

[42] On the relevance of case law in relation to the limits to the delegation of powers see IANCU Bogdan, *op. cit.* (2012), p. 182

5. Methodology and Approach

This research is based primarily on the doctrinal approach, which prioritises description of and the systematisation of the legal issues at stake. Indeed, since this thesis is intended as a legal research, the issues raised by the delegation of powers will be considered mainly "from inside the classical parameters of constitutionalism",[43] thus approaching the legality of the phenomenon from a constitutional perspective. Therefore, the focus will be especially on the positive legal provisions relating to the delegation of powers in primary and secondary law, on the case law developed by the Court of Justice of the European Union and on the legal principles underpinning EU law, with particular regard for its institutional dimension.

It is undeniable, however, that the contribution of political science on the topic of the delegation of powers had a very significant impact on the understanding of the delegation of powers in the European Union. From the works analysing the phenomenon as a principal-agent relationship[44] to the elaboration of the deliberative supranationalism theory by Joerges and Neyer,[45] these studies have unveiled the complexity and the interrelations characterising the delegation of powers, whose implications and impact on the day-to-day functioning of the European Union have been explored extensively.[46] In particular, the transmission belt model of delegation, developed in the context of public administration studies,[47] is deemed to have heavily shaped the interpretation of delegation in the EU, especially in the reform of non-legislative acts brought by the Lisbon Treaty.[48]

Moreover, in relation to the legitimacy and accountability of the delegated bodies, we cannot disregard the value of the analysis conducted on the social acceptability of the delegated norms

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[43] Being a legal mechanism created exactly for accommodating constitutional instances, this approach remains the most suitable for the delegation of powers, see SCHUTZE Robert, *op. cit.* (2011), p. 692. *Contra* WEILER Joseph H.H., "Comitology's Revolution - Infranationalism, Constitutionalism and Democracy" in JOERGES Christian and VOS Ellen, *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999), p. 339.

[44] *Inter alia*, THATCHER Mark and STONE SWEET Alec, *op. cit.* (2002), pp. 1-22; POLLACK Mark A., *The Engines of European Integration* (Oxford University Press, 2003); DEHOUSSE Renaud, *op. cit.* (2007), pp. 789-805.

[45] JOERGES Christian and NEYER Jürgen, "From Intergovernamental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", 3 *European Law Journal* No. 3 (1997), pp. 273-299; JOERGES Christian, "'Good Governance' Through Comitology?" in JOERGES Christian and VOS Ellen, *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999).

[46] *Inter alia*, HERITIER Adrienne, MOURY Catherine, BISCHOFF Carina and BERGSTROM Carl Friederik, *op. cit.* (2013); BLOM-HANSEN Jens, "Interests, Instruments and Institutional Preferences in the EU Comitology System: The 2006 Comitology Reform", 17 *European Law Journal* (2011), pp. 344-365; CHRISTIANSEN Thomas and DOBBELS Mathias, "Delegated Powers and Inter-Institutional Relations in the EU before and after the Lisbon Treaty", *paper presented at the Annual UACES Conference*, Passau, 3-5 September 2012.

[47] STEWART Richard, "The Reformation of American Administrative Law" 80 *Harvard Law Review* (1975), pp. 1667-1711.

[48] VAN GESTEL Rob, *op. cit.* (2014), p. 54.

and the effectiveness of the activities of the non-majoritarian bodies.[49] In this regard, it is acknowledged that, building on the works of Weber[50] and Habermans,[51] the present literature recognises two aspects in the notion of legitimacy.[52] On the one hand, a political system can enjoy an *input legitimacy* where the citizens are sufficiently involved in the rule-making,[53] whose result is perceived as reflecting their will when the outcome is the result of recognised procedures and bodies.[54] In this case, the participation of the citizens can take the form of direct involvement or elective representation. Recent studies have also shone light on the contribution of transparency and access to information in enhancing input legitimacy.[55] On the other hand, *output legitimacy* refers to the performance and efficiency of the results of the rule-making activities, satisfying the expectations of the citizens due to their inherent quality.[56] Remarkably, the reasons for delegating powers to non-majoritarian bodies are predominantly driven by output considerations, pointing to the efficiency and effectiveness of their action.[57]

However, the debate on the strength and weaknesses of the decision of delegating powers from a socio-political perspective is beyond the scope of this thesis and the related theories will be discussed only as far as they contribute to the legal assessment.[58] In other words, the legitimacy of the delegation of powers will be analysed primarily from an input perspective, focusing on the formal or procedural aspects and leaving the social or economic implications of the delegation of powers to the assessment of other disciplines' experts. Therefore, the delegation of powers in the

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[49] *Inter alia*, BLOM-HANSEN Jens, "Legislative Control of Powers Delegated to the Executive: The Case of the EU", 26 *Governance: An International Journal of Policy, Administration and Institutions* No. 3 (2013), pp. 425-448, JOERGES Christian, *op. cit.* (1999); HERITIER Adrienne, "Policy-Making by Subterfuge: Interest Accommodation, Innovation and Substitute Democratic Legitimation in Europe – Perspectives from Distinctive Policy Areas", 4 *Journal of European Public Policy* No. 2, pp. 171-189.

[50] WEBER Max, "Die drei reinen Typen der legitimen Herrschaft", 187 *Preußische Jahrbucher* (1922) p. 1, cited in EHNERT Tanja, "The Legitimacy of New Risk Governance – A Critical Review in Light of the EU's Approach to Nanotechnologies in Food", 21 *European Law Journal* No. 1 (2015), p. 49

[51] HABERMANS J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996), p. 73.

[52] SCHARPF Fritz, *Governing in Europe: Effective and Democratic?,* (Oxford University Press, 1999). Similarly, borrowing from the American debate, this distinction has also been labelled under the notions of "formal" or "procedural" legitimacy, i.e. when the rule-making process "can be formally/procedurally recognised as an expression of self-governance", in contrast to the idea of "substantive" legitimacy, which depends on result-related features such as the expertise and problem solving skills of the rule-maker. See MAJONE Giandomenico, *op. cit.* (1998), pp. 20-21; VERHOEVEN Amaryllis, "Democratic Life in the European Union. According to Its Constitution" in CURTIN Deirdre and WESSELS Ramses (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005), p. 46.

[53] SMISMANS Stijn, *op. cit.* (2004), p. 73.

[54] EHNERT Tanja, *op. cit.* (2015), p. 50.

[55] DYRBERG Peter, "Accountability and Legitimacy: What is the Contribution of Transparency?", in ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), p. 82.

[56] S. SMISMANS, *op. cit.* (2004), p. 73.

[57] THATCHER Mark and STONE SWEET Alec, *op. cit.* (2002), p. 18.

[58] See, for instance, BERGSTROM Carl-Fredrik, FARRELL Henry and HERITIER Adrienne, "Legislate or delegate? Bargaining over Implementation and Legislative Authority in the European Union", 30 *West European Politics* (2007), pp. 338-366.

EU legal system will be considered, first and foremost, in its role of "legitimation from the top" of the rule-making activities of non-majoritarian bodies, which can then be complemented by the "legitimation from the bottom"that the citizen participation may provide.[59] From this perspective, thus, the delegated authority enjoys democratic legitimacy as far as it exercises its powers according to the mandate and under the control of democratically legitimised authorities. In the light of this, the formal and procedural requirements developed to limit and oversee the exercise of delegated powers represent an essential aspect of the legitimacy of the delegation of powers, as well as its compliance with the constitutional principles on which the legal system is founded.

6. The Structure of the Thesis

In order to carry out a systematic analysis of the legal framework applicable to the delegation of powers in the EU legal system, this thesis will be developed through an integrated structure, looking at each of the single phenomena of delegation in connection with and as part of a more general discourse.

Therefore, the first chapter is devoted to defining the notion of delegation of powers. Building on the constitutional traditions of State legal systems and on the reflections developed in the academic literature in those contexts, the meaning and implications of the notion will be underlined. For its inherent connection with the constitutional order of competences of a certain legal system, the analysis of the notion of delegation will also unveil the institutional and conceptual framework, as well as the issues it raises in relation to traditional constitutional principles, such as the separation of powers and the hierarchy of norms. From this, reflecting on the peculiarities of the EU institutional architecture, a definition of delegation of powers suitable for the EU legal system will be proposed and will be positioned within the fundamental principles of EU law, in particular the rule of law and the institutional balance (chapter 1).

Subsequently, the different forms of delegation at the EU level will be singled out, describing the historical evolution, the powers and the structure of each. Starting with the delegation to the Commission from the origins of the comitology system to the problems posed by the Lisbon reform, the delegation to the Council will then be considered (chapter 2). Moreover, the creation and the exponential increase in the powers delegated to EU agencies will be analysed, as well as the recent empowerment of the European Central Bank within the context of the "Banking Union" (chapter 3). In this analysis of the peculiarities of each form of delegation, the specific problems -

[59] CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, 2018), p. 718.

which have emerged in the different delegation systems and, in part, are still unsettled - will be addressed, paving the way for a more detailed analysis of their conditions and limits.

Thus, the analysis of the legality of the delegation will be undertaken, distinguishing between the requirements and limits established in the act delegating the powers to the institution or agency, as elaborated on by the case law or set forth in the primary and secondary law (chapter 4). The legality of the exercise of the delegated powers will then be examined, dwelling upon the procedures for their adoption and the control exercised by other institutional actors over their content (chapter 5), as well as upon the acts adopted on the basis of such a delegation, considering their characteristics, their position in the hierarchy of norms and their judicial review (chapter 6).

Finally, some conclusions will be drawn from our analysis, focusing in particular on the issues raised in the research on a common legal framework for the delegation of powers in EU law and on the need for a reform of the current legal framework in order to provide fully-fledged legitimacy to the delegation of powers, especially with regard to EU agencies.

Chapter 1

Defining Delegation of Powers: From State-Based Models to an EU Notion

1. Introduction

For a comprehensive analysis of delegation of powers in the EU legal system, it is of paramount importance to provide for a clear definition of the object of analysis. Hence, the notion of "delegation of powers" needs to be considered carefully in order to determine its exact meaning and the phenomena it embraces. Therefore, this definitional clarification is essential not only to limit the scope of the present analysis but also in order to avoid confusion with other phenomena which are sometimes described imprecisely as delegation in the EU or national legal texts.

This effort to provide a precise definition is even more necessary in relation to EU law, since the entry into force of the Lisbon Treaty introduces the notion of delegated acts explicitly,[60] but it does not provide a definition of delegation. Reference to the notion of delegation is, however, not new at all, as it is being used as a matter of course in practice in the EU institutions since the very beginning of the European Communities, especially in the case law of the Court of Justice. In particular, the term "delegation" is commonly used in a variety of domains, characterising under this notion a wide array of legal relationships: from the relationships between EU institutions[61] to the internal organisation of the Commission's administration,[62] as well as the assignment of a right in private law.[63] Considering that such polysemy of the term may reflect the vacuity of the concept, one might be inclined to argue that delegation is nothing more than a generic term to refer to the transfer or transition of a right or an office from one person to another.[64] For the purpose of this research, however, only the usages of this expression in the field of public law will be considered.

[60] Article 290 TFEU.
[61] *In primis*, Case 25/70, *Köster, Berodty & Co. v Einfuhr und Vorratsstelle fur Getreide und Futtermittel,* EU:C:1970:115; Cases 9 and 10/56, *Meroni Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:8.
[62] See, for instance, Case F-132/14 *CH v Commission*, EU:F:2015:115, para. 99; Case 5/85 *AKZO Chemie v Commission*, EU:C:1986:328.
[63] See, for instance, Case C-534/15 *Pavel Dumitraş, Mioara Dumitraş v BRD Groupe Société Générale*, EU:C:2016:700, para. 16; Case C-215/15 *Vasilka Ivanova Gogova v Ilia Dimitrov Iliev*, EU:C:2015:710.
[64] See GARNER Bryon A., *Black's Law Dictionary*, 5th ed. (Thomson West, 2016).

Even with limiting the scope of the analysis to this particular field, in EU law literature there is no consensus on a univocal notion of delegation.[65]

However, a review of the extensive literature which has analysed this legal institution in relation to the national legal systems shows that, at least in some of the literature, delegation represents a particular notion in law, reflecting some constitutional features of those systems.[66] It might be useful, thus, to clarify its meaning in this context. Building from the conceptualisation developed at the national level, it will be possible to reach a more precise definition suitable for the EU legal system as well, thus shaping the scope of the research. In particular, the analysis will focus on the notion of delegation developed in Western legal systems by the relevant literature. In this regard, particularly interesting reflections have been elaborated by Italian and German scholars who studied the interplay between this legal institution and the traditional democratic principles underpinning the constitutional structure of the nation States. Therefore, for its relevance and for its influence in the understanding of the delegation of powers in the EU legal system, the study will necessarily refer to those sources in a substantial part. The analysis, moreover, will be integrated with references to other legal systems and to comparative law studies, when necessary. Without demanding completeness, an overview of the notion of delegation, its role in the constitutional structure of nation States and its implications for certain fundamental principles will be provided in order to unveil the issues raised by this legal institution from a constitutional perspective.

Nevertheless, it is important to note that, arguably, it is not possible - nor advisable - to apply *a priori* the public-law notions and the corresponding legal schemes elaborated for State constitutional systems to the EU legal system.[67] This is even more appropriate in this case, as the traditional notion of delegation of powers is strongly linked to a specific idea of State and State

[65] See GAUTIER Yves, *La délégation en droit communautaire*, PhD Thesis (Strasbourg, 1995), p. 4. Compare, for instance, the definition proposed by GAUTIER at p. 49 ("la délégation est un acte unilatéral par lequel, une personne, le délégant, transfère à une autre un pouvoir ou une signature, étant entendu que son propre titre de compétence est maintenu.", in particular "la délégation de pouvoirs est l'acte par lequel le délégant, titulaire de la compétence, se dessaisit d'une parcelle de ses pouvoirs au profit du délégataire") to the one proposed in LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), p. 24 ("any transfer of authority by one branch of government in which such authority is vested to some other branch or administrative agency").

[66] See, *inter alia*, TRIEPEL Heinrich, *Delegation und Mandat in öffentlichen Recht* (Stutgard und Berlin, 1952); IANCU Bogdan, *Legislative Delegation. The Erosion of Normative Limits in Modern Constitutionalism*, (Springer-Verlag Berlin Heidelberg, 2012); ALBERTI Anna, *La delegazione legislativa tra inquadramenti dogmatici e svolgimenti nella prassi* (Giappichelli, 2015); CERVATI Angelo Antonio, *La delega legislativa* (Giuffrè editore, 1972); LIGNOLA Enzo, *La Delegazione Legislativa* (Giuffrè, 1956); MAGARO' Patrizia, *Delega legislativa e dialettica politico-istituzionale* (Giappichelli, 2003); CARLASSARE Lorenza, *Regolamenti dell'esecutivo e principio di legalità*, (Cedam, 1966).

[67] CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 233; SCHINDLER Peter, *Delegation von Zuständigkeiten in der Europäischen Gemeinschaft* (Nomos, 1972), pp. 37-60.

action.[68] Therefore, the description of the domestic definition of delegation will necessarily bring us to reflect upon its relationship with some fundamental aspects of constitutional law, such as the separation of powers and the hierarchy of norms. In applying such insights to an EU concept of delegation, the extent to which such principles are applicable in EU law and the peculiar characteristics of this legal system will be highlighted, thus drawing a first picture of the EU legal framework for the delegation of powers.

2. What is in a Name? A Short History of the Notion of Delegation

Considering the development of the notion from an historical perspective, since the very beginning, delegation appears to have represented one of the mechanisms whereby a legal position is transferred from one person to another. In this generic sense of "transferring", reference to the notion of delegation can be found already in the *Corpus Iuris Civilis,* where the words *delegare* and *delegatus* are rarely used.[69] As a result of the elaboration of the notion by legal scholars in medieval and modern times,[70] the concept has acquired a more precise - and differentiated - meaning in private and public law. On the one hand, with reference to private law, the notion of delegation was drastically reduced to indicate the assignment of a debt to another person and, in civil law systems, specifically a species of novation.[71] On the other hand, with reference to public law, the term appears to have maintained a broader meaning, related to the grant of authority to a person to act on behalf of one or more others.[72] It has been noted that, since ancient times, delegation represented a general legal institution of public law, but its meaning has

[68] IANCU Bogdan, *op. cit.* (2012), p. 12.

[69] Dig. Lib. I Tit. XXI; Dig. Lib. II Tit. XIV 40; Dig. Lib. IV Tit. IlI. However, any attempt to assimilate the delegation in public Roman law and Italian public law shall be avoided in light of the differences in the conception of the legal institution and of the structure of the public power, see FRANCHINI Flaminio, *La delegazione amministrativa* (Giuffré, 1950), p. 13, citing DE RUGGIERO, "Intorno al concetto della 'delegatio' in diritto romano", *Rivista italiana di scienza giuridica* (1889), p. 3; *contra* GIRIODI, "I pubblici uffici e la gerarchia amministrativa", in ORLANDO I. (ed.), *Primo trattato completo di diritto amministrativo* (Milano, 1900), p. 269.

[70] DUFF W. Patrick and WHITESIDE E. Horace, "*Delegata Potestas Non Potest Delegari*. A Maxim of American Constitutional Law", 14 *Cornell Law Review* No. 2 (1929), pp. 168-173. The authors notice interestingly that the *pandectae*, traditionally indicated as the source of the maxim *delegata potestas non potest delegari* (Dig. Lib. XXI Tit. V; Dig. 2.1.5; C. 3.15), which has heavily influenced the evolution of the legal institution of delegation especially in US, actually use the term "mandate" (*mandatam iurisdictionem*). See DUFF W. Patrick and WHITESIDE E. Horace, *op. cit.* (1929), p. 171.

[71] GARNER Bryon A., *Black's Law Dictionary, op. cit.* (2016), *sub* "delegation": "A species of novation which consists in the change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead to the creditor, or to the person appointed by him so that the first debtor is acquitted and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor". See, for instance, Articles 1268 et seq. of Italian Civil Code.

[72] LAW Jonathan, *A Dictionary of Law,* 8th ed. (Oxford University Press, 2015).

changed significantly throughout history, in parallel with modifications as to how the notions of public power and legislation were understood.[73]

In this regard, while in the medieval legal panorama the notion of delegation did not take on great relevance,[74] with the rise of the legal systems based on the monocratic principle,[75] both in the case of monarchies and of republics, the notion of delegation became an essential concept of public law in the sense it has nowadays.[76] Delegation, thus, became a fundamental legal mechanism for the organisation and management of public power, which was vested centrally in the sovereign and, then, was distributed among the different authorities organised in an administrative structure.[77] It provided the formal justification for the exercise by the administration of certain powers nominally vested in the sovereign. To this end, delegation was identified with an act of dismissing a power from the delegator, on the one hand, corresponding to an attribution of power to the delegate, on the other hand.[78]

In this sense, it was differentiated from other legal institutions, such as the *mandate* and the *authorisation*. Firstly, with regard to the *mandate*,[79] in which traditionally the agent does not have an own competence but exercises the power of the principal in his/her name and on his/her behalf, the delegation is characterised by the exercise of the power by the delegate in his/her own name.[80] Secondly, with regard to the *authorisation*, the difference lies in the original holder of the competence: while in the case of delegation the delegator is the holder of the power, in the case of authorisation the power is assumed to be already in the hands of the authorised person and the authorisation only has the effect of removing a hindrance or obstacle to the exercise of such power.[81] In general, in the case of delegation, the delegate receives a power which is not pertaining to him/her, neither actually nor potentially, but which finds its origin in the very act of

[73] CERVATI Angelo Antonio, *La delega legislativa* (Giuffrè, 1972), p. 1.
[74] Ibidem, p. 2, citing the studies of TRIEPEL Heinrich, *op. cit.* (1942). See also BORASI Fabrizio and CONFRANCESCO Giovanni, *Separazione dei Poteri e Cultura dei Diritti* (Giappichelli, 2014), p. 17.
[75] Monocratic principle is meant here as the principle according to which the public power is conceived as deriving from a unitary source, being the will of the Sovereign or of the people. See CERVATI Angelo Antonio, *op. cit.* (1972), p. 2.
[76] CERVATI Angelo Antonio, *op. cit*. (1972), p. 2.
[77] FRANCHINI Flaminio, *op. cit*. (1950), p. 26.
[78] CERVATI Angelo Antonio, *op. cit*. (1972), p. 2.
[79] Referring to civil-law legal systems, the term *mandate* is preferred here to the Anglo-Saxon *agency*, which has a broader meaning. In particular, we are referring to the legal institution which in Italian law is called *mandato con rappresentanza,* which is a contract whereby a party commits to act on behalf and in the name of the other party pursuant to a *procura* conferred by the former. For a discussion on the difference between *delegation* and *mandat* in German law, see TRIEPEL Heinrich, *op. cit.* (1942).
[80] CERVATI Angelo Antonio, *op. cit*. (1972), p. 3. With reference to the administrative delegation, see also FAZIO Giuseppe, *La delega amministrativa e i rapporti di delegazione* (Giuffré, 1964), pp. 3-22.
[81] See ALBERTI Anna, *op. cit.* (2015), p. 4; *contra* FRANCHINI Flaminio, *La delegazione amministrativa* (Giuffrè, 1950), (but this position is admittedly not applicable to legislative delegation). With reference to the administrative delegation, see also FAZIO Giuseppe, (1964), pp. 23-28.

delegation.[82] This entails, furthermore, that, pursuant to the principle *"nemo plus iuris in alium transferre potest quam ipse habet"* (literally meaning "no one can transfer to another person more rights than he/she has"),[83] the delegate cannot be entrusted with powers which are not in the delegator's competence. It is noteworthy that, as we will see, this principle, common to the notion of delegation in many legal systems, has also been upheld by the Court of Justice when first confronted with a case of delegation.[84]

3. Different Forms of Delegation in Public Law

Against this historical background, different definitions of delegation in public law were proposed, each giving value to different aspects of this legal institution. Thus, while some authors described it as a "movement" or a "transferral" of competence from one person to another,[85] others insisted on the fact that the authority or function has to remain vested with the delegator.[86] Conversely, a number of scholars, for different reasons, reached the conclusion that it is impossible to distinguish the delegation from any other form of attribution of competence.[87] What is generally agreed upon is that the delegation implies an attribution of a power to a certain natural or legal person by virtue of an act of another natural or legal person who normally holds a broader competence in whose scope the delegated power is comprised.[88]

From the analysis conducted, it appears that, if it is possible to identify *prima facie* a concept of *delegation* in public law, it is equally relevant to recognise that there are different categories of delegation.[89] In Italian legal literature, for instance, authors have made a fundamental distinction between the delegation of powers which occurs within the scope of activities of the public

[82] TOSATO Egidio, *Le leggi di delegazione* (Cedam, 1932), p. 7.
[83] See Dig. 50.17.54.
[84] See Cases 9 and 10/56, *Meroni*, *cit*. See Chapter 4, para. 4.2.1.
[85] Cfr. TRIEPEL Heinrich, *op. cit.* (1942), *passim.* However, this image shall not be understood literally as a divestment of the competence by the delegator since the author argues for a creation of new powers through delegation, as described *infra*. *Contra* the idea of actual transferral pf powers in case of delegation, see also KUHNE F., *Das Problem der Delegation und Subdelegation von Kompetenzen der Staatsorgane*, (Aarau, 1941), pp. 10-12; BARTHOLINI S. "Delegazione legislativa in materia di amnistia e indulto", *Rivista trimestrale di diritto pubblico* (1955), p. 503.
[86] LIGNOLA Enzo, *op. cit.* (1956), p. 1.
[87] See, *inter alia*, PALADIN Livio, *Decreto Legislativo*, in *Novissimo Digesto Italiano*, vol. V (Torino, 1960), p. 294; KELSEN Hans, *Reine Rechtslehre* (Wien, 1960), p. 332: The Pure Theory of Law uses delegation as a synonym of attribution of competence. See CERVATI Angelo Antonio, *op. cit.* (1972), p. 5. Conversely, French literature has elaborated a cardinal distinction between the delegation of powers and the attribution of powers. See ROSS Alf, "Delegation of Power. Meaning and Validity of the maxim *delegata potestas non potest delegare*", 7 *American Journal of Comparative Law* (1958), p. 13.
[88] CERVATI Angelo Antonio, *op. cit.* (1972), p. 4.
[89] GAUTIER Yves, *op. cit.* (1995), p. 49.

Administration, the so-called *administrative* delegation,[90] and the delegation of powers generally vested with the legislative branch of the government to the benefit of the Government, i.e. the *legislative* delegation. Both forms of delegation have been analysed extensively in specific studies,[91] which have pointed out the difference in the two notions and in the principles applying to them.

In this regard, *administrative* delegation has been described as the mechanism according to which an organ[92] of the public administration, principally vested of a competence in a certain field, unilaterally allows another organ to exercise the same competence.[93] Consequently, the delegate, entrusted with the authority to take the necessary actions in the field concerned, carries out the activities which are ordinarily the competence of the delegator.[94] Thus, for instance, a Minister can delegate certain powers to his/her undersecretary[95] or the manager of a public body can delegate some tasks to other civil servants.[96] The reason for this phenomenon lies in the inherent tension between the general aims the public administration has to pursue, which may vary in time, and the pre-determined distribution of offices and powers among organs. In order to attain the determined aims of general interest, this legal institution provides for some flexibility in the distribution of competences of organs and bodies of the public administration, allowing a smooth continuation of its activities.[97] This observation highlights the essential character of administrative delegation as *organisational* instrument for the public administration, solving a pragmatic problem of organisation within a branch of the government.[98] At the same time, the administrative delegation has been described as an instrument of decentralisation of powers, which is thus distributed among different organs or bodies.[99]

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[90] This *prima facie* definition is proposed by FAZIO Giuseppe, op. cit. (1964), p. 27. A similar differentiation is not unknown in other legal systems. For the categories of French law, see GAUTIER Yves, *op. cit*. (1995), p. 44.

[91] On the administrative delegation, see FRANCHINI Flaminio, *op. cit*. (1950); FAZIO Giuseppe, op. cit. (1964); ROVERSI-MONACO Fabio, *La delegazione amministrativa nel quadro dell'ordinamento regionale* (Giuffré, 1970); SACCO Piero, *Il profilo della delegazione amministrativa* (Giuffré, 1970). On the legislative delegation, see TOSATO Egidio, *op. cit. (1932)*; LIGNOLA Enzo, *op. cit.* (1956); CERVATI Angelo Antonio, *op. cit.* (1972); ALBERTI Anna, *op. cit.* (2015).

[92] For a discussion of the notion of "*organo"* in Italian administrative law, see CASETTA Elio, *Manuale di diritto amministrativo,* XI ed. (Giuffrè editore, 2009), p. 130 or CASSESE Sabino, *Istitutioni di diritto amministrativo* (Giuffré, 2015), p. 87.

[93] CASETTA Elio, *op. cit.* (2009), p. 161. This delegation can occur between organs of the same body (*delegazione interorganica*) or between organs of different bodies (*delegazione intersoggettiva*), see ROVERSI-MONACO Fabio, *La delegazione amministrativa nel quadro dell'ordinamento regionale* (Giuffré, 1970), p. 16.

[94] SACCO Piero, *op. cit.* (1970), p. 11.

[95] Article 10 L. 400/1988.

[96] For instance, Article 17 (1-bis), Decreto legislativo No. 165/2001.

[97] FRANCHINI Flaminio, *op. cit.* (1950), pp. 15-19.

[98] SACCO Piero, *op. cit.* (1970), p. 18; FRANCHINI Flaminio, *op. cit.* (1950), p. 21.

[99] See ROVERSI-MONACO Fabio*, op. cit. (1970)*, p. 57; *contra* FRANCHINI Flaminio, *op. cit.* (1950), p. 26. In this regard, it is interesting to note that the notion of delegation was particularly debated in the context of

In administrative law, the phenomenon of the administrative delegation has been distinguished from the so-called delegation of signature, whereby the delegate is attributed only the power to sign an act for which the delegator remains liable.[100] Here, such as in the case of hierarchical repartition of competences within an organ,[101] there is no transferral of competence between the delegator and the delegate. Therefore, it is considered not problematic in the light of the principle of legality which conversely, as we will see, raises significant questions in relation to other forms of delegation of powers.[102]

Although some common features may be identified, the notion of administrative delegation shall be distinguished from the notion of *legislative* delegation, and the schemes elaborated by administrative law scholars cannot automatically be applied to it.[103] The difference in the two phenomena lies not only in the fact that the institutions involved in the legislative delegation are entrusted with certain powers directly by the Constitution,[104] but also in the fact that the nature of the powers conferred differ greatly.[105] Indeed, while in administrative delegation the delegate is attributed powers of the same kind as the ones it already has (and, in this sense, the administrative delegation is often described as an extension of existing powers), in the case of legislative delegation the Government is conferred powers of a different nature, which according to the separation-of-powers doctrine do not qualitatively pertain to its ordinary competence.[106]

In this sense, although the distinction between executive and legislative powers is blurred to a certain extent,[107] from a constitutional perspective the attribution to the Government of rule-making powers has more relevant implications determined by the nature of the power attributed, *i.e.* the power to create rules generally applicable to the citizens.[108] Therefore, as we will see, this

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the distribution of powers between the State and the Regions *ex* L. 59/1997. Although the text of the law described it as a "delegation of functions" (*delega di funzioni*), eminent scholars denied that this stable transferal of powers to regional authorities constituted technically delegation. The debate has now become moot as the reform of 2001 defined the competences of the Regions in the form of a "conferral" in the constitutional text. CASETTA Elio, *op. cit*. (2009), p. 93.

[100] In relation to the delegation of signature in Italian law, see CASETTA Elio, *op. cit.* (2009), p. 162. For a description of the notion of delegation of signature in French law and a comparison with the German *mandat* (as distinguished from delegation by TRIEPEL), see GAUTIER Yves, *op. cit.* (1995), p. 66.

[101] This refers to the internal delegation *stricto sensu*, where the chief of an office simply divides the task among organs hierarchically subordinate to him. See ROVERSI-MONACO Fabio, *op. cit.* (1970), p. 16 and 57.

[102] CASETTA Elio, *op. cit*. (2009), p. 162. In administrative law, the issue is more often described in terms of the compatibility of administrative delegation with the corollary principle of non-disposability of competences (*inderogabilità delle competenze*).

[103] ROVERSI-MONACO Fabio, *op. cit.* (1970), p. 21.

[104] FAZIO Giuseppe, *op. cit*. (1964), p. 10.

[105] ROVERSI-MONACO Fabio, *op. cit.* (1970), p. 21.

[106] Ibidem, p. 22. See also FRANCHINI Flaminio, *op. cit.* (1950), pp. 76-79. The separation of powers will be analysed *infra*, para. 7.

[107] The controversial distinction between executive and legislative power will be further discussed *infra*, see para. 7.4.

[108] FAZIO Giuseppe, *op. cit*. (1964), p. 10.

form of delegation is considered particularly problematic in relation to fundamental principles of constitutional law, such as the separation of powers,[109] which is not the case in relation to administrative delegation. This phenomenon has been so debated in constitutional law that, in this field, the term delegation has been progressively associated only with the delegation of legislative powers. Thus, for instance, in US law the initially generic phrase "delegation of powers" has acquired the specific meaning of "transfer of authority by one branch of government (generally the Congress) in which such authority is vested to some other branch or administrative agency".[110] However, it is important to highlight that the delegation of legislative powers represent one of the forms of delegation which have developed in the States' legal systems.

4. Some Common Features of the Notion of Delegation

The description of the evolution of this legal institution has disclosed a notion of delegation in public law which is broad enough to encompass different phenomena. Accordingly, the image of "movement" or "transferral" of a power pertaining to the competence of the delegator comprises both the situations where the delegate is part of the same branch of the government and where there is a transferral of powers from one institution or body to another.[111] Acknowledging that the legal framework for administrative delegation and the one for legislative delegation are governed by different principles and can hardly be compared,[112] it is still possible to introduce some remarks which are equally applicable to the different forms of delegation.

Firstly, it is interesting to reflect upon the relationship between the delegator and the delegate. The delegation is a unilateral act which is enacted by the delegator without the need for the approval of the delegate.[113] In this regard, it has been argued that, because of the transferral of the power, a fiduciary relationship between the two arises, whereby the delegate can be considered as a trustee (*Treuhänder*) of the delegator.[114] An echo of this approach can be recognised in the theories which, borrowing from economics and political sciences, describe the delegation as a principal-agent relationship.[115] However, it must be underlined that, admittedly, such a

[109] On the constitutional relevance of the separation of powers, suffice it to mention Article 16 of the Declaration of the rights of men and citizens: "a society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all".
[110] GARNER Bryon A., *Black's Law Dictionary, op. cit.* (2016), *sub* "delegation of powers". See also CHANDLER Ralph C., ENSLEN Richard A. and RENSTOM Peter G., *The Constitutional Law Dictionary. Vol. 2 Governmental Powers* (Santa Barbara, ABC-Clio, 1987), p. 109.
[111] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 224.
[112] CERVATI Angelo Antonio, *op. cit.* (1972), p. 4.
[113] CASETTA Elio, *op. cit*. (2009), p. 161.
[114] TRIEPEL Heinrich, *op. cit.* (1942), p. 27. See also LOCKE John, *Second Treatise of Government* (first published 1689, The Liberal Art Press, 1952), point 149, describing it as a "fiduciary power".
[115] See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 222.

relationship shall not be understood as a legal relationship *stricto sensu*.[116] The delegation *per se* does not necessarily create a subordination relationship, whereby the delegator is entitled to limit and control the delegate. Arguably, such supervision is rather determined by the provisions potentially inserted into the act through which the delegation is enacted or by the operation of the general principles underpinning the legal system.[117] Therefore, not deriving *per se* from the core notion of delegation, the *ratio* for the introduction of certain oversight mechanisms should be analysed in the light of specific rules or principles characterising the legal system.

Secondly, it has been remarked that this legal institution can be better understood as a part of a *procedure*, meaning a more complex phenomenon which is composed of different phases aiming at one result.[118] Assuming that the aim of the delegation procedure is the exercise of a certain power by the delegate, we can acknowledge that this procedure starts with an act by the delegator which grants the power to the delegate (henceforth the "enabling act"). Subsequently, the delegate exercises the power, taking a decision or adopting a measure (henceforth the "delegated act"), eventually pursuing the object enshrined in the enabling act.[119] In this second phase, the delegated authority acts autonomously, issuing measures in its own name and, within the objectives set in the enabling act, exercising a certain amount of discretion. Accordingly, at least two phases can be recognised and the will of two different entities contribute to the result. It is noteworthy that the term "delegation" is used to indicate both the first act conferring the power and the whole procedure. Moreover, it has been pointed out that, in such a procedure, the delegation represents an instrument of collaboration between the delegator and the delegate, entailing the coordination in the exercise of the competences to pursue the defined aim.[120]

5. Delegation and the Principle of Legality

As a fundamental mechanism for the organisation of the public power, the notion of delegation is bound to abide by the principles of public law. In particular, the constitutional law of nation States has elaborated certain fundamental principles which govern the exercise of public power by those entrusted with a public function, as a guarantee for their citizens.[121] Constitutional principles, such

[116] As recognised by the same TRIEPEL. See CERVATI Angelo Antonio, *op. cit*. (1972), p. 29. With reference to administrative delegation, see ROVERSI-MONACO Fabio, *op. cit.* (1970), pp. 58-65.
[117] CERVATI Angelo Antonio, *op. cit*. (1972), p. 30.
[118] PALADIN L., *Decreto legislativo*, in *Novissimo Digesto Italiano*, vol. V (Torino, 1960); LIGNOLA Enzo, *op. cit*. (1956), p. 156. See, in general on the notion of procedure, SANDULLI Aldo, *Il procedimento amministrativo* (Giuffrè, 1964).
[119] LIGNOLA Enzo, *op. cit.* (1956), p. 170. With reference to Italian administrative delegation, see ROVERSI-MONACO Fabio, *op. cit*. (1970), pp. 65-71.
[120] ROVERSI-MONACO Fabio, *op. cit*. (1970), p. 54, where he describes this procedure as consisting not only of a succession of acts, but also of a coordination of competences.
[121] CASSESE Sabino, *Istituzioni di diritto amministrativo* (Giuffré, 2015), p. 11.

as democracy and rule of law, have hence strongly influenced the way the notion of delegation is conceived and operates in domestic jurisdictions.

With particular regard to the rule of law,[122] a fundamental corollary is the principle of legality, which requires the attribution of public power to be based on, and compliant with, a previous legal norm.[123] It is considered an expression of the principle of democracy, since it provides for a link between the exercise of a public authority and the will of the people enshrined in the constitutional or legislative provisions.[124] Considering also the close link between the rule of law and the hierarchy of norms, it implies that the exercise of a given competence shall be legitimised by a higher authority, which provides for the legal basis for its exercise.[125] Therefore, with reference to the delegation of powers, an enabling act is a necessary proviso for the exercise of the power by the delegate, and it needs to be consistent with higher-ranking law.[126] However, this is particularly problematic in a legal system characterised by a rigid constitution, which provides for a fixed order of competences at the highest level of the hierarchy of norms. The transferral of powers from the delegator to the delegate, then, would violate those provisions attributing the power to a certain authority and jeopardise the given order of competences. This issue has caused scholars to reflect, with the result that they have advanced different models of delegation in public law.

Firstly, it has been questioned whether, through the delegation, the powers were literally transferred to the delegate, definitively divesting the delegator from said powers. In this regard, some early authors of Italian and German literature distinguished between the delegation which entails a loss of power by the delegator (*devolvierende Delegation*) and the one which has no such effect (*konservierende Delegation*).[127] In the former case, the transferral is definitive and results in an alienation of the competence, whereas in the latter the transferral is only temporary and precarious. The prevailing opinion is that only the latter case corresponds to the structure of

[122] We refer here specifically to the concept of "Stato di diritto" elaborated in Italian constitutional law, similar to the French "*Etat de droit*" and partially to the German *Rechtsstaat*. We acknowledge that the concept of rule of law elaborated in common law is not wholly assimilated (for a definition, see DICEY A.V., *Introduction to the Study of the Law of the Constitution* (MacMillan 1st ed. 1885, 10th ed. 1959), p. 204). See ALI' Antonino, *Il principio di legalità nell'ordinamento comunitario* (Giappichelli, 2005), pp. 17-20; PALADIN Livio, *Diritto costituzionale,* III ed. (Cedam, 1998), p. 40; GIANNINI Massimo Severo, *Diritto amministrativo* (Giuffré, 1970), p. 83.

[123] On the concept of the principle of legality in Italian administrative law, see GIANNINI Massimo Severo, *op. cit.* (1970), pp. 81-83; CASSESE Sabino, *op. cit.* (2015), pp. 11-45. With reference to French law, see also the concept of *régime administratif* proposed by HAURIOU Maurice, *Précis de droit administratif*, IX ed. (Sirey, 1927), p. 2.

[124] CASSESE Sabino, *op. cit.* (2015), p. 11; BESSELINK Leonard, PENNINGS Frans and PRECHAL Sacha (eds.), *The Eclipse of the Legality Principle in the European Union,* (Wolters Kluwer, 2011), p. 295.

[125] CERVATI Angelo Antonio, *op. cit*. (1972), p. 3.

[126] VON BOGDANDY Armin and BAST Jürgen, "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform", 39 *Common Market Law Review* (2002), p. 231.

[127] TRIEPEL Heinrich, *op. cit.* (1942), p. 60; TOSATO Egidio*, op. cit.* (1932), p. 47.

delegation since, in light of the principle of legality, arguably this legal institution cannot determine a diminishing of the delegator's competence.[128] Therefore, the delegator is still the holder of the competence and, hence, is still able to exercise a competence which is the same or, more precisely, has the same content of the one delegated.[129] Furthermore, this position is corroborated by the observation that in most cases the delegated powers are temporary and revocable and often allow the delegator to exercise the competence in spite of the delegation.[130]

However, if the delegator remains the holder of the power, what is exactly transferred to the delegate? To answer this question, different theories have been advanced. On the one hand, an interesting position, which maintains a strong influence in the literature,[131] argues that it is the *exercise* of the competence, not the competence in itself or its entitlement (i.e. *titolarità*), that is delegated.[132] In other words, the delegator confers the power to exercise its own competence to the delegate, without giving it away.[133] On the other hand, other scholars, doubting the possibility to isolate the exercise of the power from its entitlement, believe that the whole competence is conferred to the delegate, not only the exercise of the power.[134] However, this position falls short of explaining how to reconcile delegation with an order of competences set forth by a rigid and hierarchically superior law.

Secondly, as regards the attribution of the power to the delegate, eminent scholars have remarked that, generally, the power of the delegate, in its scope and procedure, is very different from the one which the delegator would have exercised without the delegation.[135] It is not just a *different* power, but, since the delegate had no power before the delegation, it is a *new* power created with the very act of delegation.[136] In this sense, the effect of a delegation is precisely the creation of new powers to the benefit of the delegate.[137] At the same time, it implies that the original competence

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[128] TOSATO Egidio, *op. cit. (1932)*, p. 47. See also RANELLETTI Oreste, *Principii di diritto amministrativo,* (L. Pierro, 1912), p. 211; ROMANO Santi, *Corso di diritto costituzionale* (Cedam, 1928), p. 69; CROSA Emilio, *La monarchia nel diritto pubblico italiano* (Bocca, 1922), p. 227. *Contra* FRANCHINI Flaminio, *op. cit.* (1950), p. 69.

[129] CERVATI Angelo Antonio, *op. cit.* (1972), p. 8.

[130] Ibidem, p. 11.

[131] CUOCOLO Fausto, *Istituzioni di diritto pubblico,* XXII ed. (Giuffré, 2003), p. 393.

[132] *Inter alia*, TOSATO Egidio, *op. cit. (1932)*, p. 46-50; *contra* PALADIN Livio*, op. cit. (1960)*; LAVAGNA Carlo, *Istituzioni di diritto pubblico* (UTET, 1970), p. 335.

[133] ALBERTI Anna, *op. cit.* (2015).

[134] MIELE Giovanni, *Principi di diritto amministrativo*, (Tornar, 1945), p. 47; LIGNOLA Enzo, *op. cit.* (1956), p. 147.

[135] ROMANO Santi, *Frammenti di un dizionario giuridico* (Giuffrè, 1947), p. 199.

[136] LIGNOLA Enzo, *op. cit*. (1956), p. 150; BARBEY Gunther, *Rechtsübertragung und Delegation: eine Auseinandersetzung mit der Delegationslehre Heinrich Triepels* (Münster, 1962), p. 84-85; TRIEPEL Heinrich, *op. cit.* (1952), p. 60.

[137] Interestingly, some French authors share this position, even when they do not admit the delegation of public powers. See, *inter alia*, DUGUIT Léon, *Traité de droit constitutionnel,* (Paris, 1924); JEZE Gaston, *Les principes généraux du droit administratif* (Paris, 1924), cited by CERVATI Angelo Antonio, *op. cit.* (1972), p. 8.

is not dissociated from the authority in which it is vested, even though its content is affected by the competence of the delegate.[138]

Thirdly, some scholars argued that the rule of law requires that the transfer of competence should be admitted only as far as it is provided by a legal norm which is at least of the same rank of that attributing the competence to the delegator.[139] In other words, a higher norm should attribute the competence and, at the same time, allow a derogation from this attribution, permitting the holder of the competence to give a certain power to another person of his/her choice.[140] Accordingly, the delegation is the result of three combined provisions: a *Regelnorm*, which identifies the originally competent authority, a *Delegationsnorm,* which is at least of the same rank as the *Regelnorm* and allows for a derogation to the latter, and a *delegierende Norm*, which can be of a lower rank and organises the specific delegation.[141] The derogation from the fixed order of competences is allowed, therefore, with the application of a higher rank provision and in so far as the enabling act complies with the limits and requirements set forth by the *Delegationsnorm.* Therefore, for instance, the administrative delegation is considered admissible only where an express legislative provision allows the delegate to exercise the power in lieu of the delegator.[142]

However, it must be noted that this approach is based theoretically on a certain concept of the hierarchy of norms: the doctrine of the *numerus clausus* of sources of law.[143] Accordingly, the creation of new competences on the basis of a delegation cannot derive from an implicit *Delegationsnorm,* but the sources of law are only those expressly provided at the higher level. Derived from the same doctrine, the principle has also been expressed in terms that no source of law can create new sources having the same or a higher effect than itself but only sources of lower rank.[144] In this formulation, it is more evident that the tripartite construction addresses issues relating to the hierarchy of norms rather than to the strict principle of legality.[145] Moreover, this approach presupposes that the *Regelnorm* conferring the power to the delegator does not also

[138] ROVERSI-MONACO Fabio, *op. cit*. (1970), p. 27. See also CHAMON Merijn, *op. cit.* (2016), p. 232, citing BARBEY Gunther, *op. cit.* (1962).
[139] TRIANTAFYLLOU Dimitris, *Des Compétences d'Attribution au Domaine de la Loi*, (Bruylant, 1997), p. 283. See also DE FIORES Claudio, *Trasformazioni della delega legislativa e crisi delle categorie normative*, (Cedam, 2001), p. 62; MALFATTI Elena, *Rapporti tra deleghe legislative e delegificazioni* (Giappichelli, 1999); MACCABIANI Nadia, *La legge delegata. Vincoli costituzionali e discrezionalità del Governo* (Giuffrè, 2005), p. 6.
[140] CERVATI Angelo Antonio, *op. cit*. (1972), p. 3.
[141] BARBEY Gunther, *op. cit.* (1962), cited also by CHAMON Merijn, *op. cit.* (2016), p. 232.
[142] CASETTA Elio, *op. cit*. (2009), p. 161, citing SEVERI. FRANCHINI Flaminio, *op. cit.* (1950), p. 77 argues for the validity of this rule also to the legislative delegation.
[143] ALBERTI Anna, *op. cit*. (2015), p. 53.
[144] ZAGREBELSKY Gustavo, *Manuale di diritto costituzionale. Il sistema delle fonti di diritto* (UTET, 1992), p. 5.
[145] Arguably, in a legal system where the hierarchy of norms is articulated in a different perspective from the domestic one, the application of BARBEY's theory is not self-evident. See Chapter 4, para. 2.

contain implicitly "a power to delegate" as part of the wider power to exercise the competence at its discretion.[146] As we will see, this issue has also emerged in EU law in relation to the delegation of powers in the absence of Treaty provisions providing for this, and the Court of Justice has taken a different position from the prevailing opinion in legal literature, allowing the delegation of the powers conferred to the institutions also in the absence of a *Delegationsnorm* in the Treaties.[147]

Finally, it is important to underline that the principle of legality does not merely require the existence of a legal basis for the exercise of the powers. Indeed, a substantive concept of legality also entails that the exercise of the public power is never arbitrary, but it is constrained by principles and procedures which limit the public authority, including the legislator.[148] Inherently related to the judicial review of the exercise of the power, this substantive aspect of legality guarantees the control of the delegate's acts in the manner it is exercised and thus, indirectly, the protection of the citizens' rights. In this sense, it represents the fulfilment of the rule of law, constituting an essential benchmark for the legitimacy of the delegation of powers.[149] Therefore, the delegation of powers is also bound to abide by this substantive aspect of the principle of legality, limiting the discretion both of the delegator and the delegate.

6. The Debate on the Delegation of Legislative Powers

Focusing now more specifically on legislative delegation,[150] it was already noted how the granting of authority from the legislative branch to the executive branch is particularly problematic from a constitutional perspective. In this regard, it is noteworthy that, since the notion of delegation presupposes the existence of a certain competence in the delegator, such a delegation requires the public power to be distributed among authorities or branches which can be distinguished from each other.[151] However, the delegation of powers - derogating from the constitutionally established order of competences and conferring rule-making powers to the executive branch - interferes with the constitutional structure of liberal States. As a mechanism for the transferral of

[146] FRANCHINI Flaminio, *op. cit.* (1950), p. 96, who argues against the position of other scholars grounding the power to delegate on "the spirit of the law" or on customs.
[147] See Case 10-56, *Meroni, cit.*; Case 25/70, *Köster, cit.*, discussed in Chapter 5, para. 2.3.
[148] See, *inter alia*, CARLASSARE Lorenza, *op. cit.* (1966), pp. 118-119.
[149] CARLASSARE Lorenza, *op. cit.* (1966), pp. 130-145.
[150] As a synonym of delegation of legislative powers, we will use the term "legislative delegation" used in IANCU Bogdan, *op. cit*. (2012), and "delegated legislation" used in LAW Jonathan, *A Dictionary of Law,* op. cit. (2015).
[151] CERVATI Angelo Antonio, *op. cit*. (1972), p. 22. The very idea of competence in public law originates from the elaboration of the doctrine of the separation of powers, according to COSTANTINESCO Vlad, *Compétences et pouvoirs dans les Communautés européennes* (Librairie générale de droit et de jurisprudence, 1974), p. 68.

power, it has a function that, in constitutional dynamics, could lead to an imbalance of the power structure of a State.[152]

The problem of admitting and limiting in positive terms the delegation of legislative powers is, hence, part of a broader legal and political issue which concerns the distribution of powers among the branches and institutions of the State.[153] Indeed, the structure and the exercise of public power over people is the core of any philosophical and political concept of State since ancient times.[154] What power the State has, how it is distributed among institutions and bodies, and how it can be exercised crucially define the form of government and the constitution. In particular, traditional principles of representative democracy and rule of law demand - and prerequisite - a constitutionally set structure of government, which would result in a "government of laws, not of men".[155] Moreover, it is important to underline that the power to enact rules, binding for citizens, is an essential constitutional function of government, which traditionally in democratic States is vested with elected and accountable representatives of the people.[156]

In light of these considerations, the admissibility of such a delegation has been strongly debated and proved to be extremely controversial both in theory and in practice. In some constitutional traditions, some scholars have argued for the unconstitutionality of legislative delegation *tout-court*,[157] whereas, in different constitutional traditions, other scholars have found such a practice to be in compliance with the constitutional principles, under certain conditions.[158] The different positions of scholars mirror the diversity in the positive law of modern constitutional systems. The issue is expressly addressed in most constitutions, but the conditions and criteria to grant

[152] IANCU Bogdan, *op. cit.* (2012), p. 4.
[153] LIGNOLA Enzo, *op. cit.* (1956), p. 99.
[154] See PLATO, *The Republic* (ed. Penguin classics, 2007)*;* ARISTOTLE, *Politics* (ed. Penguin classics, 1981).
[155] IANCU Bogdan, *op. cit*. (2012), p. 4, paraphrasing the Massachusetts Constitution, Part First, art. XXX (1780).
[156] SCHUTZE Robert, "Delegated Legislation in the (new) European Union: A Constitutional Analysis", 74 *The Modern Law Review* No. 5 (2011), p. 661.
[157] Especially French literature has strongly criticised the effects of legislative delegation and denied the admissibility of delegation of legislative powers. See, *inter alia*, ESMEIN, *Elements de droit constitutionnel français et comparé* (Librairie de la Societé Recuil Sirey, 1928), p. 84; JEZE G., *Les principes généraux de droit administratif,* (Paris, 1925), p. 380; CARRE DE MALBERG R., *Contribuition à la théorie general de l'Etat,* vol I (Paris, 1920), p. 592; BARTHELEMY H., "Le pouvoirs réglementaire du President de la Republique*"*, *Revue politique et parlamentaire* (1894), p. 203. In spite of this prevailing opinion, this legal institution was introduced in the Third Republic and it was justified by the supposed creation of a constitutional custom against the Constitution (DEGUIT Léon, "Des règlements faits en vertu d'une competence donnée au gouvernment par le législateur", *Revue de droit public* (1924), p. 313.), cited in LIGNOLA Enzo, *op. cit.* (1956), p. 2, note 2. See also HAURIOU, proposing a notion of "délégation de matières" in lieu of the inadmissible delegation of legislative powers, HAURIOU M., *Précis de droit constitutionnel,* (Paris, 1910), p. 419.
[158] In particular, German literature was generally in favour of legislative delegation, which also corresponded to the practice during the Empire. See, *inter alia*, JELLINEK, *Gesentz und Verordnung* (Verlag von J Mohr, 1887), cited in LIGNOLA Enzo, *op. cit*. (1956), p. 2, note 2; EISENMANN Ch., "Die Theorie "délégation legislative" und die französische Rechtlehre", *Zeitshrift für öffentl. Recht* (1931), pp. 338-345.

such a power to the executive remarkably differ.[159] Arguably, the disagreement among scholars on the admissibility and definition of legislative delegation is essentially linked to the different understanding of fundamental concepts which underpin the notion of legislative delegation, namely the principle of separation of powers and the notion of legislation. Consequently, these concepts need to be analysed thoroughly in order to explore what the notion of delegation of powers represents and to what extent it could be relevant in the analysis of the delegation of powers in the EU legal system.

7. The Doctrine of the Separation of Powers

Since what is delegated is a branch-specific constitutional function,[160] the delegation of powers presupposes the idea of the division of powers between branches of the government. At the same time, the separation-of-powers doctrine also functions as a limit to the delegation, introducing a normative principle which relates a specific power to a certain branch of the government. Therefore, the definition of legislative delegation is greatly influenced by the understanding of the political-constitutional principle of the separation of powers.[161]

The separation of powers is often described as a fundamental principle of modern democracies, but wildly diverse ideas and models are subsumed under this label.[162] In generic terms, it concerns the horizontal distribution of governmental power among its constituent parts in order to avoid the abusive concentration of power in any one part.[163] Indeed, the underlying function of the principle is to prevent the government from obtaining tyrannical powers over groups or individuals and, in this sense, it represents a fundamental pillar to uphold the democratic character of a legal system.[164] Accordingly, it is intrinsically related to the concepts of democracy and the rule of law.[165] However, the principle of the separation of powers has undergone a significant evolution from its first elaboration as a philosophical and political principle in the 18th century.[166]

[159] IANCU Bogdan, *op. cit*. (2012), p. 1.
[160] Ibidem, p. 4.
[161] CERVATI Angelo Antonio, *op. cit*. (1972), p. 18.
[162] IANCU Bogdan, *op. cit*. (2012), p. 58.
[163] CHANDLER Ralph C., ENSLEN Richard A. and RENSTOM Peter G., *The Constitutional Law Dictionary. Vol. 2 Governmental Powers* (ABC-Clio, 1987), p. 57.
[164] LENAERTS Koen, "Some Reflections on the Separation of Powers in the European Community", 28 *Common Market Law Review* (1991), p. 12.
[165] CHAMON Merijn, *op. cit.* (2016), p. 259.
[166] LIGNOLA Enzo, *op. cit.* (1956), p. 100.

7.1. The Traditional Notion of the Separation of Powers

Historically, an antecedent of the separation-of-powers doctrine has been recognised in the writings of Aristotle,[167] who originally distinguished between deliberative, magistrative, and judicial functions of government, as well as in the Polybius' description of the Roman Republic as a "mixed" government in about 118 B.C.[168] Although similar concepts can be traced in the work of earlier writers,[169] it is important to acknowledge that the separation of powers is an institutional model which belongs to a specific phase of the Western modern States' history, which is the transition from the *ancien régime* to the liberal State.[170] The season in which the separation-of-powers idea blooms is strongly characterised by the individualistic-liberal idea that the State's role is essentially to protect the rights of individuals without interfering in the society's functioning.[171] To protect and promote the individual rights and freedoms adequately, the ancient model of "concentration" of public powers in one person (generally the sovereign) was no longer suitable and a different model of division of powers was destined to prevail.[172]

In this context, the first elaboration of the distinction between the legislative, executive, and the so-called "federative" branches appears in John Locke's *Second Treatise of Government*. Founding his political theory on social contract, the English philosopher describes the legislative power as having "to direct how the Force of the Commonwealth shall be imployed (*sic*) for preserving the Community and the Members of it",[173] while the executive power is charged with enforcing the law as it is applied in specific cases. A distribution of the legislative power among different persons, and of the two powers among different entities, is suggested.[174]

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[167] ARISTOTLE, *Politics,* Book IV, Chapters 9-11 and 14-16. A distinction between guardians, auxiliaries and craftsmen can also be found in the *Republic* by PLATO, but it represents more a division of social functions than of governmental power (See CHANDLER Ralph C., ENSLEN Richard A. and RENSTOM Peter G., *The Constitutional Law Dictionary. Vol. 2 Governmental Powers* (ABC-Clio, 1987), p. 57.)

[168] POLIBIUS, *Histories,* VI, II.

[169] *Inter alia*, CICERO, Sir Thomas SMITH (*De Republica Anglorum*, 1583), James HARRINGTON (*Oceana*, 1656) and Oliver CROMWELL (*Instrument of Government*, 1690) mentioned the separation of powers. See CHANDLER Ralph C., ENSLEN Richard A. and RENSTOM Peter G., *The Constitutional Law Dictionary. Vol. 2 Governmental Powers* (Santa Barbara, ABC-Clio, 1987), p. 57.

[170] BOGNETTI Giovanni, *Divisione dei poteri. Saggio di diritto comparato,* II ed. (Giuffrè, 2001), p. 13.

[171] Ibidem, p. 14.

[172] Ibidem, p. 25.

[173] LOCKE John, *op. cit.* (1689), para. 143.

[174] "…because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government [...]". LOCKE John, *op. cit.* (1689), para. 143.

Particularly interesting for the delegation of powers, in the *Second Treatise of Government,* as a corollary of Locke's distinction, we can find the first statement of the idea that the legislature cannot delegate its law-making function:

> *"Fourthly, the legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. […] The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."*[175]

In Locke's view, therefore, the delegation of legislative powers from the legislator to the executive is interpreted as a form of illegitimate sub-delegation, since the legislative power is itself delegated by the people and, for this reason, cannot be further delegated.[176] In this sense, the separation-of-powers doctrine serves as a basis to justify limitations to the delegation of powers. However, on this point, it has been observed that the image of the people delegating their powers to the Parliament holds true only in political terms. In a legal system based on a constitution, the powers of the legislative branch are not formally delegated, but they are conferred directly from the constitution.[177]

However, the model of separation of powers, which most influenced modern constitutionalism,[178] is certainly the model elaborated by Baron Charles de Montesquieu in 1748. In *The Spirit of the Laws*, the enlightened aristocrat took inspiration from the constitutional arrangement in England and described State functions or powers analytically. As a result, he identified three powers: the legislative, the executive and the judiciary powers. While the legislative power concerns the enactment, amendment and abrogation of laws, the executive power "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions".[179] Finally, the judiciary provides for the punishment of criminals and the resolution of disputes between individuals.[180]

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[175] LOCKE John, *op. cit.* (1689), para. 141.
[176] According to the maxim "*potestas delegata non potest delegari*" (i.e. the delegated power cannot be delegated"). For an overview of the origin and the application of the maxim in US law, see DUFF W. Patrick and WHITESIDE E. Horace, *op. cit*. (1929), pp. 168-196.
[177] LIGNOLA Enzo, *op. cit*. (1956), p. 2.
[178] IANCU Bogdan, *op. cit.* (2012), p. 59.
[179] MONTESQUIEU (Baron de), DE SECONDAT Charles, *The Spirit of the Laws. Translated by Thomas Nugent* (first published 1752, Kitchener, 2001), p. 173.
[180] MONTESQUIEU (Baron de), DE SECONDAT Charles, *op. cit.* (1752), p. 173.

In light of this functional distinction, Montesquieu advocated their "distribution" between different institutions:

> *"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."*[181]

His writings were traditionally interpreted in the sense that a neat division between the entities exercising the three functions was the optimal structure of government in order to protect the freedom of citizens.[182] However, it has been noted that a different reading of Montesquieu's theory is possible.[183] Emphasising his reflections related to the prevention of tyranny, it emerges that, in order to avoid abuses, the distribution of powers unavoidably entails a combination of powers: "To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other."[184] From this, he infers the need to provide checks and balances among branches so that "power puts a stop to power".[185]

7.2. The Application of the Doctrine in Modern States

Remarkably, the separation of powers described represents a model, a paradigm which for three centuries inspired the shaping of the constitutional structure of Western modern States, and decisively contributed to moulding their peoples' government.[186] However, it was acknowledged early that a pure application of the model would prove impossible, as Vile remarked:

> *"The pure doctrine of separation of powers implied, that the functions of government could be uniquely divided up between the branches of government in such a way that no branch need ever exercise the function of another. In practice*

[181] MONTESQUIEU (Baron de), DE SECONDAT Charles, *op. cit.* (1752), p. 173.
[182] BORASI Fabrizio and CONFRANCESCO Giovanni, *op. cit*. (2014), p. 20.
[183] SCHUTZE Robert, *European Constitutional Law* (Cambridge University Press, 2012), p. 84.
[184] MONTESQUIEU (Baron de), DE SECONDAT Charles, *op. cit.* (1752), p. 79.
[185] "Par la disposition des choses, le pouvoir arrête le pouvoirs", MONTESQUIEU (Baron de), DE SECONDAT Charles, op. cit. (1752), Book XI, Chapter IV.
[186] BOGNETTI Giovanni, *op. cit*. (2001), p. 43.

> *such a division of functions has never been achieved, nor indeed is it desirable that it should be, for it would involve a disjuncture in the actions of government which would be intolerable."*[187]

Therefore, its historical concretisation has presented variations and different connotations.[188] In a form very close to the original model, the principle of separation of powers was inserted into the first French Constitutions of the late 18th century and in the federal Constitution of the United States.[189] In the US, in particular, the original political model was further elaborated by James Madison. In *The Federalist Papers*, he recommended preventing the concentration of power in the same "department" (*i.e.* branch of government) in order to safeguard political liberty.[190] Consequently, the legislative,[191] executive[192] and judiciary[193] powers were to be clearly vested in distinct institutions, nominally on the same footing. In such a rigid division of powers, it comes as no surprise that, in the first years of the US system, the delegation of powers from Congress to the President was considered unconstitutional, and the famous "non-delegation doctrine" was elaborated by the Supreme Court.[194] In fact, US courts still impose strict limits for delegation, although the initial position was later softened with the recognition of admissible delegations for which "inherent necessity" justifies them and where an "intelligible principle" set forth by Congress guides the action of the executive.[195] Thus, the separation-of-powers doctrine was used as a theoretical ground for limiting the delegation of powers in the US legal system.

7.3. The Evolution of the State in 20th Century

The doctrine of the separation of powers was embraced in later constitutions in more nuanced terms. Although this principle has inspired modern Western constitutionalism, its application in

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[187] VILE M.J.C., *Constitutionalism and the Separation of Powers* (Clarendon Press, 1967), p. 318.
[188] BOGNETTI Giovanni, op. cit. (2001), p. 50.
[189] LIGNOLA Enzo, *op. cit.* (1956), p. 101.
[190] MADISON James, HAMILTON Alexander and JAY John (CAREY George W. and McCLELLAN James eds.), *The Federalist* (Liberty Fund Indianapolis, 2001). See especially No. 47 and 51.
[191] Article I, Section 1 of the Constitution of the United States: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
[192] Article II, Section 1 of the Constitution of the United States: "The executive Power shall be vested in a President of the United States of America."
[193] Article III, Section 1 of the Constitution of the United States: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
[194] "Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained in the Constitution", *Field v Clark*, 143 U.S. 649,692 (1892). See, *inter alia*, *The Bring Aurora*, 7 Cranch, 382 (1813); *Rice v Foster*, 4 Harr. 479 (Del. 1847); *Parker v Commonwealth*, 6 Barr, 507 (Pa. 1847). See DUFF W. Patrick and WHITESIDE E. Horace, *op. cit*. (1929), *passim*.
[195] For the "intelligible principle test", see *J.W. Hampton & Co. V United States*, 276 U.S. 394 (1928).

20th century constitutions has been tempered by other tendencies.[196] In this regard, it is generally agreed that, in Europe, albeit remaining a core principle in the organisation of modern States', its meaning and application differ significantly from the original model.[197]

In the historical evolution of the separation-of-powers doctrine, we can recognise at least two tendencies which marked a departure from the original model.[198] Firstly, already the 19th century witnessed the rise of the parliamentary system, which was characterised by a strong link between the Parliament and the Government.[199] While a rigid understanding of the separation of powers would require a clear division between the executive and the legislative branch, in parliamentary systems there is a monistic understanding of government, as a political *continuum* between the legislative and the executive.[200] In particular, in the parliamentary systems, the Parliament has the function of voting to put confidence in the executive and to control its actions, having the power to dismiss the Government.[201] Therefore, the Government necessarily shares the political orientation of the majority in the Parliament, *de facto* entailing a sort of "fusion" between the legislative and the executive.[202] Secondly, there is a tendency in most European constitutions to allow the Government to exercise the functions which traditionally pertain to another branch. For example, the Government is often empowered to adopt secondary acts, which contain general and abstract rules and which, according to the original separation-of-powers model, should be adopted by the Parliament. [203]

Behind these tendencies lies a fundamental transformation of the role of the State in society. From the 19th century concept of the State as just protecting and ensuring the rights of the individual, claims for a more decisive role of the State in society and economy rose in the 20th century.[204] In the name of substantial equality and solidarity, the public power is also required to provide services and aid to the weakest of its citizens, as well as to promote the economic and social development of the nation as a whole.[205] To promote these new social rights, State intervention expands from economic governance to social protection and it requires not only a bigger public administration but also a more efficient exercise of public power.[206]

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[196] BOGNETTI Giovanni, *op. cit.* (2001), p. 56.
[197] LIGNOLA Enzo, *op. cit.* (1956), p. 101.
[198] See BIN Roberto and PITRUZZELLA Giovanni, *Diritto costituzionale,* IX ed. (Giappichelli, 2008), p. 74.
[199] LIGNOLA Enzo, *op. cit*. (1956), p. 101.
[200] MAGARO' Patrizia, *op. cit.* (2003), p. 220.
[201] LIGNOLA Enzo, *op. cit*. (1956), p. 102.
[202] BIN Roberto and PITRUZZELLA Giovanni, *op. cit*. (2008), p. 74.
[203] Ibidem, p. 75.
[204] Ibidem, p. 56. See also ROSS Alf, *op. cit.* (1958), p. 4.
[205] BOGNETTI Giovanni, *op. cit. (*2001), p. 57.
[206] BIN Roberto and PITRUZZELLA Giovanni, *op. cit*. (2008), p. 76.

Therefore, the division of powers had to change accordingly. It has been argued that, in most European countries, the original tripartite model of the separation of powers had to make room at least for a fourth function of government, *i.e.* the function of political direction.[207] It mainly consists of determining the essential guidelines for the legal system's development, both in the internal and external dimension and in managing its implementation. This function has been attributed to the most efficient of branches, the Government, which no longer only has the role of executing the legislator's acts, but it becomes a real governing power.[208] To achieve its political objectives, the Government avails itself of all the means it has, for instance inserting normative content into administrative acts, and exploits its close connection with the majority in the Parliament, having the necessary bills passed as legislation or obtaining a delegation in certain matters.[209]

For the attainment of the social objectives of the Welfare State, the relationship between the legislative and executive branches had to take the form of a collaboration rather than a separation. Remarkably, legislative delegation becomes a fundamental tool for collaboration between the two branches of the government, which significantly share the determination of programme objectives and the means to reach them.[210] Consequently, the use of this legal institution assumes an unprecedented proportion in the 20th century.[211]

However, this does not mean that the principle of the separation of powers plays no role in parliamentary systems: it is still fundamental as an inspiring organisational principle.[212] In this sense, it expresses the opportunity that the State functions are distributed among different and structurally separate branches, so that each branch of government has a scope of autonomous competence[213] and normally exercises the powers which pertain to it.[214] Nevertheless, this is not interpreted as an actual separation. This explains why, in contemporary legal systems, forms of

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[207] Ibidem, p. 77. On the function of political direction, see SMEND Rudolf, *Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform* (Mohr, 1923); CRISAFULLI Vezio, "Per una teoria giuridica dell'indirizzo politico" in *Studi Urbinati* (1939); ELIA L., *Governo (forme di),* in *Encl. Del Dir.,* vol. XIX (Milano, 1970).

[208] BOGNETTI Giovanni, *op. cit*. (2001), p. 78.

[209] In this respect, an example is provided by looking at the law enacted by the Italian Parliament in the last fifteen years: more than 95% of formal laws were based on disegni di legge, i.e. proposals made by the Government and not by single Members of the Parliament. See BIN Roberto and PITRUZZELLA Giovanni, *op. cit.* (2008), p. 77; DELLA CANANEA Giacinto, "Legitimacy and Accountability in Italian Administrative Law", in RUFFERT Matthias (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, 2011), p. 63.

[210] MAGARO Patrizia, *op. cit.* (2003), p. 2119.

[211] ROSS Alf, *op. cit.* (1958), p. 4. The author summarises the reasons for the success of legislative delegation as follows: (i) pressure on parliamentary time, (ii) technicality of the subject matter, (iii) unforeseen contingencies, (iv) flexibility, (v) opportunity for experiment, and (vi) emergency powers.

[212] LIGNOLA Enzo, *op. cit*. (1956), p. 103.

[213] Ibidem, p. 47.

[214] Ibidem *op. cit.* (1956), p. 103.

collaboration between branches of government are more easily accepted when it is necessary for the attainment of certain objectives.

7.4. The Impact on the Notion of Legislation

The overview on the separation-of-powers doctrine has already shown the central place the legislative function had in modern legal systems. The prominence of the legislative power, and of law, over the other two functions is widely recognised by 18th century thinkers. In its *Second Treaties of the Government*, John Locke described the legislative power as "not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it".[215] Conversely, the executive power was conceived as a "ministerial and subordinate power",[216] concerning the mere implementation of general rules in particular cases.[217]

In the original separation-of-powers model, the legislator's competence is to enact rules which protect, in a positive, certain and precise way, the rights and freedom of the citizens. The protection of individual rights is better assured when the legislative branch is, at least in part, representative of the citizens. In particular, Rousseau champions the idea that, being the fundamental instrument to rule over the people, the law must be the expression of the general will of the people.[218] For its representative character, only the Parliament could adopt the relevant laws and enact rules which are binding for the other two branches.[219] Accordingly, when, exceptionally, the exercise of normative power outside this representation channel is allowed, it is strictly limited (often prohibited in relation to certain matters) and always linked to the law, expression of the general will, [220] and to the control of citizens' representatives.[221]

However, as we have seen, the original separation-of-powers model was conceived in a context of liberal States, whose action was limited to the protection of the rights of the citizens. Concerning principally the essential freedom of citizens, the legislation consisted of general and abstract provisions, which were stable and limited in number.[222] In 20th century, due to the described

[215] LOCKE John, op. cit. (1689), para. 134.
[216] Ibidem, para. 152.
[217] IANCU Bogdan, *op. cit.* (2012), p. 65.
[218] It is interesting to note that the general shall not be understood *a priori* as the will of the majority. Rousseau distinguishes between *volonté de tous* (the will of everybody, i.e. the sum of individuals of the community), *volonté de la majorité* (the will of the majority, i.e. 50% plus 1) and *volonté générale*, which represents the real interests of a certain community and aims at the common good. See TODESCAN Franco, *Metodo, diritto, politica* (Monduzzi, 2002), p. 157.
[219] BOGNETTI Giovanni, *op. cit.* (2001), p. 31.
[220] Ibidem, p. 32.
[221] BORASI Fabrizio and CONFRANCESCO Giovanni, *op. cit*. (2014).
[222] BOGNETTI Giovanni, *op. cit*. (2001), p. 59.

socio-economic transformations,[223] the expectations of citizens in relation to the State's role changed. The growing demand for State intervention entailed the necessity of adopting more legal rules,[224] penetrating deeply into the functioning of society. The need for laws grew not only in number, but also in technical complexity, as the State was asked to intervene in the realms of economy and trade. From legal provisions of a stable and solemn nature, the law became subject to continuous change in order to keep up with the variable balance of conflicting interests and with the technical innovations.[225]

For its nature and composition, the Parliament was not in a position to respond adequately to the increasing need for laws and, in order to fulfil the citizens' expectations, the executive was strengthened to ensure the adoption of the necessary rules.[226] In the interests of efficiency, this has led the branch, which was better suited to the elaboration of adequate rules, the executive branch, to acquire rule-making functions.[227] In this sense, the rise of a rule-making executive "constitutes one of the most important transformations of constitutionalism".[228]

The emergence of the Government as a rule-maker has principally taken two forms. On the one hand, a flourishing of legislative delegations from the Parliament to the Government was noticed in most Western States. In relation to this, provisions allowing for the delegation of powers from the Parliament to the Governments, such as Article 76 of the Italian Constitution[229] or Article 80 of the Basic Law for the Federal Republic of Germany,[230] were introduced at the constitutional level. On the other hand, autonomous rule-making powers have been granted to the Government or even to specific governmental entities, either subordinate or independent from it, in the form

[223] In this regard, one reason has been identified in the expansion of the suffrage and the consequent modification of the electorate, bearing different and often conflicting interests. See TURK Alexander Heinrich, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International, 2006), p. 8.
[224] Ibidem, p. 1.
[225] CERVATI Angelo Antonio, *op. cit*. (1972), p. 42.
[226] TURK Alexander Heinrich, *op. cit.* (2006), p. 14.
[227] BOGNETTI Giovanni, *op. cit.* (2001), p. 60. See also CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, 2018), p. 717; CRAIG Paul, "The Role of the European Parliament under the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, (Springer, 2008), p. 124.
[228] ZOLLER E., *Droit constitutionnel,* (Presses Universitaires de France, 1999), p. 425, cited also by SCHUTZE Robert, *op. cit.* (2012), p. 224.
[229] Article 76 Italian Constitution: "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes."
[230] Article 80(1) Basic Law for the Federal Republic of Germany: "The Federal Government, a Federal Minister or the Land governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument."

of secondary or administrative acts.[231] The most remarkable case is Article 37 of the French Constitution, which grants the Government regulatory powers in a large number of subjects, thus conversely limiting the Parliament's competence.[232]

7.5. A New Model of the Separation of Powers

The end of the Parliament's legislative monopoly and the rise of the Government as a lawmaker has put into question the traditional definition of legislation. The original connection between legislation and acts of Parliament was no longer indissoluble, blurring the line between execution and legislation. At the same time, the separation of powers remained an inspiring principle in constitutional law, and the exercise of normative powers by a public authority still had to find its legitimation in the general will. This created a theoretical dilemma: how is it possible to reconcile the rule-making powers of the Government with the exclusive role of the Parliament as lawmaker?[233]

7.5.1. The Formal/Substantive Theory on the Separation of Powers

In order to address this dilemma, German and Italian literature elaborated the formal/substantive theory of separation of powers.[234] According to this theory, the functions of the State can be identified according to formal criteria or substantive criteria. On the one hand, applying formal criteria, the function is characterised by the branch exercising it according to a certain procedure. Therefore, the formally legislative function is exercised only by the legislative branch and following a certain solemn procedure, while the executive branch can exercise only a formally executive function. On the other hand, adopting the substantive criteria, the legislative function is characterised by the adoption of general and abstract rules,[235] while the executive function aims at the concrete management of public interests.[236] As a rule, the substantive function is exercised by the formally entitled branch, assuring a full alignment between the formal and substantial aspects. For example, the legislative power enacts general and abstract rules in the form of laws. However, in some cases a certain branch exercises the function which is formally attributed to

[231] BOGNETTI Giovanni, *op. cit.* (2001), p. 60.
[232] See Article 37 of the Constitution of the Fifth French Republic: "Les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire. Les textes de forme législative intervenus en ces matières peuvent être modifiés par décrets pris après avis du Conseil d'État. Ceux de ces textes qui interviendraient après l'entrée en vigueur de la présente Constitution ne pourront être modifiés par décret que si le Conseil Constitutionnel a déclaré qu'ils ont un caractère réglementaire en vertu de l'alinéa précédent."
[233] TURK Alexander Heinrich, *op. cit.* (2006), p. 9.
[234] See, *in primis*, LABAND Paul, *Das Staatsrecht des deutschen Reiches*, (Mohr, Tübingen, 1911); JELLINEK Georg, *Allgemeine Staatslehre*, (Springer, Berlin, 1929); ROMANO Santi, *op. cit.* (1928).
[235] See LIGNOLA Enzo, *op. cit*. (1956), p. 40. See also authors cited therein.
[236] BIN Roberto and PITRUZZELLA Giovanni, *op. cit.* (2008), p. 75.

another branch, such as in the case of delegated legislation. In these cases, there is a dissociation between the formal and the substantive aspects.[237] In the case of delegated legislation, for instance, the Government exercises a function which is formally executive, but substantially legislative since it stipulates general rules.[238]

Aiming at preserving the formal role of the Parliament as lawmaker, this theory enucleates, as a corollary, two different notions of legislation. When we refer to legislation in the formal sense, we mean a legal act which is defined by formal criteria, such as the empowered authority and the procedure for its adoption.[239] In the tradition of Western States, these criteria are set forth in the Constitution and the empowered authority is the Parliament, as the institution composed of citizens' representatives. Conversely, when we talk about legislation in the substantive sense, we focus on the content of the act: it sets forth legally binding rules of general application, irrespectively of the form and the authority issuing it.[240]

The relationship between legislation in formal sense and legislation in substance is complex and deeply influenced by the principle of separation of powers.[241] Thus, being theoretically perceived that the formal and the substantive aspects should correspond, in case of disconnection the link between the two needs generally to be restored by an act of the authority formally vested with the power.[242] With some exceptions, legislation in substance which is not adopted through the formal legislative procedure is normally at least based on legislative acts in the formal sense.[243] The most common form is a delegation from the Parliament, contained in a legislative act in the formal sense, which allows the Government to adopt binding rules of general application. In light of the above, the role of this legal institution as formal link between the expression of the general will in the formal law and the exercise of the power by the Government can be fully appreciated.

7.5.2. The Regulatory Power and its Distinction

It is important to recognise that, in more recent studies, the formal/substantive theory of legislation has been repeatedly demystified, contesting the possibility to distinguish the legislative and executive functions according to those substantive criteria, based on the generality of the rule.[244] Thus, the assumption that the adoption of rules of general and abstract application was a

[237] BIN Roberto and PITRUZZELLA Giovanni, *op. cit. (*2008), p. 75.
[238] Ibidem.
[239] TURK Alexander Heinrich, *op. cit.* (2006), p. 63.
[240] Ibidem, p. 65.
[241] Ibidem, p. 65.
[242] Ibidem, p. 65.
[243] The reference here is once again to Article 37 of the French Constitution.
[244] See, *inter alia*, ROSS Alf, *Theorie der Rechtsquellen,* (Scientia, 1929, repr. 1989), cited also by BAST Jürgen, "Is There a Hierarchy of Legislative, Delegated and Implementing Acts?", in BERGSTROM Carl Frederik and RITLENG Dominique, Rulemaking by the European Commission. The New System for Delegation of Powers,

prerogative of the legislative function was deconstructed, recognising that also the concrete execution of the law may require the adoption of general rules. Considering that ultimately the substance cannot be dissociated from the effects, the hierarchical position and the function of the rule have been emphasised.[245] Within the power sphere of the Government, then, a distinct function was identified, *i.e.* the regulatory function, which cannot be ultimately assimilated neither to the executive function nor to the legislative one.[246] In this sense, it means that a rule of general application is not necessarily legislative in nature, but it can be the expression of the regulatory function, depending on the effects it has within the legal system considered.

However, the distinction between legislation, regulation and execution remains highly debated. While the adoption of acts of individual application is easily attributed to the executive function, rules of general and abstract application are more difficult to distinguish on the basis of substantive criteria. In this regard, different authors put forward theories based on the inherent "sovereignty" of the rules,[247] on the different "spirit" of the provisions,[248] on the "discretion" enjoyed the author,[249] and on the degree of detail contained.[250] The latter, in particular, counterposes the fundamental rules ("*règles fondamentaux*") of the legislative function to the detailed rules of the executive function ("*détails d'exécution*"), finding in the degree of precision the diving line between legislation and executive rule-making.

Although strongly criticised,[251] this idea - that the legislative function is associated with the adoption of important rules, while the detail is left to the executive one - has taken root in legal scholarship at the national level, appearing to have an influence even, as we will see, in the context of implementation of EU law. However, at the same time, the dichotomy of the formal/substantial

(Oxford University Press, 2016), p. 166; CARLASSARE Lorenza, *op. cit*. (1966), pp. 26-27; MOREAU Felix, *Le réglement administratif* (Paris, 1901), pp. 40 et seq.

[245] CARLASSARE Lorenza, *op. cit*. (1966), pp. 26-27; MOREAU Felix, *Le réglement administratif* (Paris, 1901), p. 82.

[246] CARLASSARE Lorenza, *op. cit*. (1966), esp. p. 82 et seq.

[247] CARRE' DE MALBERG, *La loi, expression de la volonté générale,* (Paris, 1931), p. 24.

[248] HAURIOU, *Précis de droit administratif et de droit public*, (Paris, 1927), p. 461.

[249] GUARINO Antonio, "Sul carattere discrezionale dei regolamenti*", Foro italiano* (1953), p. 541; GASPARRI Pietro, "Il sistema costituzionale delle fonti normative", *Giurisprudenza costituzionale* (1958), p. 396.

[250] See CARLASSARE Lorenza, *op. cit*. (1966), p. 98, who dates this idea back to PORTALIS and the French Revolution's codification.

[251] In particular, by MOREAU Felix, *Le réglement administratif* (Paris, 1901), pp. 40 et seq. The author, championing the idea that legislative and regulatory functions coincide in the substance, raised three interesting objections: (i) the distinction according to the principle/detail criterion is extremely imprecise since the degree of detail is uncertain and relative; (ii) as legislative acts do not contain only principles, but often regulate in detail the matter, the criterion does not correspond to the reality of things; (iii) it is a factual criterion rather than a legal criterion. See CARLASSARE Lorenza, *op. cit*. (1966), p. 99, who contests, in relation to (i), that all the distinctions entail a certain degree of imprecision, which does not preclude the existence of clear cases, and, in relation to (ii), that the existence of detailed legislative acts depends on the absence of a reserved domain of the executive power, so that the legislator can regulate every aspect of the matter without denying the existence of an autonomous regulatory function.

theory, considering all provisions of general application as legislative in substance, still permeates the academic debate,[252] giving rise to terminological uncertainties and discussions. Therefore, bearing in mind the legal issues underpinning the different notions, these considerations appear still relevant for the analysis of the delegation of powers, especially with regard to the nature of the powers delegated.

8. The Notion of Delegation in State Legal Systems

8.1. Taking Stock: A Notion Determined by the Constitutional Principles of the Legal System

The analysis of the notion of delegation elaborated in State law has shown how this concept has developed significantly since ancient times. With the development of administrative structures, the delegation has emerged as a fundamental mechanism for the transferral of powers or authority among natural or legal persons. In this sense, it became an important tool for the organisation and management of public power, providing a formal justification for the exercise of public powers by authorities which do not have the ordinary competence to exercise such powers.

In this evolution, the notion of delegation in public law has acquired a specific meaning, which has differentiated this legal institution from other legal mechanisms for granting authority to other natural or legal persons. Therefore, the delegation of powers is deemed to occur when a certain order of competences, defined by the law, is modified by the transferral of power by a unilateral act of the authority entrusted with that power. In this sense, the delegation entails the empowerment of an institutional actor to exercise that power in an autonomous way.

Within this general notion of delegation in public law, the analysis conducted has shown that different forms of delegation can be recognised which, although they have some commonalities, may have different implications from a constitutional perspective. Thus, while the delegation of executive powers among entities within the public administration is merely bound to respect the principle of legality, the delegation between different branches of the government poses more controversial questions. In this respect, in a legal system dominated by the separation-of-powers principle and by a prominent role of legislation, the delegation of legislative powers has proved to be particularly problematic in light of the democratic foundation of nation States and its principles, such as the rule of law. In legal literature, the interplay between the notion of the

[252] For a recent example of the correlation of the general application/legislative nature, see CRAIG Paul, "Delegated and Implementing Acts", *op. cit.* (2018), p. 717.

delegation of powers and these fundamental principles has greatly influenced the way the notion is conceived and is accepted in the States' legal systems.

In this regard, firstly, consisting of the transferral of powers from the competent institution or body to another, such a delegation entails a derogation from the order of competences, which in a legal system based on a rigid hierarchy of norms is fixed by a higher source of law. Secondly, with particular regard to the delegation of legislative powers, the analysis conducted has shown the ambivalence of the separation-of-powers doctrine in relation to the delegation of powers. On the one hand, the delegation of powers implies the division of competences among institutional actors, which, in the tradition of Western modern States, was largely shaped by the separation-of-powers doctrine. In this sense, the separation of powers acts as a precondition for the occurrence of a delegation of legislative powers. On the other hand, due to its normative value, which calls for a correspondence between the single branch and the specific function, this doctrine also represents a limitation on the use of legislative delegation. The exercise of legislative powers by a branch of the government other than the Parliament appears at odds with the concept of the law as an expression of the will of the people represented in an elected assembly. The increasing need for effectiveness in the public action of the nation States, however, required a reconsideration of the traditional doctrine, which evolved in the sense of a wider acceptance of the delegation of legislative powers from the Parliament to the Government. Therefore, in most State legal systems, this delegation of powers is allowed by constitutional provisions, which generally establish specific limitations and criteria for the exercise of legislative powers by the Government.

8.2. Singling Out the Notion of Delegation in State Legal Systems

Overall, in light of the analysis on the delegation of powers in States' legal systems, it emerges that this notion identifies the transferral of the exercise of certain powers, which ordinarily pertain to one institution or body of public law according to a determined order of competences, to another institutional actor. Accordingly, from a theoretical perspective, it can be recognised that the conditions to have a delegation of powers are, firstly, the existence of a certain order of competences defined by the law, according to which the power is exercised by different institutional actors. Secondly, a unilateral act of the authority entrusted with certain powers is needed, transferring those powers to another institutional actor which, thus, can exercise it. Since the delegation entails the creation of a new competence in the hands of the delegated authority, the power is exercised, thus, in its name and in an autonomous way.

However, this does not mean that the transferral is definitive or unconditional. The influence of the constitutional principles of the legal system may require the imposition of limits and

conditions on this transferral, as well as a certain oversight by the delegating authority. In particular, in State legal systems, the order of competences is embedded in a hierarchy of norms, according to the principle of legality, and it is shaped by the separation-of-powers doctrine. The influence of these principles precludes an unconditional transferral of powers, especially in the case of a delegation of legislative powers.

Therefore, it is essential to investigate when and how these conditions are met in the EU legal system, in order to define a notion of delegation of powers in that context. Considering that the delegation of powers appears to be strictly linked with the particular constitutional structure of the public power, particular attention should be paid to the order of competences in EU law, which shapes the allocation of powers among different institutions and bodies and the exercise of their powers. Moreover, since the concept of delegation of powers is greatly influenced by the constitutional principles of the legal system, a reflection on the fundamental principles of the EU institutional structure appears to be important to provide the conceptual framework within which this legal concept is manifested in this peculiar legal system.

9. In Search of a Notion of Delegation for the EU Legal System

9.1. Approaching the Notion of Delegation in the EU

Considering the European level, it is generally acknowledged that the delegation of powers also occurs in the EU legal system. From the analysis of EU legal sources, different interpretations of the notion of delegation of powers can be recognised. On the one hand, under a textual interpretation, the notion of the delegation of powers might be limited to the phenomena explicitly defined as such in the Treaties. In this regard, the Lisbon Treaty has introduced the notion of "delegated acts" in the text of the Treaties,[253] providing for a procedure expressly defined as delegation. However, it will be argued that, in light of the institutional structure and the principles of the EU legal system, the notion of the delegation of powers in EU law is not limited to the adoption of acts according to Article 290 TFEU, but it also encompasses other phenomena. On the other hand, considering some uses of the term delegation in the case law and in the literature,[254] it might appear that only a generic notion of delegation is applicable to EU law. However, it will be argued that this idea is only partially correct since it does not reflect the complexity of the phenomena developed in the evolution of the EU institutional structure. Indeed, certain inter-institutional dynamics have evolved that bear a strong resemblance to the peculiar

[253] Article 290 TFEU.
[254] See Chapter 1, para. 1.

form of the delegation of powers described in relation to the State legal system and they cannot be reduced to a vague legal notion.[255]

Therefore, for the purpose of this research, a third path will be explored: in light of the analysis conducted, a definition will be built upon the basis of the constitutional principles which have been identified as influencing the evolution and understanding of the delegation of powers. In order to develop a definition of delegation of powers in the EU, an analysis of the described elements of the notion and the manner in which they operate in the EU legal system is necessary. Therefore, the order of competences established by the Treaties at the EU level will be investigated, describing the way the inter-relationship is articulated between the national and the EU level and among the different institutions, and the influence of fundamental principles - in particular the rule of law, the principle of legality and the separation of powers - on the institutional architecture of the EU and on the concept of the delegation of powers in this system. This will allow, thus, for a definition of delegation of powers which takes into account the specific institutional characteristics of the EU system.[256]

9.2. The Applicability of a State-Based Notion to the EU Legal System

The first question to be considered is whether such a State-based notion is equally applicable to the EU context, bearing in mind that in principle its specific institutional arrangements cannot be automatically equated with similar State institutions.[257] In this respect, on a general level, the meaning and the scope of terms for which EU law provides no definition must be determined "by considering the general context in which they are used and their usual meaning in everyday language".[258] It is, in fact, a clear assumption in the case law developed by the Court of Justice that, given the autonomous character of the EU legal system and the need for a uniform interpretation of EU law, legal concepts should be interpreted according to the specific principles of EU law, thereby detaching them from the notions developed in domestic law.[259] Therefore, in light of the

[255] On the development of a "rhetoric of delegation of powers" in EU law, see LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), p. 36.
[256] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 223.
[257] TURK Alexander Heinrich, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International, 2006), p. 68.
[258] See, *inter alia*, Case 349/85, *Denmark v Commission*, EU:C:1988:34, para. 9; Case C-164/98 P, *DIR International and others v Commission*, EU:C:2000:48, para. 26.
[259] See REICH Norbert, GODDARD Christopher, and VASILJEVA Ksenija, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Intersentia, 2003), p. 27. See also, *inter alia*, Case 283/81, *CILFIT and Lanificio di Gavardo v Ministry of Health*, EU:C:1982:335, para. 19: "It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States."

principle of the autonomous interpretation of EU law, the notion of the delegation of powers should be in principle conceived by reference to the EU's own system and objectives.

Specifically, the peculiar features of the European Union as a unique institutional phenomenon and as an autonomous legal system should be taken into account. Indeed, the EU legal system is generally described as a *sui generis* system,[260] which is neither a State nor just an international organisation.[261] However, such a theory - or more precisely an *anti*-theory[262] - of the *sui generis* character of the EU should not be used as an excuse to prevent scholars from undertaking analyses of the institutional features of EU law in the light of traditional constitutional values.[263] On the contrary, the peculiarities of the EU legal system should trigger an interest in testing the existing conceptual tools in such a context. In other words, considering that the EU legal order is different from a State, the real question is what is the extent and what are the implications of that difference? The question is even more pertinent in light of the fact that, in spite of its peculiarities, the EU exercises a form of power having an inter-individual dimension, creating legal norms which directly apply to individuals.[264] Therefore, the analysis of the applicability of constitutional concepts necessarily touches upon fundamental questions on the nature of the European Union as a whole.

10. The Constitutional Foundations of the EU

Historically, with the Treaty of Rome, the Member States created the European Economic Community and attributed certain competences to the European level in a number of domains.[265]

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[260] *Inter alia*, CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford University Press, 2009), p. 33.

[261] For an analysis of the nature of the Union, see, *inter alia*, JACQUE' Jean Paul, *Droit institutionnel de l'Union européenne*, 7ème ed., (Dalloz, 2012), pp. 103-111.

[262] SCHUTZE Robert, *European Constitutional Law* (Cambridge University Press, 2012), p. 48 and 67, citing POPPER Karl, *The Logic of Scientific Discovery,* 1 ed. (Hutchinson & Co, 1959).

[263] CONWAY Gerard, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012), p. 4. See also MENDES Joana, "The Making of Delegated and Implementing Acts, Legitimacy beyond Institutional Balance.", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers*, (Oxford University Press, 2016), p. 26.

[264] See CORTESE Bernardo, "A la recherche d'un parcours d'autoconstitution de l'ordre juridique interindividuel européen: essai d'une lecture pluraliste 50 ans après Van Gend en Loos et Costa", *Il diritto dell'Unione europea* No. 2 (2015), pp. 227-271. See also CORTESE Bernardo, *L'ordinamento dell'Unione europea, tra autocostituzione, collaborazione e autonomia* (Giappichelli, 2018).

[265] Certain authors consider the attribution of competences to the European Union itself a "delegation of powers" by the Member States. However, this statement appears relevant from a political science perspective (especially if adopting the principal-agency theory) or using the term "delegation" in its generic meaning of "moving/transferring". From a legal perspective, the creation and attribution of powers to the European Union cannot be explained by merely using the concept of delegation of powers as defined in the present study since it entails a limitation of States' sovereign rights with deeper constitutional implications (see Case 26-62, *Van Gen den Loos*, EU:C:1963:1). For a discussion on the issue, see FRANCHINO Fabio, *The Powers of the Union. Delegation in the EU*, (Cambridge University Press, 2006), p. 13; VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt"

Although its origin lies in an international treaty,[266] in light of the successive treaty amendments and of the incisive interpretation of the Court of Justice - which developed the concepts of the autonomy of the EU legal order and its supremacy over all national law - the EU legal system has significantly evolved in constitutional terms.[267] In adhering to the "new legal order" created by the Treaties, the Member States have "limited their sovereign rights in ever wider fields".[268] In this respect, it has been noted that the progressive extension of EU competences in successive Treaty amendments and the more prominent role of the European Parliament, coupled with the direct effect and supremacy of its legal acts, have progressively moved the original design closer to the legal systems of the Member States.[269] Among the values proclaimed in the Treaty, democracy and the rule of law are considered as foundations of the Union, thus making a clear reference into the tradition of the modern Western States.[270] This has induced many commentators to argue that the EU legal system has evolved in federal terms,[271] to the extent that it has been claimed "the Union

Theory", 2 *The Theory and Practice of Legislation* No. 1 (2014), pp. 42-44; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 223; CURTIN Deirdre, *op. cit*. (2009); LINDSETH Peter, *Power and Legitimacy. Reconciling Europe and the Nation-State*, (Oxford University Press, 2010) and the critical book review by DE WITTE Bruno in *European Consitutional Law Review* (2012), pp. 148-152; LINDSETH Peter, "Delegation is Dead, Long Live Delegation: managing the Democracy Disconnect in the European Market-Polity", in JOERGES Christian and DEHOUSSE Renaud (eds.), *Good Governance in Europe's Integrated Market*, (Oxford University Press, 2002), pp. 139-140.

[266] For some authors, the origin in an international treaty is not a decisive argument for excluding the constitutional character of a legal system. See KELSEN Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr, 1920), p. 195: "treaty and constitution are not mutually exclusive concepts. […] What matters is not, whether the treaty creates a legal order – every treaty does – but whether the legal order so created is considered as a partial legal order or as a total legal order. The decisive difference between the two lies in whether the juristic construction of the binding force of the treaty... is considered to derive from a "higher", that is a more general, legal order – in our case: from the legal norm "pacta sunt servanda" of the international legal order; or, whether the juristic construction posits the legal order created by the treaty itself as the highest source. In the latter case, the binding force of the treaty order is derived from an "original hypothesis". Thereby, one must not overlook that the treaty as such, that is, a meeting of wills, is never "constitutive". "Constitutive", that is, the final source of legal validity and force, is in the former case the "international law hypothesis", in other words, the idea that above the contracting parties stands a higher international legal order; and in the latter case the "originality hypothesis", cited and translated by SCHUTZE Robert, *op. cit*. (2012), p. 57.

[267] See, *inter alia*, SCHUTZE Robert, *op. cit*. (2012), p. 60; MANCINI Giuseppe Federico, "The Making of a Constitution for Europe", 26 *Common Market Law Review* (1989), pp. 595-614; COSTANZO Pasquale, MEZZETTI Luca and RUGGIERI Antonio, *Lineamenti di diritto costituzionale dell'Unione europea* (Giappichelli, 2010), p. 21; STEIN Eric, "Towards Supremacy by Judicial Fiat: on the margin of the Costa Case", 63 *Michigan Law Journal* (1964-5), p. 491, where the compound "Treaty-Constitution" is used to describe the status of the EU Treaties.

[268] Opinion 1/91 EEA Agreement, EU:C:1991:490, para. 21.

[269] TURK Alexander Heinrich, *op. cit.* (2006), p. 68.

[270] CONWAY Gerard, *op. cit.* (2012), p. 4.

[271] *Inter alia*, see SCHUTZE Robert, *op. cit.* (2012), pp. 47-80; WEILER J.H.H., *The Constitution of Europe* (Cambridge University Press, 1999); JACQUE' Jean Paul, *op. cit.* (2012), p. 108. On this issue, it is noteworthy the definition of European Community given by the German Constitutional Court in its judgment of 12 October 1993. It defined this peculiar supranational entity as *Staatenverbund* (association of States), so avoiding both the notions of confederation (*Staatenbund*) and federal State (*Bundestaat*).

nowadays is a reality which must be studied first and foremost with the tools offered by the constitutional law of Federal States".[272]

Without entering into a debate on the federal nature of the EU, it is undisputed that the EU is vested with public power[273] and exercises its competences[274] within the framework of the Treaties.[275] The exercise of these competences directly affects the European citizens, who, pursuant to the principles of direct effect and primacy as developed by the Court of Justice, are subject to the rules enacted by the EU Institutions in a legal system whose source of legitimacy goes beyond the intergovernmental legitimation deriving from international law. In particular, we will share the position that the EU has undergone a process of self-constitution as a legal order, which resulted not only in a legal system of autonomous character, but also of an inter-individual character.[276] Accordingly, it appears consistent to describe it as a substantial constitutional legal system[277] and to read the Treaty provisions as regulating the general structuring of the legal order, as well as the relationship between the individual and the public power.[278] Therefore, in light of its evolution, it can be argued that the EU legal system is not beyond the existing conceptual tools developed for understanding national political entities. Its analysis just requires adjustment and modifications to reflect its peculiarities.[279]

In spite of the evolution of the EU legal system in the sense just described, the institutional architecture of the EU is far from being assimilated to the institutional structure of a State. Indeed, the uniqueness of the process of EU integration has resulted in an institutional model which can

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[272] MANCINI Federico, *Democracy and Constitutionalism in the European Union: Collected Essays* (Bloomsbury Publishing, 2000), p. 17.

[273] VON BOGDANDY Armin, "The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organisations", 23 *European Journal of International Law* No. 2 (2012), p. 317.

[274] In EU Treaties, the use of the terms "competence" and "power" is not completely coherent (as remarked by VON BOGDANDY Armin and BAST Jürgen, "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform", 39 *Common Market Law Review* (2002), p. 229). In this thesis, relating to EU law, in line with the traditional French literature, we will tend to use the concept of "competence" (*compétence*) for the vertical allocation of powers between the EU and the Member States, and the concept of power (*pouvoir*) for the distribution of powers among EU institutions. See COSTANTINESCO Vlad, *Compétences et pouvoirs dans les Communautés européennes* (Librairie générale de droit et de jurisprudence, 1974).

[275] In this sense, the EU is a "*pouvoir public commun*", as remarked by ISAAC Guy, *Droit communautaire général,* (Paris, 2001), pp. 355-356, cited in ALI' Antonino, *Il principio di legalità nell'ordinamento comunitario* (Giappichelli, 2005), p. 2. See also Opinion 1/78 *(Natural Rubber),* EU:C:1979:224.

[276] CORTESE Bernardo, *op. cit.* (2015), pp. 227-271. See also CORTESE Bernardo, *op. cit.* (2018).

[277] In the sense of Article 16 of the Declaration of the Rights of Man and of the Citizen. CORTESE Bernardo, *op. cit.* (2015), p. 33. See also Case C-50/00 P, *Uniòn de Pequenos Agricultores v Council*, EU:C:2002:462, para. 38-45; Opinion 1/09 (*European and Community Patents Court)*, EU:C:2011:123, para. 80,83-85; Opinion 2/13 (*EU Accession to ECHR)*, EU:C:2014:2475, para. 176, 196-198.

[278] CONWAY Gerard, *op. cit.* (2012), p. 8.

[279] CONWAY Gerard, *op. cit*. (2012), p. 192. See also VON BOGDANDY Armin, "Founding Principles of EU law: A Theoretical and Doctrinal Sketch", 16 *European Law Journal* No 2 (2010), pp. 95-111.

hardly be described with the glossary of the classic models of State organisation.[280] In an attempt to balance and compromise the different tensions between Member States, as well as between the national and the European level, the institutional architecture did not evolve in the sense of re-creating the hierarchical power structure of States.[281] Instead, it appears to be composed of different institutions and bodies which represent different interests in a balance of powers which is peculiar to the EU. As we will see, the distribution of powers among these institutions and bodies, rather than following the logic of the organic separation of powers which inspired the organisation of States, is arguably inspired by a *ratio* of representation of interests.[282] Therefore, for instance, not only can the relationship between the Parliament and the European Commission hardly be considered tantamount to the one existing between a national Parliament and a Government,[283] but also the identification of a unitary executive branch is problematic in the EU context.[284]

Such peculiarities greatly influence the way the delegation of powers is conceived and is articulated in the EU legal system. Therefore, it appears essential for the purpose of our research to analyse the institutional principles which underpin this peculiar institutional machinery, giving an account of the similarities and differences with the concepts described in relation to the States. In this regard, the reflection must start with the analysis of the competences conferred on the EU by the Member States and the distribution of powers among different institutions and bodies of EU.

[280] See MAJONE Giandomenico, "Delegation of Regulatory Powers in a Mixed Polity", 8 *European Law Journal* No. 3 (2002), p. 320.
[281] DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2008), p. 795.
[282] See JACQUE' Jean-Paul, "Pouvoir législatif et pouvoirs exécutif dans l'Union européenne", in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen,* II ed. (Bruylant, 2014), pp. 43-67; CURTIN Deirdre, "EU Constitution as Architecture. Separation of Powers in the Twenty-First Century", in REESTMAN Jan-Herman, SCHRAUWEN Annette, VAN MONTFRANS Manet and JANS Jon, *De regels en het spel* (Asser Press, 2011), pp. 123-132; DEHOUSSE Renaud, *op. cit.* (2008), p. 795; VOS Ellen, *Institutional Framework of Community Health and Safety Regulation* (Hart Publishing, 1999), p. 84; WESTLAKE Martin and GALLOWAY David, *The Council of the European Union*, (John Harper Publishing, 2004), p. 9.
[283] For instance, although the Parliament has acquired increasing powers in the appointment (Article 17 TEU) and censure (Article 234 TFEU) of the Commission, its composition still reflects the logic of national preferences and the procedure for its appointment is still substantially driven by European Council and the Council. See, *inter alia*, DEHOUSSE Renaud, *op. cit.* (2008), p. 11.
[284] See, *inter alia*, JACQUE' Jean-Paul, "The Evolution of the Approach to Executive Law-Making in the EU", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 23; CURTIN Deirdre, *op. cit*. (2009).

11. The Principle of Conferral

Considering that the European Union exercises public power according to the Treaty provisions, it is necessary to analyse the limits and the distribution of this power within the EU system. In this regard, the system of EU competences is based upon the principle of conferral, according to which the Union can only exercise those competences conferred on it by the Member States.[285] Conversely, "competences not conferred upon the Union in the Treaties remain with the Member States".[286] Therefore, the Union does not enjoy unlimited competences, but it can act only "within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein."[287] This principle refers to both the internal action and international action of the EU.[288] However, the existence of a flexibility clause in the Treaties[289] and the interpretation by the Court of Justice[290] have contributed to mitigate the rigidity of such a principle.

The competences conferred upon the Union can have a different nature,[291] being exclusive competences,[292] shared competences,[293] or competences to support, co-ordinate or supplement Member State action.[294] In the last two cases, the use of the competence by the Union is also governed by the principles of subsidiarity and proportionality.[295] In conferring the competence on the EU, the Treaties generally do not specify the content of the competence in substantive terms, leaving open the question whether the acts to be adopted accordingly are legislative or

[285] See, *inter alia*, VON BOGDANDY Armin and BAST Jürgen, *op. cit*. (2002), pp. 227-268.
[286] Article 4 TEU. However, on the phenomenon of the "competence creep" see, *inter alia*, PRECHAL Sacha, DE VRIES Sybe and VAN EIJKEN Hanneke, "The Principle of Attributed Powers and the 'Scope of EU Law'", in BESSELINK Leonard, PENNINGS Frans and PRECHAL Sacha (eds.), *The Eclipse of the Legality Principle in the European Union,* (Wolters Kluwer, 2011), pp. 213-249.
[287] Article 5 TEU. In the words of the Court of Justice, it means that the Union "has only those powers which have been conferred on it." (Opinion 2/94, *EU Accession to ECHR*, EU:C:1996:140, para. 25).
[288] LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *Constitutional Law of the European Union*, (Sweet & Maxwell, 2005), p. 86. However, on the peculiarities of EU external relations law, see JACQUE' Jean Paul, *op. cit.* (2012), pp. 157-163.
[289] Article 352 TFEU.
[290] On the doctrine of the implied powers, see, *inter alia*, Case 8/55, *Fédéchar*, EU:C:1956:11; Cases 281, 283-285, 287/85, *Germany v Commission*, EU:C:1987:351; Case C-176/03, *Commission v Council*, EU:C:2005:542. More specifically on the doctrine of implied powers in EU external relations law, see Case 22/70, *Commission v Council (AETR)*, EU:C:1971:32; Opinion 1/76 *(Inland waterway vessels)*, EU:C:1977:63; Opinion 2/91 *(ILO)*, EU:C:1993:106; Opinion 1/94 *(WTO)*, EU:C:1994:384; Opinion 2/94 *(Accession to ECHR)*, EU:C:1996:140; Case C-466/98, *Commission v UK (Open Skies)*, EU:C:2002:624; Opinion 1/03 *(Lugano Convention)*, EU:C:2006:81; see EECKHOUT Piet, *EU External Relations Law,* (Oxford University Press, 2011), pp. 70-113. For a distinction between implied powers and implied competence (as in Case C-295/90, *European Parliament v Council*, EU:C:1992:294; Case 9/74, *Casagrande*, EU:C:1974:74), see LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), paras. 5-015 and 5-016.
[291] Article 2 TFEU.
[292] Article 3 TFEU.
[293] Article 4 TFEU.
[294] Article 6 TFEU.
[295] Article 5 TEU.

executive in nature.[296] Indeed, the wording of the Treaties' provisions on competences suggests that the competence comprises both the power to adopt legislation and the power to implement it, although the implementation is in principle carried out by the Member States through indirect administration.[297]

11.1. The Need for a Legal Basis

The principle of conferral implies that, to pursue the values and objectives listed in Articles 2 and 3 TEU, the Union can act only in so far as there is a specific treaty provision which provides a legal basis for its action. Such a legal basis identifies the main principles guiding Union action in the field and defines the decision-making powers which the Union institutions enjoy for the attainment of that objective.[298] Hence, the legal basis does not only establish the competence of the Union in a certain field, but it also regulates the precise decision-making procedure to be followed and, in certain cases, the type of measures which can be adopted. Therefore, it has both a vertical dimension, relating to the division of powers between the EU and the Member States, and a horizontal dimension, determining which institutions are to be involved and how the act is to be adopted.[299]

Considering the implications of the legal basis for the horizontal allocation of powers and the procedure to be followed, the choice of the correct legal basis has constitutional importance and causes a considerable amount of litigation between the institutions.[300] As the Court held in *Massey-Ferguson*, the choice of the wrong legal basis can result in the annulment of the measure where it affects "the rules of the Treaty on the forming of the (Council's) decision" or "the division of powers between the institutions".[301] In this regard, the Court has clarified that this choice shall be "based on objective factors which are amenable to judicial review", such as the aim and content of the act.[302] Accordingly, the legal basis of each EU act shall be expressed[303] or, at least, it shall be

[296] See VON BOGDANDY Armin and BAST Jürgen, "The Vertical Order of Competences", in VON BOGDANDY Armin and BAST Jürgen, *Principles of European Constitutional Law* (Hart Publishing, 2005), pp. 348-349. See also JACQUE' Jean-Paul, op. cit. (2014), p. 47; LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert (ed.), *Constitutional Law of the European Union*, 2nd ed. (Sweet & Maxwell, 2005), para. 13-012.
[297] SCHREIBER Stefanie, *Verwaltungskompetenzen der Europäischen Gemeinschaft*, (Nomos, 1997), p. 185, cited in CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 136.
[298] See DASHWOOD Alan, DOUGAN Michael, RODGER Barry, SPAVENTA Eleanor and WYATT Derrick, *Wyatt and Dashwood's European Union Law* (Hart Publishing, 2011), p. 99.
[299] LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), p. 88.
[300] Ibidem, para. 5.012.
[301] Case 8/73, *Hauptzollamt Bremerhaven v Massey-Ferguson*, EU:C:1973:90, para. 4. See HARTLEY Trevor, *The Foundations of European Union Law,* 8th ed. (Oxford University Press, 2014), p. 120.
[302] Case 45/86, *Commission v Council*, EU:C:1987:163, para. 11; Case C-300/89, *Commission v Council*, EU:C:1991:244, para. 10.
[303] The failure to specify the precise legal basis is an infringement of an essential procedural requirement, thus of one of the grounds for the annulment of an act ex Article 263 TFEU. See Case C-325/91, *France v*

deduced unambiguously by other factors.[304] However, the determination of the correct legal basis might not always be straightforward.[305] In the case of an act with manifold objectives or touching upon different aspects, the main aim or the main aspect of the measure shall determine the choice of the legal basis.[306] Where it is not possible to identify such a main objective or aspect, the procedural requirements of both legal bases shall be respected,[307] unless they are incompatible.[308]

Based on these objective criteria, the choice of the legal basis and the procedure to be followed for the adoption of EU acts is not at the disposal of the institutional actors.[309] In this regard, it is important to note that the delegation of powers, which empowers an institution according to the enabling act, has the effect of creating a new legal basis for the adoption of EU measures. This new legal basis, not provided in the Treaties, may allow the institution or body to act according to a procedure which does not correspond to the one provided in primary law and which does not involve the other institutions in the same way. Therefore, the delegation of powers has the potential to interfere with the established legal basis and the division of powers as defined by the Treaties, requiring a careful assessment of its compatibility with the principle of conferral.[310]

11.2. The Horizontal Dimension

With regard to the horizontal dimension of the principle of conferral, Article 13 (2) TEU sets forth that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them." Accordingly, such provisions determine the allocation of powers among institutions, shaping the scope of each institution's competence. It is important to recall that such powers can be exercised by the institutions either alone or, more often, in cooperation with other institutions, according to the procedure established by the relevant legal basis. Hence, as examples of the first case, the

Commission, EU:C:1993:245, para. 26; Case 45/86, *Commission v Council (Tariff Preferences)*, EU:C:1987:163, para. 9.

[304] Case T-70/99, *Alpharma v Council*, EU:T:2002:210, paras. 110-112.

[305] HARTLEY Trevor, op. cit. (2014), p. 120.

[306] See, *inter alia*, Case 68/86, *UK v Council*, EU:C:1988:85, paras. 14-16; Case 70/88, *Parliament v Council*, EU:C:1991:373, paras. 16-18; Case C-187/93, *Parliament v Council*, EU:C:1994:265, paras. 23-26; case C-281/01*, Commission v Council*, EU:C:2002:761, paras. 33-49.

[307] Case 165/87, *Commission v Council (Commodity Coding)*, EU:C:1988:458, para. 11.

[308] Case C-300/89, *Commission v Council (Titanium Dioxide)*, EU:C:1991:244, paras. 17-21. The case concerned a Council act laying down uniform standards for environmental protection on titanium dioxide. Since the measure had twofold objectives (the environmental protection and fair competition among industries), both Article 130s EEC (requiring unanimity in Council and consultation of the Parliament) and Article 100a EEC (requiring qualified majority voting in the Council and co-operation procedure with the Parliament) were applicable. However, if both the procedures were applied, the position of the Parliament would have become meaningless since, under the co-operation procedure, the Council could anyway override its negative opinion by unanimity. Therefore, the Court identified in Article 100a EEC the correct legal basis. For a different approach, see Case C-166/07, *Parliament v Council*, EU:C:2009:499.

[309] Case C-133/06, *European Parliament v Council of the European Union*EU:C:2008:257, para. 54.

[310] Ibidem, para. 57. See also LENAERTS Koen, op. cit. (1993), p. 35.

Commission can adopt acts in the field of competition law and State aid without the involvement of other institutions,[311] or the Council can adopt rules governing the languages of the Union institutions by unanimity[312] or promote administrative cooperation within the Area of Freedom, Security and Justice by qualified majority voting.[313] Conversely, in a great number of areas, the exercise of the EU competences implies the cooperation between the Commission, the Council and the Parliament. In particular, the ordinary legislative procedure[314] requires the Council and the Parliament to exercise the legislative function jointly, on an equal footing.[315] In this case, arguably the powers are shared between the institutions adopting the act.

Within the scope of the conferred powers, each institution has the power to decide on its own organisation and manner of operation.[316] Therefore, according to the principle of autonomy, for instance, each institution can adopt its internal regulations autonomously, establishing the decision-making procedures or the procedures for monitoring its internal operations. However, in determining its organisation and procedures, the institution cannot disregard the principles of EU law. [317]

Considering the meaning of the principle of conferral in relation to the notion of delegation, it implies that, firstly, the delegation of powers at the EU level can occur only within the limits of the competences vertically attributed to the Union as established in the Treaties. Secondly, also on the horizontal level, each institution can only delegate the powers which are thereby attributed to it, according to the abovementioned principle *nemo plus iuris*.[318] Such a principle is arguably applicable both in cases of delegation within the same institution or body and in cases where the powers are conferred from one institution or body to another.[319] In other words, in the EU legal system there is a fixed order of competences whereby the power conferred on the Union is distributed among different institutions or bodies by a higher source of law, *i.e.* the Treaties. The first condition for the delegation of powers is thus met in the EU legal system, although this does

[311] See Articles 105 and 108 TFEU.
[312] See Article 342 TFEU.
[313] See Article 74 TFEU.
[314] The ordinary legislative procedure corresponds to the co-decision procedure introduced in Maastricht. The number of areas where it is applicable has been growing significantly in the Treaties revisions, including now also agriculture, services, asylum and migration, structural and cohesion funds, and the creation of specialized courts. See CRAIG Paul and DE BURCA Grainne, *EU Law. Text, Cases and Materials*, 5th ed., (Oxford University Press, 2011), p. 124.
[315] Article 294 TFEU.
[316] JACQUE' Jean Paul, *op. cit.* (2012), p. 222; LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), para. 13-009.
[317] For the limits to the principle of autonomy, whose misuse could encroach the other institutions' powers, see, *inter alia*, Case 208/80, *Lord Bruce of Donington*, EU:C:1981:194; Case 230/81, *Luxembourg v Parliament*, EU:C:1983:32; Case 294/83, *Les Verts v Parliament*, EU:C:1986:166.
[318] See *supra* para. 2.
[319] See Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306, para. 46, analysed *infra*.

not clarify whether such a distribution of powers is inspired by a meta-legal principle, such as the doctrine of separation of powers in State legal systems.

12. The Rule of Law in the EU

Considering the relevance of the rule of law to the notion of the delegation of powers in State legal systems,[320] it is important to reflect on its role, particularly with reference to its corollary of the principle of legality,[321] within the EU legal system.

In this regard, it is interesting to note that such a principle was not mentioned in the Treaty of Rome, but it was inserted into the text of the Treaties only in the Amsterdam Treaty.[322] This did not impede the Court from recognising, already in *Les Verts*, that the Community was a legal system "based on the rule of law" whereby neither the Member States nor its institutions can escape the review of the compliance of their acts with the Treaty provisions.[323] The importance of this principle in the case law of the Court, and for the European integration process in general, has been widely recognised.[324] Nowadays, while the recitals of the Lisbon Treaties reaffirm the importance of the rule of law in the democratic systems of the Member States,[325] Article 2 TEU

[320] See *supra* para. 5.

[321] It is acknowledged that in EU law the definition of rule of law, and of the sub-principles derived from it, are still debated in literature (see, *inter alia*, LENAERTS Koen, "The Rule of Law and the Coherence of the Judicial System of the European Union", *Common Market Law Review* 44 (2007), pp. 1625-1659; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 149; SCHROEDER Werner (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, (Hart Publishing, 2016), part I and II). In particular, most definitions include the separation of powers among the sub-principles of the rule of law, but for the importance it has on the delegation of powers, it will be analysed separately.

[322] Article 6 of the Consolidated Version of the Treaty of the European Union (1997). The Maastricht Treaty, however, already mentioned the development of the rule of law in the developing countries among the objectives of the development cooperation policy (Article 130u). See CONWAY Gerard, *op. cit.* (2012), p. 89.

[323] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, p. 23. The case concerned an action for annulment brought by the Greens party against an act of the Parliament refusing funding to political parties which did not have seats in the European Parliament. Although not provided in Article 173 EC, the Court ruled for the admissibility of an action of annulment against a measure adopted by the Parliament, granting it passive standing. See also Case 101/78, *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, EU:C:1979:38, para. 5; Case C-15/00, *Commission v EIB*, EU:C:2003:396, para. 75; Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International v Commission*, EU:T:2003:6, para. 121; Joined Cases 46/87 and 227/88, *Hoechst AG v Commission,* EU:C:1989:337.

[324] *Inter alia*, HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 149; AZOULAI Loic, "Le principe de legalité" in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen,* II ed. (Bruylant, 2014), p. 393. For some critical remarks on the effective application of the principle, see PECH Laurent, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law", 6 *European Constitutional Law Review* (2010), pp. 359-396; BESSELINK Leonard, PENNINGS Frans and PRECHAL Sacha (eds.), *The Eclipse of the Legality Principle in the European Union,* (Wolters Kluwer, 2011); COSTANZO Pasquale, MEZZETTI Luca and RUGGIERI Antonio, *Lineamenti di diritto costituzionale dell'Unione europea* (Giappichelli, 2010), pp. 97-98.

[325] See Recital 2: "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" and Recital 4: "confirming their attachment to the

explicitly states that the rule of law is one of the funding values of the Union.[326] Therefore, it is beyond doubt that this principle, both in its formal and substantive meanings,[327] shall guide the exercise of the EU competences and of the powers attributed to the EU institutions,[328] thus shaping the legal framework for the delegation of powers at the EU level.

12.1. The Principle of Legality

With particular regard to the principle of legality, which represents one of the pillars of the rule of law,[329] it generally implies that the exercise of public powers shall be embedded within a legal framework which enables the institution or body to exercise that power within certain substantive limits and under certain procedural requirements established by a higher law.[330] Accordingly, the EU institutions and bodies shall act "under the law and within the law", meaning according to rules set forth in a primary law or secondary legislation.[331] The implications of the principle of legality in EU law have been identified, in particular, in the need for EU institutions and bodies to act within the power given to them.[332] Therefore, any exercise of the power *ultra vires* is considered contrary to the rule of law and, on this ground, invalid.[333] Thus, with reference to the delegation of powers, the Court of Justice has jurisdiction to annul an act of the delegated institution or body which exceeds the powers conferred on it by the delegator.[334]

Moreover, it has been argued that, from the perspective of EU institutional law, the principle of legality presents a negative and a positive aspect.[335] On the one hand, considering the principle of *negative* legality, it means that each act of the EU shall be consistent with the body of law which is higher in the hierarchy of norms.[336] Therefore, as we will see, no provision of secondary law can

principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law" of the Consolidated Version of the Treaty on the European Union (2010).

[326] Article 2(1) TEU.

[327] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 251; CRAIG Paul, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", *Public Law* (1997), pp. 467-487.

[328] In this regard, cf. CONWAY Gerard, *op. cit.* (2012), p. 90, who describes it as a meta-principle for judicial interpretation.

[329] As defined by BESSELINK Leonard, PENNINGS Frans and PRECHAL Sacha (eds.), *op. cit.* (2011), p. 2.

[330] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 150. See also BESSELINK Leonard, PENNINGS Frans and PRECHAL Sacha (eds.), *op. cit*. (2011), pp. 4-5.

[331] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 151. For a recent confirmation of the principle of legality as a recognised principle in EU law, see Case C-42/17, *M.A.S. and M.B. (Taricco II)*, EU:C:2017:936.

[332] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 151.

[333] As it will be seen, pursuant to Article 263 (2) TFEU, any act of EU institutions, bodies, offices or agencies is subject to a judicial review by the Court of Justice on the grounds of a "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

[334] See, *inter alia*, Case 34/78, *Yoshida Netherland v Kamer van Koophandel en Fabrieken voor Friesland*, EU:C:1979:20, paras. 12-14; Case 162/82, *Cousin*, EU:C:1983:93, para. 15.

[335] VON BOGDANDY Armin and BAST Jürgen, *op. cit*. (2002), p. 229.

[336] Ibidem.

derogate from the Treaty provisions or the principles and norms at the same level.[337] In this sense, this aspect shows how the principle of legality is strictly interlinked with the principle of conferred powers and with the hierarchy of norms. On the other hand, considering the *positive* aspect of the principle of legality, it has been interpreted as requiring the existence of a legal basis for each act of EU law.[338] Therefore, the exercise of powers shall find an enabling provision either in primary law or secondary law, which in turn has its legal basis in the Treaties.[339] Therefore, the legal basis of an EU act can also consist of another EU act, which is required for its implementation.[340]

Considering how controversial the interplay between the principle of legality and the hierarchy of norms was considered in the delegation of powers in the States' legal systems based on a constitutionally established order of competences,[341] it is surprising that in EU law this aspect has been perceived as being less problematic.[342] The Court of Justice has accepted forms of delegation of powers conferred on certain institutions by secondary law provisions even in the absence of a clear *Delegationsnorm* at the primary level.[343] In this regard, the case law seems to have adopted the position according to which, respecting the limits of primary law, secondary law can constitute sources of norms which, in State legal systems, would be ranked lower in the hierarchy of norms.[344] This may be understood in relation to the peculiarities of the hierarchy of norms existing in the EU legal system, especially before the Lisbon Treaty, which hence deserves closer attention.

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[337] See *infra* para. 12.2.

[338] For a discussion of the legal basis, see *supra* para. 4.1. See also Joined Cases 46/87 and 227/88, *Hoechst AG v Commission*, EU:C:1989:337, para. 19: "in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law."

[339] VON BOGDANDY Armin and BAST Jürgen, *op. cit*. (2002), p. 231. According to the authors, in EU law the principle of positive legality is assimilated to the principle of conferred powers.

[340] LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), para. 5-009.

[341] See *supra*, para. 5.

[342] See, however, a reference to the problem in connection to the principle of conferral in LENAERTS Koen, *op. cit*. (1993), p. 23; GRILLER Stefan and ORATOR Andreas, "Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine", 35 *European Law Review No.* 1 (2010), p. 15.

[343] See Case 10-56, *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:8; Case 25/70, *Köster, Berodty & Co. v. Einfuhr und Vorratsstelle fur Getreide und Futtermittel*, EU:C:1970:115. The issue will be discussed in detail *infra* in Chapter 5, para. 2.

[344] ALI' Antonino, *op. cit.* (2005), p. 98, citing PALADIN Livio, *Diritto costitutionale,* II ed. (Cedam, 1997), p. 198.

12.2. The Hierarchy of Norms in EU Law

12.2.1. The Hierarchy before the Lisbon Treaty

In the pre-Lisbon era, legal literature has traditionally remarked on the difficulty of drawing a clear picture of the hierarchy of norms among the EU legal instruments.[345] The perception of fragmentation, and perhaps chaos, in the structure of the legal instruments of the EU has caused many scholars to claim that, at least with reference to secondary law, no clear hierarchy of norms could be identified.[346]

Nevertheless, it is important to recall that even before the adoption of the Lisbon Treaty, EU law recognised a certain form of hierarchy of norms.[347] On the one hand, the position of the Treaty provisions at the highest level of the hierarchy was undisputed, entailing that all the legal instruments of secondary law were subordinate to primary law.[348] Therefore, the relationship between primary and secondary law was (and still is) certainly hierarchical.[349] On the other hand, the acts whose legal basis was in a secondary law act were considered subordinate to such acts, having to comply with the procedural and substantial requirements imposed by the basic act.[350]

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[345] CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *European Union Law. Cases and Materials,* 2nd ed. (Cambridge University Press, 2010), p. 100; VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, "Legal Instruments in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis", *Yearbook of European Law* (2004), p. 91; Working Group IX of the European Convention, Final Report, CONV 424/02, I, p.3.

[346] See, for instance, D'ATENA Antonio, "L'anomalo assetto delle fonti comunitarie", *Il Diritto dell'Unione Europea* (2001), p. 596; CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2010), p. 100; SCHUTZE Robert, "Sharpening the Separation of Powers through a Hierarchy of Norms?", *EIPA Working Paper 2005/W/01,* http://www.eipa.eu/files/repository (last accessed 08.08.2016), p. 7; DE WITTE Bruno, "Simplification and Reorganization of the European Treaties", 39 *Common Market Law Review* (2002), p. 1285.

[347] JACQUE' Jean-Paul, *op. cit.* (2016), p. 22; DE WITTE Bruno, "Legal Instruments and Law-Making in the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, (Springer, 2008), p. 91.

[348] This derives from the application of Article 263 TFEU (Article 230 EC) which establishes the judicial review of acts of secondary law on the ground, *inter alia*, of "infringement of the Treaties or of any rule of law relating to their application". It was also considered the application of Article 249 EC since it specified that the institutions could adopt regulations, directives, decisions, recommendations, and opinions "in accordance with the provisions of this Treaty" (the phrase has been repealed in Article 288 TFEU), see BAST Jürgen, "On the Grammar of EU Law: Legal Instruments", *Jean Monnet Working Paper 9/03 (Heidelberg 24-27 February 2003),* p. 21.

[349] TIZZANO Antonio, "La gerarchia delle norme comunitarie", *Il Diritto dell'Unione Europea* (1996), p. 61, where the author recognises a certain hierarchy also within primary law, considering the higher value given to certain principles of "constitutional character" (e.g. non-discrimination, democracy, proportionality etc.) by the Court.

[350] Case 38/70, *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1971:24, para. 10; Joined Cases 9/71-11/71, *Compagnie d'approvisionnement, de transport et de credit v Commission*, EU:C:1972:52; Case 46/86, *Romkes*, EU:C:1987:287, para. 16. See BAST Jürgen, op. cit. (2003), p. 30; BIEBER Roland and SALOME' Isabelle, "Hierarchy of Norms in European Law", 33 *Common Market Law Review* (1996), p. 920; DE WITTE Bruno, *op. cit.* (2008), p. 92. The issue will be discussed in detail in Chapter 6, para. 4.

In these contexts, the Court of Justice has recognised the hierarchy of norms as an unwritten principle of EU law, applying it for the determination of the outcome of its cases.[351]

However, considering the legal instruments of secondary law, the situation was far less clear. The proliferation of different acts as a result of the subsequent Treaty reforms (especially in the second and third pillars) and of the practice of the institutions,[352] together with the difficulties of classifying the EU acts according to the categories elaborated in domestic law,[353] has contributed to a general impression of "fuzziness" of the hierarchy of norms in the EU legal system.[354] Different aspects precluded the identification of a clear hierarchy of norms among acts of EU secondary law.

Firstly, there was no hierarchy among types of acts listed in what is now Article 288 TFEU.[355] Regulations, directives and decisions (just to consider the binding sources of law) are distinguished on the basis of their specific "operating mode",[356] but not on the basis of the reciprocal collocation in a hierarchy of norms.[357] Evidence of this is visible in the interchangeability between legal instruments allowed by the Court: where the relevant legal basis does not specify which kind of act is to be adopted, the institutions are left with broad discretion as to the choice of the legal instrument on which the Court exercises only a marginal judicial review.[358] Moreover, Article 288 TFEU does not provide an exhaustive list of legal instruments since the Treaties envisaged a large number of atypical acts.[359]

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[351] See, *inter alia*, Case 38/70, *Tradax*, EU:C:1971:24; Case 34/78, *Yoshida*, EU:C:1979:20; Case 145/79, *Roquette v France*, EU:C:1980:234; Case T-536/93, *Benzler v Commission*, EU:T:1994:264. See BIEBER Roland and SALOME' Isabelle, *op. cit.* (1996), p. 913.

[352] The Court has never prohibited the creation of atypical acts, endorsing the argument that the legal instruments described in the Treaties are not a *numerus clausus*. See, *inter alia*, Cases 90/63 and 91/63, *Commission v Luxembourg and Belgium*, EU:C:1964:80.

[353] The reference here is to the decisions having no specified addressee, which German legal scholars struggle to classify in the domestic categories of *Beschluss* or *Entsheidung*. See VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, *op. cit.* (2004), p. 103.

[354] VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, *op. cit.* (2004), p. 104.

[355] See BIEBER Roland and SALOME' Isabelle, *op. cit.* (1996), p. 919; BAST Jürgen, *op. cit.* (2003), p. 28.

[356] BAST Jürgen, *op. cit*. (2003), p. 29.

[357] Article 288 TFEU: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force."

[358] Case 5/73, *Balkan-Import-Export*, EU:C:1973:109, para. 18; Case C-163/99, *Portugal v Commission*, EU:C:2001:189, para. 20; Case C-107/95 P, *Bundesverband der Bilanzbuchhalter v Commission*, EU:C:1997:71, para. 27; see BAST Jürgen, "Is There a Hierarchy of Acts?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 168.

[359] See BIEBER Roland and SALOME' Isabelle, *op. cit*. (1996), p. 921; TIZZANO Antonio, *op. cit.* (1996), p. 66.

Secondly, it has been noted that there was no hierarchy among rule-making institutions.[360] While in the domestic legal systems, the doctrine of separation of powers attributes the central role in the adoption of legislative acts to the Parliament, conferring on its measures a hierarchical value above the acts of other institutions,[361] in EU law several institutions have autonomous rule-making powers.[362] Both the Commission and the Council, for instance, are conferred rule-making powers directly from the Treaties. In this regard, the Court has refused to distinguish the legal effects of the acts according to the institution which adopted it,[363] precluding the establishment of a hierarchy of acts on the basis of the enacting institution. Thirdly, related to this, it was argued that there was no hierarchy among the procedures.[364] Before the adoption of the Lisbon Treaty, within the variety of procedures established in primary law, no procedure was recognised as having a special formal status for the enactment of rules, having no bearing whether one or more institutions were involved, or whether the Parliament, as the democratically-elected institution, had a more important role. In this sense, the anomalies of the hierarchy of norms were strictly linked to the peculiarities of the EU institutional structure.[365]

Therefore, a need to reform the existing system of legal instruments was voiced, especially by the European Parliament.[366] Indeed, in light of the increasing "parliamentarisation" of the EU, the lack of a hierarchy in secondary law appeared to be more and more an "anomaly" of the system.[367] Consequently, the 1996 Intergovernmental Conference was conferred the mandate to "examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of acts."[368] This task was eventually carried out by the XI Working Group of the Convention for the Future of Europe, which

[360] See BAST Jürgen, *op. cit*. (2003), pp.24-26; BIEBER Roland and SALOME' Isabelle, *op. cit*. (1996), p. 915.
[361] In particular, the normative acts of the Government are generally at a lower hierarchical level. See Chapter 1, para. 6.
[362] The reference here is to the acts adopted directly on the basis of the Treaties by the various EU institutions. The particular case of acts with a legal basis in secondary law differs, as illustrated *supra*.
[363] Case 41/69, *Chemiefarma v Commission*, EU:C:1970:71, paras. 60-62; Joined Cases 188/80-190/80, *France v Commission*, EU:C:1982:257, para. 65; see BAST Jürgen, *op. cit*. (2003), p. 25.
[364] BAST Jürgen, *op. cit.* (2003), p. 26; BIEBER Roland and SALOME' Isabelle, *op. cit.* (1996), p. 916.
[365] D'ATENA Antonio, *op. cit.* (2001), p. 601. See *infra* Chapter 1, para. 6.
[366] See, *inter alia*, BIEBER Roland and SALOME' Isabelle, *op. cit.* (1996), p. 921; European Parliament, Preliminary draft Treaty establishing the European Union presented on 14 February 1984, O.J. C 77/33; European Parliament, Resolution of 18 April 1991 on the Nature of Community Acts, OJ C 129, 20.5.1991, p. 136.
[367] BAST Jürgen, *op. cit.* (2016), p. 157; BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), pp. 885-928.
[368] Declaration n° 16 annexed to the Treaty of the European Union, signed in Maastricht on 7 February 1992. In 1990, during the Intergovernmental Conference in charge of the preparation of the Maastricht Treaty, the Italian delegation tabled a proposal for a hierarchy of norms, but the only result was this reference in the final act. The issue was not addressed neither in Amsterdam nor in Nice, being resumed only in the Convention for the Future of Europe. See TIZZANO Antonio, *op. cit.* (1996), pp. 57-87; JACQUE' Jean-Paul, *op. cit*. (2014), p. 45; ALI' Antonino, *op. cit.* (2005), p. 103.

- in view of the simplification (or better, reorganisation)[369] of the Treaties - tabled a proposal for a substantial reform of the legal instruments. Intrinsically linking the establishment of a hierarchy of norms to the fundamental aspect of the separation of powers, especially between the executive and legislative powers, and to the democratic legitimacy, a classification of the legal instruments among "legislative acts" (in the form of "laws" and "framework laws"), "delegated acts" and "implementing acts" was proposed.[370] These acts were intended to constitute three different levels of a hierarchy.[371]

12.2.2. The Hierarchy after the Lisbon Treaty

After the failure to enter into force of the Constitutional Treaty and the subsequent Intergovernmental Conference in 2007, the proposed innovations were partially inserted into the Lisbon Treaty. Accordingly, a distinction was introduced between legislative acts, meaning "legal acts adopted by legislative procedure" according to Article 289 TFEU,[372] and non-legislative acts.

Among non-legislative acts, three categories can be counted:[373] (i) acts having their legal basis directly in the Treaties, (ii) delegated acts adopted by the Commission "to supplement or amend certain non-essential elements of the legislative act", and (iii) implementing acts of the Commission or the Council which are necessary for the uniform application of EU law. A detailed discussion of the different categories will be provided in the following chapters.[374] For the purpose of the analysis of the hierarchy of norms in the EU, suffice it to remark that the Lisbon Treaty appears to have introduced a hierarchy between legislative and non-legislative acts.[375] Such a relationship is based on a hierarchy among procedures, giving a particular value to the ordinary legislative procedure which entails the joint adoption by the Council and the Parliament.[376]

However, it is important to recall that legislative acts are not defined according to their content but according to the procedure for their adoption.[377] Legislative acts may derive not only from the ordinary legislative procedure, but also from special legislative procedures, where the

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[369] On the difference, see DE WITTE Bruno, *op. cit*. (2002), pp. 1255-1287.
[370] Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, pp. 338-343. For a discussion, see *inter alia* SCHUTZE Robert, *op. cit*. (2005).
[371] Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 339.
[372] Article 289 TFEU.
[373] DASHWOOD Alan, DOUGAN Michael, RODGER Barry, SPAVENTA Eleanor and WYATT Derrick, *op. cit*. (2011), p. 83.
[374] Chapter 4, paras. 3 and 4.
[375] CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit*. (2010), p. 100; VOERMANS Wim, "Delegation is a Matter of Confidence", 17 *European Public Law* n° 2 (2011), p. 317.
[376] Article 289 TFEU.
[377] See, *inter alia*, DE WITTE Bruno, *op. cit.* (2008), p. 92.

involvement of the Parliament may vary, disappointing the expectations of a coherent procedural criterion based on the role of the Parliament in rule-making.[378] What is more, since the legislative character of a procedure is determined formally by the text of the Treaty, acts adopted with similar procedures may be classified as legislative acts or non-legislative acts depending on the express definition of the particular procedure as "legislative" or not.[379] In light of this, such a criterion arguably appears rather formalistic, if not altogether arbitrary.[380]

Moreover, the alleged hierarchical superiority of legislative acts that the new categorisation aimed to achieve appears remarkably scaled down in judicial interpretation. Indeed, in the recent case *Slovakia v Council*, concerning the relocation quotas of third-country nationals, the Court allowed a non-legislative act based directly on the Treaties to derogate from provisions established in a legislative act.[381] Therefore, at least between acts based directly on the Treaties, the clarification of the hierarchy of norms still appears to be unsettled.

Furthermore, although the new system is considered a three-tiered hierarchy,[382] a vertical understanding of the relationship between the delegated acts and the implementing acts has been contested.[383] In particular, in the absence of a clear hierarchical collocation by the Treaties, such a hierarchy is far from being established also in the light of the substantial overlap between the two categories and the unsolved difficulties in the distinction, exacerbated by the recent rulings of the Court of Justice.[384] Therefore, the relationship between the two categories - and the relationship between them and the legislative acts - needs further reflection.[385]

Finally, the categorisation introduced by the Lisbon Treaty still does not result in a *numerus clausus* of legal instruments,[386] as it is not complete. Indeed, on the one hand, the three-tiered categorisation does not include the non-legislative acts adopted directly under the Treaties, whose existence is manifestly outside the hierarchy.[387] On the other hand, the Court has recognised that Articles 290 and 291 TFEU constitute an open system which allows institutions,

[378] BAST Jürgen, *op. cit.* (2012), p. 893. *Contra* VOERMANS Wim, *op. cit.* (2011), p. 319.
[379] Compare, for instance, Article 21(3) TFEU, a special legislative procedure with vote of the Council and consultation of the Parliament, with Article 103(1) TFEU, a procedure with vote of the Council and consultation of the Parliament but not defined "special legislative procedure".
[380] DE WITTE Bruno, *op. cit.* (2002), p. 101.
[381] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, EU:C:2017:631, esp. para. 78.
[382] See, *inter alia*, MAGARO' Patrizia, *Delega legislativa e dialettica politico-istituzionale* (Giappichelli, 2003), p. 291, where the answer of the President of the Working Group is reported, asserting that the delegated acts should be considered "sub-primary" (not secondary) acts.
[383] BAST Jürgen, *op. cit.* (2016), pp. 157-171.
[384] *In primis*, Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170. See BAST Jürgen, *op. cit.* (2016), pp. 170-171.
[385] See Chapter 6, para. 3.2.
[386] See *supra* Chapter 1, para. 5.
[387] DE WITTE Bruno, *op. cit.* (2002), p. 100.

bodies and agencies of the EU to adopt other types of acts.[388] Therefore, any attempt to identify a defined hierarchy of norms on the basis of the Treaty articles on the legal acts of the Union[389] falls necessarily short of completeness. In light of this system of hierarchy of norms and its implications for the relationship between the principle of legality and the delegation of powers, this observation entails that phenomena of delegation can also occur in the absence of a provision in primary law.[390] Therefore, the scope of the research on the delegation of powers in the EU legal system cannot be limited to the provisions of the Treaty, but it should look at the transferral of powers which also occur in the shadow of the Treaties' provisions.

13. The Separation of Powers in the EU

The distribution of powers at the vertical and horizontal level follows the principle of conferral or attributed powers, defining the competence of the EU in relation to the Member States and, within this competence, the powers of the different institutional actors. However, this does not clarify whether such a distribution is inspired by a meta-legal principle which conditions such order of competences. In the State legal systems, this role is played by the separation-of-powers doctrine. Bearing in mind that the derogative aspect of the delegation of powers is problematic, especially in relation to this principle,[391] it can be questioned whether this principle is also relevant in the EU legal system or whether another principle with the same function has been developed at the EU level.

It is a *topos* in EU literature to point out that, given its *sui generis* character, it is inappropriate to apply the idea of a tripartite separation of powers to the EU.[392] In Pierre Pescatore's words, "the tripartite doctrine of separation of powers is not an explanatory principle valid for a transnational ensemble such as the EU".[393] The analysis of the principle of separation of powers in the domestic

[388] See Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18, esp. paras. 77-87. But see also Case C-613/14, *James Elliott Construction Limited v Irish Asphalt Limited*, EU:C:2016:821, para. 34, where the Court describes the harmonised standards issued by the European standard-setting organisations "measures implementing or applying an act of EU law".
[389] Meaning Articles 288-292 TFEU.
[390] See Case 10-56, *Meroni, cit.*; Case 25/70, *Köster, cit*. See *infra* Chapter 5, para. 2.3.
[391] See *infra* Chapter 1, paras. 5 and 6.
[392] As Vice-President Amato famously declared in his opening speech at the Convention: "Montesquieu has never visited Brussels". See, *inter alia*, BLANKE Hermann-Josef and MANGIAMELI Stelio, *The Treaty on the European Union (TEU): A Commentary* (Springer, 2013), p. 558; LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), p. 564; DASHWOOD Alan, DOUGAN Michael, RODGER Barry, SPAVENTA Eleanor and WYATT Derrick, *op. cit.* (2011), p. 66.
[393] "La doctrine "tripartite" de la séparation de pouvoirs n'est pas un principe d'explication valable pour un ensemble transnational tel que les Communautés européennes.", PESCATORE Pierre, "L'éxecutif communautaire: Justification du Quadripatitisme institué par les Traités de Paris et de Rome", 14 *Cahiers de droit européen* No. 4 (1978), p. 388, cited also in CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 263.

legal systems, however, has shown that such a principle cannot be reduced to Montesquieu's idea of the *trias politica*, but its meaning and influence must be appreciated in light of its significant evolution. Recalling the origin of such a principle as a reaction to the concentration of powers of the *ancien régime*, it is clear that its main aim is protecting individuals' rights by preventing the exercise of public authority in an arbitrary way. In this regard, it is arguable that the exercise of EU competences also implies the risk of power abuse and arbitrary rule,[394] requiring an equally conceived guarantee.

However, although at the EU level the power is far from being concentrated in the hands of a single actor,[395] the division of powers within the EU institutional system is "of a different configuration from that which exists in a domestic legal system."[396] Arguably, the prevailing idea during the negotiations for the EEC Treaty was that, being an international organisation established to pursue specific aims, there was simply no need to resort to such a doctrine.[397] As we have seen, in the traditional doctrine, the State action is distinguished in the executive, legislative and judicial functions (together with the function of political direction, after the rise of the welfare State) and these functions must be attributed to different branches. What is seen as problematic in the EU is that the attribution of certain powers to the institutions is not in accordance with this correlation between a single branch and its specific function. In the literature, there have been attempts to equate the Parliament and the Council to the legislative power, the Court of Justice to the judicial power, and to describe the Commission as the main executive power.[398]

However, such an analogy - based on an organic understanding of the separation of powers - holds true only at a superficial level,[399] as it represents "only an incomplete picture of the institutional structure".[400] Indeed, the Court of Justice has rejected the very idea that a certain function pertains solely to a single institution.[401] In Joined Cases 188 to 190/80, the Court ruled out that all the original law-making power was vested in the Council, recognising the autonomous powers of decision of the Commission according to the Treaty provisions.[402] As a rule, "the limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not

[394] CHAMON Merijn, "The Institutional Balance, an Ill-Fated Principle of EU Law?", 21 *European Public Law* No. 2 (2015), p. 373; VOS Ellen, *op. cit.* (1999), p. 84; DEHOUSSE Renaud, *op. cit.* (2008), pp. 789–805.
[395] BOGNETTI Giovanni, *op. cit.* (2001), p. 170.
[396] Opinion of Advocate General Bot in Case C-63/12, *European Commission v Council*, EU:C:2013:547, note 111.
[397] COSTANZO Pasquale, MEZZETTI Luca and RUGGIERI Antonio, *Lineamenti di diritto costituzionale dell'Unione europea* (Giappichelli, 2010), p. 240.
[398] See, *inter alia*, PESCATORE Pierre, *op. cit.* (1978), p. 387; CONWAY Gerard, *op. cit.* (2012), pp. 172-192.
[399] LENAERTS Koen, "Some Reflections on the Separation of Powers in the European Community", 28 *Common Market Law Review* (1991), p. 12.
[400] Ibidem, p. 14.
[401] CHAMON Merijn, *op. cit.* (2016), p. 263.
[402] Joint cases 188-190/80, *France, Italy and UK v Commission*, EU:C:1982:257, para. 4-6.

from a general principle, but from an interpretation of the particular wording of the provision in question."[403]

Conversely, adopting a functional approach to the separation of powers, and looking at the specific Treaty provisions,[404] it is clear that the EU legal system appears much more complex than the domestic level. A certain number of differences are immediately recognisable. In this regard, firstly, pursuant to the principle of conferred powers, the exercise of the legislative, executive and judicial functions is divided between the EU and the national levels.[405] In particular, the traditional mode of implementation of EU acts was centred on the idea of "indirect administration".[406] Secondly, at the European level, it has been noted that the legislative function of the Parliament is conditioned by the monopoly of the Commission in relation to legislative initiative,[407] which, in addition, holds autonomous rule-making powers in certain fields.[408] Unlike in the case of the autonomous normative powers of the Government at the State level, the acts of the Commission are not necessarily subordinate to the legislative acts issued by the Parliament and the Council.[409] Arguably, in spite of the improvements introduced by the Lisbon Treaty, a certain confusion can still be recognised between the executive and legislative powers at the EU level.[410] Thirdly, with reference to the Council, its role encompasses both the legislative and the executive function. On the one hand, it participates in the ordinary legislative procedure together with the Parliament and as a main legislator in the special legislative procedures. On the other hand, it exercises a part of the executive function pursuant to Article 291 TFEU. This contributes to the fragmentation of the EU executive, which is thus spread among the Member States, the Commission and the Council.[411] Moreover, as we will see, the composite character of the EU executive is exacerbated by the recent process of agencification and by the peculiar system of committees which assist the

[403] Joint cases 188-190/80, *France, Italy and UK v Commission*, EU:C:1982:257, para. 6.
[404] LENAERTS Koen, *op. cit.* (1991), p. 13.
[405] CHAMON Merijn, *op. cit.* (2016), p. 266.
[406] See, *inter alia*, MAJONE Giandomenico, "The New European Agencies: Regulation by Information", *Journal of European Public Policy* (1997), p. 263; DELLA CANANEA Giacinto, FRANCHINI Claudio and MACCHIA Marco, *I principi dell'amministrazione europea,* (Giappichelli, 2017). However, it has been argued that the vision of the EU as a "mere law-making community" where the administration is mostly indirect (see, for instance, VON BOGDANDY Armin and BAST Jürgen (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2005), p. 348) is fading, see GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), p. 3.
[407] MAJONE describes this as "the most striking violation of separation-of-powers" in EU law, MAJONE Giandomenico, *op. cit.* (2002), p. 324.
[408] Such as the decisions adopted by the Commission in the field of competition and State aid. LENAERTS Koen, *op. cit.* (1991), p. 17.
[409] CHAMON Merijn, *op. cit.* (2016), p. 266. See *supra* para. 5.2.
[410] JACQUE' Jean Paul, *op. cit.* (2012), p. 212. On the issue, see in particular Case C-427/12, *European Commission v European Parliament and Council (Biocides)*, EU:C:2014:170. The distinction between executive and legislative powers in EU law will be discussed in detail further in relation to the distinction between delegated and implementing powers.
[411] CHAMON Merijn, *op. cit.* (2016), p. 266.

Commission in its implementing activities.[412] Finally, even considering the new model of separation of powers, the function of political direction which has been acquired by the Government in the 20th century is not clearly identified.[413] Indeed, Article 15 TEU allocates the power to define "the general political directions and priorities" to the European Council, but it cannot exercise legislative functions.[414] The political leadership is considered to be shared with the Commission, impeding the recognition of a unitary and central governing power.[415]

In light of the above, it is arguable that the doctrine of the separation of powers cannot be used to describe the institutional structure of EU, but this does not mean that, as a politico-philosophical principle, it is not relevant at the EU level.[416] As we will see, giving value to the evolution of the concept in the sense of "checks and balances" and cooperation among the branches,[417] a certain influence can be recognised in the complex system of the reciprocal interactions established by the Treaties.[418]

The relevance of the separation of powers for the development of the EU institutional structure is even more evident in the innovations brought about by Treaty of Lisbon.[419] Admittedly, the effort for the simplification of the Union's acts, in the works of the Convention on the Future of Europe, was driven by considerations on the democratic nature of the system, seen as intrinsically linked to the hierarchy of norms and the separation of powers.[420] Indeed, the establishment of a clearer hierarchy between legal instruments can be recognised as an attempt to introduce a more explicit separation of powers, especially between the legislative and the executive.[421] This perspective can be seen, for example, in the introduction of counterbalancing mechanisms in the case of the delegation of powers in *ex* article 290 TFEU.[422] The achievement of such an attempt, however, will

[412] See CURTIN Deirdre, *op. cit.* (2009).
[413] See Chapter 1, para. 7.3.
[414] On the changing role of the European Council due to the euro-crisis, see DAWSON Mark and DE WITTE Floris, "Constitutional Balance in the EU after the Euro-Crisis", 76 *The Modern Law Review* No. 5 (2013), pp. 830-831.
[415] COSTANZO Pasquale, MEZZETTI Luca and RUGGIERI Antonio, *Lineamenti di diritto costituzionale dell'Unione europea* (Giappichelli, 2010), pp. 246-247. In this regard, see European Parliament, Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, 2014/2248(INI), para. 47.
[416] CHAMON Merijn, *op. cit.* (2015), p. 374.
[417] See Chapter 1, para. 7.
[418] LENAERTS Koen, *op. cit.* (1991), p. 13.
[419] See SCHUTZE Robert, *op. cit.* (2005).
[420] See Convention Européenne, Documents de travail preparatoires, p. 332: "Cela nous amène directement à une plus claire hiérarchie des normes, consequénce d'une meilleure séparation des pouvoirs. Et cela, non sans le but de rendre hommage à Montesquieu, mais en raison d'un souci de démocratie".
[421] See CURTIN Deirdre, "European Union Executives: out of the Shade, into the Sunshine?", in DE ZWAAN Jaap, JANS Jan and NELISSEN Frans, *The European Union. An Ongoing process of integration* (TMC Asser Press, 2004), p. 99. See *supra* para. 5.2.
[422] Recognising the correlation between article 290 TFEU and the separation of powers, see Opinion of Advocate General Mengozzi in Case C-88/14, *Commission v Parliament and Council*, EU:C:2015:304 para. 45: "The objective of such mechanisms is to counterbalance the derogation from the principle of the separation

be critically assessed in the present study. In any case, albeit not being an organisational principle in EU law,[423] recognising the role of the separation of powers as an inspiring principle of certain institutional arrangements helps to shed light on the evolution of the EU legal system.[424]

14. The Principle of Institutional Balance

14.1. The Institutional Balance and the Separation of Powers

Having clarified that an organic separation of powers cannot be recognised in the institutional architecture of the EU, it is relevant now to consider whether the EU legal system has developed a similar principle ensuring the distribution of powers between institutions and bodies exercising public power, which could act as a limit to the delegation of powers. In this regard, the principle of institutional balance[425] appears central in the EU constitutional landscape.

In the vast body of literature on institutional balance, it is often claimed that such a principle is considered by the Court as a substitute of the principle of separation of powers.[426] The two principles, however, should not be uncritically assimilated. In this respect, it has been noted that the development of the EU institutional structure has been driven more by pragmatic considerations than by an adherence to the philosophical-political principles identified as being at the basis of Western liberal democracies.[427] The distribution of powers between the institutions appears to be the result of the attempt to take into account the different interests which were at

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of powers (albeit limited to the more technical aspects of the legislation) inherent in the legislative act providing for the delegation, and thus to ensure strict observance of the principle of democracy affirmed, in EU law, in Articles 2 TEU and 10 TEU."; Opinion of Advocate General in Case C-547/14, *Philip Morris Brands SARL v Secretary of State for Health*, EU:C:2015:853, para. 249: "Ultimately, the requirements governing delegation of powers in accordance with Article 290 TFEU and the case-law pertaining thereto are an expression of the separation of powers and the institutional balance within the European Union."

[423] Institutional principle in the sense proposed by DE WITTE Bruno, "Institutional Principles: A Special Category of General Principles of EC Law", in BERNITZ Ulf and NERGELIUS Joakim, *General Principles of European Community Law. Reports from a Conference in Malmö*, 27-28 August 1999 (Kluwer Law International, 2000).

[424] For a similar conclusion, see PRECHAL Sacha, "Institutional Balance: A Fragile Principle with Uncertain Contents", in HEUKELS Ton, BLOKKER Niels and BRUS Marcel, *The European Union after Amsterdam*, (Kluwer Law International, 1998), p. 280.

[425] The institutional balance was allegedly defined as a "principle" by the literature quite early, whereas the Court of Justice has used this term only later in Case C-133/06, *Parliament v Council*, EU:C:2008:257, para. 57. We acknowledge that the status of principle is controversial (see DE WITTE Bruno, *op. cit.* (2000), pp. 150-153), as discussed further.

[426] See JACQUE' Jean-Paul, "The Principle of Institutional Balance", 41 *Common Market Law Review* (2004), p. 384; CONWAY Gerard, "Recovering a Separation of Powers in the European Union", 17 *European Law Journal* No. 3 (2011), p. 319; CRAIG Paul and DE BURCA Grainne (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), p. 58. As an example of the attitude of the Court, see Opinion of Advocate General Bobek in Case C-220/15, *Commission v Germany*, EU:C:2016:534, para. 39: "Those interpretative limits are closely connected to the second element outlined above, that of the separation of powers (or rather, in the European Union context, the institutional balance)."

[427] JACQUE' Jean Paul, *op. cit*. (2012), p. 213; VOS Ellen, *op. cit*. (1999), p. 87.

stake in the creation of a supranational entity. On the one hand, with regard to the vertical dimension, the maintenance of a certain balance between the different Member States was relevant in the shaping of the composition and procedures of the institutions.[428] On the other hand, the horizontal dimension also needed to take into account the different interests which constitute this peculiar legal system.[429] This resulted in a distribution of tasks between institutions which, far from being separated, are embedded in a complex system of interactions and reciprocal controls.[430]

However, considering the described evolution of the concept of separation of powers in the sense of "checks and balances" and the collaboration between different branches of government, arguably the principle of institutional balance can be considered to have the same function of the separation of powers in the States' legal systems.[431] In this respect, it has been argued that the structure of the EU institutional system was originally conceived in a way to impede the European Commission from acquiring excessive power outside the Member States' control.[432] In this sense, the institutional balance enshrined in the Treaties has been used to prevent a concentration of powers within a single institution. Therefore, although derived from different historical contingencies, it shares the essential *ratio* of the doctrine of separation of powers.[433] Indeed, as

[428] DEHOUSSE Renaud, *op. cit.* (2008), p. 799.
[429] VOS Ellen, *op. cit.* (1999), p. 87. We refer here to the description by JACQUE' according to which the EU institutions represent different interests constituting the legal system: the Parliament the "peoples of the Member States", the Council the national Governments and the European Commission the Union's interest. See JACQUE' Jean-Paul, "Course Gèneral de Droit Communautaire" in CHAPHALM A. (ed.), *Collected Courses of the Academy of European Law* (Martinus Nijhoff, 1990), pp. 289-291; MAJONE Giandomenico, op. cit. (2002), p. 326.
[430] See VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, *op. cit.* (2004), p. 93. Another difference between the separation of powers and the institutional balance, allegedly based on the efficiency dimension, has been put forward by AG Trstenjak in Audiolux: "The institutional balance within the Community is not based on the principle of the separation of powers in the constitutional-law sense, but on a principle of the separation of functions, whereby the Community's functions are intended to be exercised by the organs which are best placed to perform them under the Treaties. Unlike the principle of the separation of powers, which seeks partly to ensure that the individual is protected by moderating state power, the principle of the separation of functions is intended to ensure that the Community's aims are effectively achieved". Opinion of Advocate General Trstenjak in Case C-101/08, *Audiolux e.a.*, EU:C:2009:410, para. 104.
[431] *Inter alia*, VOS Ellen, *op. cit.* (1999), p. 87. See also CRAIG Paul, op. cit. (2012), p. 253, where the principle of institutional balance is not distinguished by the concept developed in State constitutionalism in XV and XVI centuries. *Contra*, MAJONE argues that the separation of powers and the institutional balance shall be distinguished since they have different functions: being derived from the model of "mixed government" characterised by the representation of social interests in the political system, the institutional balance is not intended to confine each institution to its function, but "to prevent any of the social interests represented by the estates from becoming dominant". MAJONE Giandomenico, *op. cit.* (2002), p. 323.
[432] VOS Ellen, *op. cit.* (1999), p. 87, citing DEHOUSSE Renaud, "Comparing National Law and EU Law: The Problem of the Level of Analysis", *The American Journal of Comparative Law* (1994), p.777. See also FEATHERSTONE Kevin, "Jean Monnet and the 'Democratic Deficit' in the European Union", 32 *Journal of Common Market Studies No.* 2 (1994), pp. 149-170.
[433] VOS Ellen, *op. cit.* (1999), p. 87; PRECHAL Sacha, *op. cit.* (1998), p. 280; CHAMON Merijn, *op. cit.* (2015), p. 374; GUILLEERMIN Guy, "Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes", 119 *Journal de droit international* No. 2 (1992), p. 344.

clarified in the case law, the principle of institutional balance is seen as "a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community."[434] Arguably, the ultimate aim of this *distributional* system is the protection of individuals' rights and freedom. As recognised by the Court in its first interpretation of the principle,[435] "the balance of powers which is characteristic of the institutional structure of the Community [is] a fundamental guarantee granted by the Treaty in particular to undertakings and associations of undertakings to which it applies."[436]

Considering its role as guarantee for natural and legal persons, it is interesting to note that this protective function of the institutional balance should not be necessarily understood as a rule of law intended to confer rights on individuals. Although this principle is often invoked by private litigants in their pleadings,[437] in *Vreugdenhil* the Court clarified that "the aim of the system of the division of powers between various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to protect individuals".[438] In other words, the institutional balance concerns, primarily, the relations between institutions in their reciprocal positions and it cannot be considered "a superior rule of law protecting individuals".[439] This position has been described as a shift in the approach of the Court, [440] which in earlier cases appeared to be more inclined to support the protective function of the principle.[441] However, it should be noted that *Vreugdenhil* concerned an action for damages against the EU, and the refusal to grant such compensation on the ground of a violation of such a general principle should be considered within that context.[442] The refusal to grant direct protection to individuals based on

[434] Case C-316/91, *Parliament v Council EU*:C:1994:76, para. 11.
[435] In this sense, LENAERTS Koen and VERHOEVEN Amaryllis, "Institutional Balance as a Guarantee for Democracy in EU Governance", in JOERGES Christian and DEHOUSSE Renaud (eds.), *Good Governance in Europe's Integrated Market*, (Oxford University Press, 2002), p. 36, contra CHAMON Merijn, *op. cit.* (2015), p. 378.
[436] Case 10-56, *Meroni, cit.,* p. 173.
[437] With little success rates. See CHAMON Merijn, *op. cit.* (2015), p. 382, especially case law cited at note 50.
[438] Case C-282/90, *Industrie- en Handelsonderneming Vreugdenhil BV v Commission*, EU:C:1992:124, para. 20. See also Opinion of Advocate General Darmon in the same case, EU:C:1992:12, para. 38; Case T- 243/94, *British Steel plc v Commission*, EU:T:1997:159.
[439] Case C-282/90, *Industrie- en Handelsonderneming Vreugdenhil BV v Commission*, EU:C:1992:124, para. 22. See Case 5/71, *Zuckerfabrik Schöppenstedt v Council,* EU:C:1971:116, para. 11. For a discussion of the requirement of the violation of "a superior rule of law" to incur liability under Article 268 TFEU and 340 (2) TFEU, see LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *EU Procedural Law,* (Oxford University Press, 2014), pp. 510-521. In particular, the authors point out the equivalence of the formulations used in the case law ("rule of law intended to confer rights on individuals", "rule of law protecting individuals", "for the protection of individuals") to express the same legal concept.
[440] CHAMON Merijn, *op. cit.* (2015), p. 383.
[441] Cases 9 and 10-56, *Meroni*, *cit.*, p. 173; Case 70/88, *Parliament v Council (Chernobyl*), EU:C:1991:373.
[442] PRECHAL Sacha, *op. cit.* (1998), p. 283. For a discussion on whether the breach of a rule relating to the procedure and form of legislative measures does necessarily result in liability, see Opinion of Advocate General Darmon in Case C-282/90, *Industrie- en Handelsonderneming Vreugdenhil BV v Commission*,

this principle in an action for damages does not undermine the essential protective meaning and purpose of the institutional balance, the violation of which can be invoked calling for the annulment of EU acts.[443]

Arguably, in relation to the institutional balance, the notion of the protection of individuals shall be understood not merely in purely formal legal terms as those developed by the case law concerning an action for damages,[444] but it implies a broader political-constitutional dimension.[445] Accordingly, the protective function of the principle of institutional balance should be understood as a *systemic* protection of the fundamental elements in the EU institutional system against the misuse of powers.[446] Precluding the institutions from stepping outside the powers conferred on them in the Treaties, the institutional balance acts as a guarantee that the EU institutions do not act *ultra vires* and, thus, do respect the position of institutional and individual actors within the EU legal system.[447] In this sense, the institutional balance relates to democracy and to the rule of law, since it represents a guarantee that the rights of the individuals within the EU legal system are safeguarded.[448]

14.2. The Notion of Institutional Balance

The principle of institutional balance represents an elusive concept, "a fragile principle with uncertain contents", which is often invoked for convenience without a clear understanding of its peculiarities.[449] In the literature, the principle has been described from two different perspectives.

On the one hand, as a political principle, the institutional balance is considered "a means of describing the way the relationship between the institutions is organised".[450] In particular, the organisation and the functioning of the EU legal system is considered to reflect the balance between representatives of various interests.[451] Considering that the European Parliament

EU:C:1992:12. See also LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 515-521.

[443] JACQUE' Jean Paul, *op. cit.* (2012), p. 221.

[444] See, *inter alia*, Case 5/71, *Zuckerfabrik Schöppenstedt v Council,* EU:C:1971:116; Case C-352/98 P, *Bergaderm and Goupil v Commission*, EU:C:2000:361; Case T-341/07, *Sison v Council*, EU:T:2011:687; Joined Cases C-120/06 P and C-121/06 P, *FIAMM and others v Council and Commission*, EU:C:2008:476.

[445] EVERSON Michelle and VOS Ellen, "European Agencies: What about the Institutional Balance?", *Maastricht Faculty of Law Working Paper* No. 4 (2014), p. 10.

[446] LE BOT F., *Le principe de l'équilibre institutionnel en droit de l'Union européenne*, PhD thesis (Panthéon-Assas, 2012), p. 243, cited in CHAMON Merijn, *op. cit*. (2015), p. 384.

[447] VOS Ellen, *op. cit.* (1999), p. 85.

[448] VOS Ellen, *op. cit.* (1999), p. 86.

[449] PRECHAL Sacha, *op. cit*. (1998), pp. 273-274.

[450] JACQUE' Jean-Paul, *op. cit*. (2004), p. 383.

[451] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 42; MAJONE Giandomenico, *Dilemmas of European Integration,* (Oxford University Press, 2005), Chapter 3; CRAIG Paul, "The Nature of the Community: Integration, Democracy and Legitimacy", in CRAIG Paul and DE BURCA Grainne (eds.), *op. cit.* (1999), pp. 36-41; DE BURCA Grainne, "The Institutional Development of the EU: A Constitutional Analysis",

represents "the peoples of the States", the Council represents the Member States' governments and the Commission "the general interest of the Community",[452] the institutional balance is seen as a guiding principle for the shaping of the institutions and their interactions. In this sense, it expresses the need for a balanced representation of each interest and constituency in the Union to be respected - so to speak - *iure condendo*, in the amending of the text by the makers of the EU Treaties.[453]

On the other hand, as a legal principle, the institutional balance has been developed in the case law of the Court of Justice as an unwritten principle of EU constitutional law.[454] It is now reflected in Article 13 (2) TEU which provides that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them." The institutional structure of the Union is based on the division of powers between institutions, and this structure cannot be undermined without violating the institutional balance. However, this does not mean that such a structure is "balanced", meaning that each institution has the same weight.[455] Albeit unbalanced from a political point of view, the function of the legal principle of institutional balance is to preserve the powers and prerogatives of the institutions as set forth in the Treaties:[456]

> *"Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur."*[457]

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in CRAIG Paul and DE BURCA Grainne (eds.), *op. cit.* (1999), pp. 57-75; JOERGES Christian and NEYER Jürgen, "From Intergovernamental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", 3 *European Law Journal* No. 3 (1997), p. 273. For an analysis of this argument, see SMISMANS Stijn, "Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven", in JOERGES Christian and DEHOUSSE Renaud (eds.), *Good Governance in Europe's Integrated Market*, (Oxford University Press, 2002), pp. 89-108.

[452] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 42. In this sense also JACQUE' Jean Paul, *op. cit.* (2012), *passim*.

[453] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 47.

[454] GUILLEERMIN Guy, *op. cit.* (1992), p. 321. Identifying in *Meroni* the first reference to such principle, JACQUE' Jean-Paul, *op. cit.* (2004), p. 384.

[455] JACQUE' Jean-Paul, *op. cit.* (2004), p. 383.

[456] Ibidem, p. 386.

[457] Case C-70/88, *Parliament v Council (Chernobyl)*, EU:C:1991:373, para. 21-22.

However, the institutional balance should not be considered to be a static principle.[458] Being based on the Treaty provisions assigning certain powers to the institutions, the inter-institutional interactions have undergone a significant evolution along with the amendments of the original Treaties.[459] The position and powers of the European Parliament, for example, have significantly increased from the Treaty of Rome to the Treaty of Lisbon. In this sense, it has been noted that the institutional balance is necessarily dynamic in light of the inherent dynamism of EU constitution, which by definition evolves towards a closer European integration.[460] Moreover, the actual balance between institutions is determined by the specific legal basis established in the Treaty, so that it acquires different connotations in each policy of the Union. This means, moreover, that the single legal basis can be considered an expression of the institutional balance in the particular area.[461]

Yet, the most important element of dynamism in the institutional balance is represented by its role as a meta-principle[462] which, as we will see, has been used in the case law to complete the text of the Treaties.[463] Therefore, considering its interplay with the principles of democracy and the rule of law,[464] the balance to be preserved may not derive just from the specific provisions, but also from the systematic reading of the Treaties.

Analysing the case law of the Court of Justice, Lenaerts and Verhoeven have identified three aspects which help to shed light on the concept. Firstly, the principle of institutional balance implies that "each institution should enjoy a sufficient independence in order to exercise its powers".[465] Therefore, respecting the limits set forth by the Treaties, each institution can regulate its own organisation and functioning, including internal decision-making procedures.[466] In other words, the powers of the institutions are limited, but within those limits, they are exclusive.[467] Secondly, the principle of institutional balance precludes the institutions from depriving the Treaty provisions on the attribution of powers of their meaning, by unconditionally assigning their powers to other institutions.[468] As will be analysed further, this aspect of the institutional

[458] JACQUE' Jean-Paul, *op. cit.* (2004), p. 383.
[459] PRECHAL Sacha, *op. cit.* (1998), p. 276.
[460] "Le caractère dynamique de l'intégration européenne soumet l'équilibre institutionnel établi par les traités à evolution", COSTANTINESCO Vlad, "Les institutions communautaires: Présentation générale, fasc. 200" in LOY (ed.), *Traité de droit européen* (Ed. Techniques, 1989), cited by CHAMON Merijn, *op. cit.* (2016), p. 272. For interesting considerations on the alteration of the institutional balance in the recent euro-crisis, see, *inter alia*, DAWSON Mark and DE WITTE Floris, *op. cit.* (2013), pp. 817-844.
[461] See JACQUE' Jean-Paul, *op. cit.* (2004), p. 386.
[462] In the meaning intended by CRAIG Paul, *op. cit*. (2012), p. 250.
[463] JACQUE' Jean Paul, *op. cit*. (2012), p. 221.
[464] See, *inter alia*, Case 138/79, *Roquette Frères v Council*, EU:C:1980:249, para. 33.
[465] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit*. (2002), p. 44.
[466] See Case 5/85, *AKZO Chemie v Commission*, EU:C:1986:328, paras. 37-40.
[467] GUILLEERMIN Guy, *op. cit.* (1992), p. 334.
[468] See Cases 9 and 10/56, Me*roni, cit.*

balance is particularly relevant in the case of the delegation of powers. Thirdly, the principle of institutional balance entails that "institutions may not, in the exercise of their powers, encroach on the powers and prerogatives of other institutions".[469] Each institution shall thus respect the division of powers, as set forth by the Treaties, and therefore cannot seize or disregard the powers of other institutions.[470]

14.3. The Scope of the Institutional Balance

The institutional balance concerns the relationships between the institutions of the European Union. As noted in the *Köster* case, the institutional balance "regards both the relationship between institutions and the exercise of their respective powers."[471] In this regard, it was argued initially that such a principle is applicable only as far as the "*triangle institutionnel*" is concerned, meaning the Council, the Parliament and the Commission.[472] The Court of Justice itself should be excluded from the notion on the basis of its role of guardian of the institutional balance.[473] However, this approach has been refuted by the Court, which in some cases has applied the notion to delimit its own jurisdiction.[474] Moreover, in the case law, the scope of institutional balance appears to have evolved in the sense of including not only all the institutions established by the Treaties,[475] but it is intended to apply also "to relations between Community institutions and *bodies*".[476]

In parallel with this horizontal dimension of the institutional balance, it was argued that this principle also enshrines a vertical dimension. In particular, considering that the strict division of powers between institutions reflects "the Member States' concern that the integrity of their own

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[469] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 45.
[470] GUILLEERMIN Guy, *op. cit.* (1992), p. 338. The AG Saggio in Case C-159/96, *Portugal v Commission*, EU:C:1998:367, para. 72 expressed this idea in the following terms: "Concerning the principle of institutional balance, suffice it to say that a general rule of law of that sort essentially concerns the relationship between the institutions, and more particularly compliance with the reciprocal powers of the institutions. Whilst it is true that the exercise of functions by an institution that does not have the competence to perform them in itself constitutes infringement of the balance between the institutions, it is in precisely the opposite case, namely where whilst remaining within the powers conferred upon it an institution has in one way or another limited the exercise of the powers of the others, that that principle really becomes relevant."
[471] Case 25/70, *Köster, cit.*, para. 4.
[472] GUILLEERMIN Guy, *op. cit.* (1992), p. 330.
[473] Ibidem, p. 328.
[474] PRECHAL Sacha, *op. cit.* (1998), p. 281. See, *inter alia*, Case 109/75 R, *National Carbonising Company v Commission,* EU:C:1975:133; Case 415/85, *Commission v Ireland*, EU:C:1988:320; Case 416/85, *Commission v UK*, EU:C:1988:321.
[475] See, for instance, for the ECB: Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306. On the entities not part of the institutional balance, see Case T-89/96, *British Steel v Commission*, EU:T:1999:136.
[476] Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306, para. 46. The inclusion of the agencies in the institutional balance, however, will be analysed further.

powers be maintained",[477] it crystallises a structure which impedes the concentration of powers in one single institution against the Member States' will.[478] In particular, it has been argued that the institutional structure is the result of the attempt to avoid the European Commission to gain excessive powers to the detriment of Member States' prerogatives.[479] Therefore, the notion of institutional balance cannot disregard such a vertical element in the shaping of the institutional architecture. Accordingly, the scope of institutional balance should be defined widely, also including the balance between the Union and the Member States.[480]

Albeit controversial in the literature,[481] some cases of the Court appear to support this "Member-State oriented" understanding of institutional balance. In particular, in *Région Wallone*, the Court recognised that "the institutional balance provided for by the Treaties [..] *inter alia*, governs the conditions under which the Member States [..] participate in the functioning of the Community institutions".[482] In this case, then, the Court of Justice reasoned that the institutional balance also had a protective function towards the position of the Member States in the European Union.[483] The reasoning of the Court was confirmed in cases like *Regione Toscana*[484] and *Regione Siciliana*,[485] where the refusal to grant access to the Court for regional authorities of Member States was justified by the risk of upsetting the institutional balance. Moreover, it is noteworthy that, with reference to the first aspect identified by Lenaerts and Verhoeven, the autonomy of the institutions in their own organisation and functioning is also to be respected in the relations with the Member States.[486] Conversely, it has been noted that, in some recent cases, the Court has refused to uphold argumentations based on the vertical understanding of the institutional balance.[487] However, such missed opportunities should not overshadow the relevance of appreciating the principle of institutional balance in the complexity of the EU structure, characterised by the interplay between the horizontal and vertical levels.

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[477] VOS Ellen, "The Rise of Committees", 3 *European Law Journal* No. 3 (1997), p. 223.
[478] Ibidem, p. 223.
[479] VOS Ellen, *op. cit*. (1999), p. 88.
[480] VOS Ellen, *op. cit.* (1997), p. 223. See also GORMLEY Laurence W., "Disturbing or Rebalancing Powers within the European Union?" in DE ZWAAN Jaap, JANS Jan and NELISSEN Frans, *The European Union. An Ongoing process of integration* (TMC Asser Press, 2004), pp. 40-41; LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert, *op. cit.* (2005), para. 13-008, where, in particular, the inclusion of the Member States in the institutional balance is considered deriving from the duty of loyal cooperation.
[481] PRECHAL Sacha, *op. cit*. (1998), p. 284.
[482] Case C-95/97, *Région Wallone v Commission*, EU:C:1997:184, para. 6.
[483] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 44.
[484] Case C-180/97, *Regione Toscana v Commission*, EU:C:1997:451.
[485] Case C-417/04 P, *Regione Siciliana v Commission*, EU:C:2006:282. See also Case C-452/98, *Nederlandse Antillen v Council*, EU:C:2001:623, para. 50.
[486] See Case C-345/95, *France v European Parliament*, EU:C:1997:450, para. 20.
[487] See Case C-38/06, *Commission v Portugal*, EU:C:2010:108, para. 49; Opinion of AG Poiares Maduro in case C-411/06, *Commission v Parliament and Council*, EU:C:2009:189, para. 6. See CHAMON Merijn, *op. cit.* (2015), p. 380.

14.4. The Function of Institutional Balance in the Case Law of the Court

The value of institutional balance as legal principle is generally considered to be limited, but nonetheless important.[488] The case law of the Court has clarified that the breach of the principle of institutional balance can be judicially sanctioned as its violation can lead to the annulment of an EU act.

In this respect, the Court of Justice has been particularly active in cases relating to the institutional role of the Parliament in the decision-making procedures.[489] In particular, a number of cases concerned the consultation (or re-consultation) of the Parliament during the legislative procedure.[490] In this regard, in interpreting the Treaty provisions in a series of cases (the so-called *isoglucose* cases), the Court clarified that the consultation of the Parliament represents "an essential factor in the institutional balance", which is strictly linked to the democratic guarantees provided in the Treaty.[491] Any disregard of such involvement constitutes an infringement of an essential procedural requirement, which would render the act thus adopted void. According to the Court, the preservation of the institutional balance requires not only that the consultation be carried out on the initial text, but that each time the text adopted is substantially different from the one on which the Parliament has expressed its opinion[492] a new consultation is required.[493] However, as the Court held in *Wybot*, it is the same principle which entails that the Parliament cannot abuse the right to be consulted in a manner that deprives the other institutions of their prerogatives.[494]

The Court has applied the principle of institutional balance also in relation to certain procedural rights of the Parliament.[495] Most remarkably, in *Chernobyl* the Court was confronted with the issue of the capacity of the Parliament to bring an action for the annulment of an act.[496] The case

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[488] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 44; PRECHAL Sacha, *op. cit*. (1998), p. 293.
[489] PRECHAL Sacha, *op. cit*. (1998), p. 278.
[490] See, *inter alia*, Case 138/79, *Roquette Frères v Council*, EU:C:1980:249; Case 139/79, *Maizena GmbH v Council*, EU:C:1980:250; Case 817/79, *Buyl v Commission*, EU:C:1982:36; Case 828/79, *Adam v Commission*, EU:C:1982:37; Case 1253/79, *Battaglia v Commission*, EU:C:1982:38; Case C-65/90, *Parliament v Council*, EU:C:1992:325.
[491] Case 138/79, *Roquette Frères v Council*, EU:C:1980:249, para. 33.
[492] With the exception of modifications to the text in the sense expressed by the Parliament, Case 817/79, *Buyl v Commission*, EU:C:1982:36, paras. 16-24.
[493] See Case 41/69, *Chemiefarma v Commission*, EU:C:1970:71, paras. 68-70 and 177-179; Case C-65/90, *Parliament v Council*, EU:C:1992:325, para. 16.
[494] Case 149/85, *Wybot v Faure and others*, EU:C:1986:310, para. 23: "In accordance with the balance of powers between the institutions provided for by the Treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves."
[495] For the identification of this group of cases, see PRECHAL Sacha, *op. cit*. (1998), p. 279-280.
[496] Case C-70/88, *Parliament v Council*, EU:C:1990:217 (interlocutory judgment of 22 May 1990). For the merit of the action of annulment, see Case C-70/88, *Parliament v Council,* EU:C:1991:373.

concerned, in particular, a Regulation establishing the maximum level of radioactive contamination in food and feed, which was adopted under Article 31 of the Euratom Treaty, a legal basis considered incorrect by the Parliament.[497] At the time, the text of the Treaty did not grant a privileged status to the European Parliament in actions for annulment. It is interesting to note that, a couple of years earlier, the *Comitology* case raised the same issue and the Court had denied standing to the Parliament.[498] Nevertheless, since in this case the Parliament could not avail of other effective means for defending its prerogatives, the Court recognised that "a legal vacuum"[499] existed in the Treaties. Therefore, having identified this "procedural gap" of the Treaties, the Court filled it by resorting to a systematic reading of the position of the European Parliament as an institution established in the Treaty.[500] In particular, the Court held that:

> *"The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve."*[501]

Therefore, in view of maintaining the institutional balance, the Court granted active *locus standi* to the European Parliament against the wording of the Treaties.[502] The outcome of the case was thus determined by the consideration of the Parliament's role and prerogatives in the legislative process, which were insufficiently protected by the legal remedies established in the Treaties unless considered in the light of the meta-principle of institutional balance.

However, according to some scholars, the *Chernobyl* case should be considered an exception in the application of the institutional balance by the Court.[503] While in this case the Court appears to have used institutional balance as source of a specific legal norm to solve the issue, it has been

[497] According to the Parliament, Article 100A EC would have been the correct legal basis.
[498] See Case 302/87, *Parliament v Council (Comitology)*, EU:C:1988:461. In this case, the Parliament sought to bring an action for annulment against the Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (so-called First Comitology Decision which will be analysed in detail in Chapter 3, para. 2.4). However, the Court dismissed the action as inadmissible, rejecting all the Parliament's arguments.
[499] Case C-70/88, *Parliament v Council*, EU:C:1990:217, para. 8. In para. 26 it is defined also as a "procedural gap".
[500] Case C-70/88, *Parliament v Council*, EU:C:1990:217, paras. 28-31. However, for an example of the limits to the use of the principle, see Case C-345/00 P, *FNAB v Council*, EU:C:2001:270.
[501] Case C-70/88, *Parliament v Council*, EU:C:1990:217, para. 23.
[502] This interpretation has been defined *contra legem* by some scholars: LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2002), p. 45; CHAMON Merijn, *op. cit.* (2015), p. 382. Others consider its interpretation *preaeter legem*, see Opinion of Advocate General Mengozzi in Case C-354/04 P, G*estoras Pro Amnistìa, and others v Council*, EU:C:2006:667, para. 168-173, cited in CHAMON Merijn, *op. cit.* (2015), p. 381.
[503] CHAMON also includes in the exception Case C-233/02, *France v Commission*, EU:C:2004:173.

noted that in most cases the text of the Treaty is so detailed that there is no scope for applying a principle with independent content.[504] Therefore, the principle of institutional balance is used merely as "a convenient shorthand for the set of Treaty rules which happen to apply to the particular institutional dispute under consideration."[505] Conversely, others have underlined the incompleteness and vagueness of the rules governing the position of the institutions and their relations, identifying in these "grey zones" the context for a relevant application of the principle of institutional balance.[506] In particular, the institutional balance has been considered to play two relevant functions: an interpretative function and a gap-filling function.[507]

Firstly, with reference to the interpretative function, it is clear that the institutional balance does not constitute a method of interpretation, but rather a guiding principle to justify a constructive interpretation of the Treaties.[508] It plays a role particularly in cases where rival interpretations on Treaty provisions can be advanced.[509] Bearing in mind also the political aspect of the principle, the institutional balance has driven the Court, for instance, to consider the institutions as having equal positions, unless differently stated in the Treaty,[510] and to take due consideration of their autonomy in deciding on a case.[511] Therefore, as a principle of interpretation, it can be considered, to a certain extent, a guarantee against the concentration of powers in one institution to the detriment of the other institutions.[512]

Secondly, it is arguable that the most interesting function of the principle of institutional balance takes place in the "grey zone", meaning between the lines of the Treaty provisions. In particular, where a certain institutional practice has developed without a clear legal basis in the Treaty, a *lacuna* can emerge and provoke litigation before the Court.[513] In such cases, the recourse to the principle of institutional balance can fill such a gap by providing a solution which preserves the position of the institutions. This was particularly the case in *Chernobyl*, where the Court observed:

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[504] DE WITTE Bruno, *op. cit*. (2000), p. 151.
[505] Ibidem. See also CHAMON Merijn, "The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: comment on *United Kingdom v Parliament and Council (Short Selling)* and the Proposed Single Resolution Mechanism", 39 *European Law Review* No. 3 (2014), p. 397.
[506] PRECHAL Sacha, *op. cit*. (1998), p. 277; CHAMON Merijn, *op. cit*. (2015), p. 376.
[507] GUILLERMIN Guy, "Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes", 119 *Journal de droit international* No. 2 (1992), p. 339.
[508] GUILLERMIN Guy, *op. cit*. (1992), p. 340.
[509] CHAMON Merijn, *op. cit.* (2015), p. 385.
[510] See Case 13/83, *Parliament v Council*, EU:C:1985:220; Case 139/79, *Maizena GmbH v Council*, EU:C:1980:250. PRECHAL Sacha, *op. cit*. (1998), p. 279.
[511] See Case 70/88, *Parliament v Council (Chernobyl)*, EU:C:1991:373; Case 294/83, *Les Verts v Parliament*, EU:C:1986:166; Case 34/86, *Council v Parliament*, EU:C:1986:291. PRECHAL Sacha, *op. cit.* (1998), p. 280.
[512] PRECHAL Sacha, *op. cit*. (1998), p. 293.
[513] CHAMON Merijn, *op. cit.* (2015), p. 386.

> *"The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities."*[514]

A similar application of the principle has also been identified in the *France v Commission* case, where the power of the Commission to conclude non-binding agreements with third countries was at issue.[515] Albeit allegedly exceptional,[516] this function of the principle of institutional balance is particularly interesting in relation to the forms of delegation of powers which have developed at the EU level without a textual basis in the Treaties. Therefore, with reference to these cases, such a principle has the potential to play a fundamental role in allowing or limiting the transferral of powers between institutions or bodies which are part of the institutional architecture. As we will see, the meta-principle of institutional balance, and its gap-filling role, constitutes the ultimate yardstick for the delegation of powers in the EU legal system.

15. Intra-institutional and Inter-institutional Delegation

15.1. A Notion of Legislative Powers in EU Law?

In the analysis of the delegation of powers in States' legal systems, it was seen how relevant the elaboration of the concept of legislative delegation (as opposed to administrative delegation) and its limits has been.[517] Considering the importance of the legislative function in the constitutional architecture, it may be interesting to investigate whether such a distinction is also applicable to the EU legal system. In particular, to anticipate some reflections which will be deepened in the following chapters, it is important to clarify whether the notion of *legislative* powers can also be referred to in the EU context.

In this regard, it is interesting to resort to the described formal and substantial definitions of legislation.[518] With reference to the formal criterion, according to which the legislative function is characterised by the branch normally exercising it, the analysis conducted has already clarified that, in the EU, the distribution of powers among institutions is not moulded according to the traditional separation-of-powers doctrine which attributes each an essential function of the

[514] Case C-70/88, *Parliament v Council*, EU:C:1991:373, para. 23.
[515] CHAMON Merijn, *op. cit.* (2015), p. 387.
[516] In this sense, we share the observations of DE WITTE Bruno, *op. cit.* (2000), pp. 150-152.
[517] See *supra* para. 6.
[518] See *supra* para. 7.5.1.

government to a certain institution.[519] Therefore, while in domestic legal systems the legislative delegation is easily identified in the delegation of the powers normally exercised by the legislative branch (*i.e.* the Parliament) to the benefit of the Government, in the EU the identification of such a legislative branch is not equally straightforward.[520] Although, both in the literature and in the official documents, there are frequent references to a "EU legislator",[521] the Treaty provisions actually attribute rule-making powers to different institutions, without distinguishing the legal effects of the acts according to the *institution* which adopted it.[522]

With the adoption of the Lisbon Treaty, a definition of legislative acts - based on the adoption through the so-called legislative *procedure* - has been introduced.[523] This definition is based on a formal criterion and, in relation to legislative delegation, two aspects may be observed. On the one hand, the acts adopted according to a delegation of powers cannot be, by definition, legislative acts in a formal sense since they are not adopted pursuant the relevant procedures. On the other hand, as already remarked, this criterion presents some inconsistencies.[524] In particular, being the legislative acts adopted either by an ordinary legislative procedure or by a special legislative procedure, the latter can foresee the involvement of the institutions at a varying degree and with different modalities. Therefore, since a special legislative procedure is any procedure so defined in the Treaties, arguably this innovation does not constitute a coherent criterion for identifying the legislative function from an institutional perspective.[525]

Conversely, with reference to the substantive criterion, in the pre-Lisbon legal framework it has been argued that the EU legal system also has a concept of "legislation" from a substantive perspective.[526] From an analysis of the case law on Article 230 of the EC Treaty, it appeared that, although with some ambiguities, [527] the Court has elaborated a criterion to identify legislation in substance based on the *general application* of the acts, in contrast to the acts of individual application.[528] Indeed, with due regard to the peculiarities of the system, it is possible to recognise,

[519] See *supra* para. 6.
[520] See TURK Alexander Heinrich, *op. cit.* (2006), p. 72; VAN GESTEL Rob, *op. cit*. (2014), pp. 36-37.
[521] To indicate the Council and the Parliament. See, for instance, European Commission, *White Paper on European Governance*, COM (2001) 428 final.
[522] Case 41/69, *Chemiefarma v Commission*, EU:C:1970:71, paras. 60-62; Joined Cases 188/80-190/80, *France v Commission*, EU:C:1982:257, para. 65; see BAST Jürgen, *op. cit.* (2003), p. 25.
[523] Article 289 TFEU.
[524] See *supra* para. 5.2.2.
[525] See BAST Jürgen, *op. cit.* (2012), p. 893.
[526] TURK Alexander Heinrich, *op. cit*. (2006), p. 187. For a description of the formal/substantive doctrine of the separation of powers, see Chapter 1, para. 7.5.1.
[527] See TURK Alexander Heinrich, *op. cit*. (2006), p. 184.
[528] TURK Alexander Heinrich, *op. cit*. (2006), p. 161. In particular, an act of general application is considered one which is "applicable to objectively determined situations", see, *inter alia*, Joined Cases 16 and 17/62, *Producteurs de Fruits v Council*, EU:C:1962:47, para. 3. Compare it, however, with the definition of "regulatory act" in Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:T:2011:419, para. 56, as "acts of general application apart from legislative acts".

among the acts adopted by the institutions, provisions which, for their general and abstract application, come closer to the notion of legislation in substance elaborated in State legal systems. Therefore, albeit controversial, from a substantive perspective, a notion of legislative powers is not completely alien to the EU legal system.[529]

However, it is important to underline that the treaty provisions generally do not specify the content of the competence attributed in substantive terms, empowering the institutions to adopt acts either of general application or of individual application pursuant to the same legal basis.[530] Hence, the acts drawing up rules and applying the rules to specific cases are generally adopted through the same procedures[531] and the absence of a hierarchy between such acts arguably impedes a clear distinction between the executive and the legislative functions.[532] Therefore, for the purpose of providing a definition of delegation of powers in the EU legal system, it still appears to be inappropriate to adopt the language elaborated in the domestic legal system on legislative delegation.

Indeed, since the concept of legislation is still controversial both in the formal and in the substantive sense, the use of the phrase "legislative powers" may be equivocal. Without denying the relevance of the notion in EU law, it still appears not to be suitable for the conceptual clarity needed for defining the scope of the research. Therefore, in light of the institutional structure and the principle of conferral,[533] the powers attributed to the institutions are better defined by the generic term "decision-making" or "rule-making" powers,[534] leaving the discussion about the nature of such powers to the detailed analysis of the different phenomena.[535] Therefore, any reference to legislative powers should be avoided in defining the notion of delegation of powers, but the implications of such ambiguity for the delegation of powers in the EU legal system will deserve further attention in the development of the analysis.

[529] See TURK Alexander Heinrich, op. cit. (2006), *passim*; TIZZANO Antonio, *op. cit.* (1996a), p. 216. See also HOFMANN Herwing, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), pp. 482-505.
[530] See VON BOGDANDY Armin and BAST Jürgen, *op. cit.* (2005), pp. 348-349.
[531] ALI' Antonino, *op. cit.* (2005), p. 100.
[532] TIZZANO Antonio, "The Instruments of Community Law and the Hierarchy of Norms", in WINTER Jan, CURTIN Deirdre, KELLERMANN Alfred and DE WITTE Bruno, *Reforming the Treaty on European Union. The Legal Debate* (Kluwer Law International, 1996a), p. 216. But on the relationship between acts of general application and of individual application, see Case T-9/93, *Schøller Lebensmittel*, EU:T:1995:99.
[533] See VON BOGDANDY Armin and BAST Jürgen (eds.), *op. cit*. (2005), p. 348.
[534] See, *inter alia*, BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016).
[535] See Chapters 2, paras. 2.11 and 3.4; Chapter 3, paras. 4.3 and 5.3.

15.2. Delegation of Authority and Delegation of Signature

Although the distinction between legislative and administrative delegation, which was elaborated in the domestic legal system, is not particularly suitable for the EU context, it is still possible to distinguish between different forms of delegation in EU law. In particular, from the analysis of the case law of the Court of Justice, it emerges that a relevant distinction is between "internal" and "external" delegation.[536] Indeed, also in this legal context, the limits and the implications of delegation present certain divergences if the delegation occurs within the same institution or body (intra-institutional delegation) or if the transferral of powers is from one institution or body to another (inter-institutional delegation). Since the present study focuses on the latter kind of delegation, which also in EU law represents the more controversial and interesting phenomenon from a constitutional perspective, the intra-institutional form of delegation will only be examined briefly here to highlight its differences from the main subject of our analysis.

In this regard, in the literature and in the case law, two kinds of intra-institutional delegation have been considered: the delegation of authority and the delegation of signature.[537] Firstly, the delegation of authority allows a member of a collegiate body or a high-ranking civil servant of the same body to adopt decisions of a management or administrative nature which are the competence of the institution or body.[538] This kind of intra-institutional delegation is often necessary due to the great number of decisions to be taken by the EU collegiate bodies, which otherwise could not function in an efficient manner.[539] It is remarkable that such transferral of powers from a collegiate body to a single member or civil servant entails the risk of undermining the principle of collegiate responsibility of the institution or body.[540] The Court has addressed this issue in the case *AKZO*, where it found that the system of delegation of authority within the Commission is compatible with the principle of collegiate responsibility, where it was limited to

[536] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 224.
[537] Ibidem, pp. 251-255.
[538] Ibidem, p. 251. See, for instance, Article 13 of the Rules of Procedure of the European Commission: "The Commission may, provided the principle of collective responsibility is fully respected, empower one or more of its Members to take management or administrative measures on its behalf and subject to such restrictions and conditions as it shall impose. The Commission may also instruct one or more of its Members, with the agreement of the President, to adopt the definitive text of any instrument or of any proposal to be presented to the other institutions the substance of which has already been determined in discussion. Powers conferred in this way may be sub-delegated to the Directors-General and Heads of Service unless this is expressly prohibited in the empowering decision. The provisions of the first, second and third paragraphs shall be without prejudice to the rules concerning delegation in respect of financial matters or the powers conferred on the appointing authority and the authority empowered to conclude contracts of employment." See also Article 14 of the same Rules: "The Commission may, provided the principle of collective responsibility is fully respected, delegate the adoption of management or administrative measures to the Directors-General and Heads of Service, acting on its behalf and subject to such restrictions and conditions as it shall impose."
[539] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 251.
[540] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 251.

specific categories of measures of management and administration, procedural guarantees were in place and, being the decisions of the delegated authority adopted in the name of the Commission, it remained fully responsible for them.[541]

This case law on the delegation of authority within the Commission is also applicable in relation to other institutions or bodies. In *Tralli*, concerning a delegation by the Executive Board of the ECB to its Vice-President, the Court upheld the principles developed in *AKZO* and imposed strict conditions, echoing those developed in *Meroni* for the inter-institutional delegation.[542] However, different from the latter case, the Court refused to apply the principle of institutional balance since it is "intended to apply only to relations between Community institutions and bodies".[543] In any case, where the body or person lacks the necessary authority from the collegiate body competent to act, the consequence is the annulment of the act.[544]

Secondly, with regard to the delegation of signature, the delegation within an institution or body may concern the power to sign an act on behalf of the institution or body. In a case relating to the empowerment of a Director-General to sign a decision approved by the Commissioner under the delegation of the College of Commissioners, the Court considered this kind of intra-institutional delegation to be not "a delegation of powers, but merely [...] an authorisation to sign".[545]

In general, these phenomena are considered by the Court as "measures relating to the internal organisation" of the institution or body,[546] thus inherently pertaining to the competence attributed to the institution or body. Moreover, since the delegated authority adopts the act on behalf and in the name of the delegator, there is no transfer of responsibility, not being the

[541] Case 5/85, *AKZO Chemie v Commission,* EU:C:1986:328. See also Case T-275/94, *Groupement des cartes bancaires CB v Commission,* EU:T:1995:141; Case T-254/99, *Maja v Commission,* EU:T:2003:67; Case C-137/92 P, *Commission v BASF and others,* EU:C:1994:247.

[542] Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306. The Court, in particular, held at para. 46 that "With regard to the conditions to be complied with in the context of such delegations of powers, it should be recalled that, as the Court held in Meroni (see [1958] ECR 149 to 152, 153 and 154), first, a delegating authority cannot confer upon the authority to which the powers are delegated powers different from those which it has itself received. Secondly, the exercise of the powers entrusted to the body to which the powers are delegated must be subject to the same conditions as those to which it would be subject if the delegating authority exercised them directly, particularly as regards the requirements to state reasons and to publish. Finally, even when entitled to delegate its powers, the delegating authority must take an express decision transferring them and the delegation can relate only to clearly defined executive powers." For an analysis of the judgment, see HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011). The *Meroni* case will be analysed in detail in Chapter 3, para. 4.2.1.2.

[543] Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306, para. 46. The approach of the Court is described as a "relaxed" application of *Meroni* in case of the internal organisation and management of institutions, see TRIDIMAS Takis, "Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement", 28 *Yearbook of European Law No.* 1 (2009), p. 245.

[544] See Case T-33/01, *Infront WM v Commission,* EU:T:2005:461.

[545] Case 48/69, *ICI v Commission*, EU:C:1972:70, para. 13.

[546] Ibidem, para. 14.

delegator divested of its powers.[547] Accordingly, the use of intra-institutional delegation is considered not to impinge on the principles underpinning the institutional system and structuring the relations between institutions and bodies, in particular the principle of institutional balance.[548] Therefore, the legal framework governing the limits and the principles for this kind of delegation only partially corresponds to the one applicable in the case of inter-institutional delegation, which will be analysed in this study.

16. Building a Definition of the Delegation of Powers for the EU Legal System

The analysis conducted has demonstrated that, in comparison to the structure and the principles of States' legal systems, the institutional architecture of the EU presents significant peculiarities which touch upon the legal principles most relevant for the notion of delegation of powers. Therefore, any attempt to provide a definition of delegation to be applied in the EU legal system cannot disregard the differences, and the analogies, which have emerged. Focusing on the most prominent ones, the following observations should be considered.

16.1. Taking Stock: A Different Institutional Context

Firstly, any definition should be based on the legal framework established by the Treaties. Considering the relevance of the principle of conferral in its vertical and horizontal dimensions, this means that the delegation of powers can occur only within the competences attributed by the Member States to the EU and, at the European level, only within the powers that each institution is conferred. Accordingly, the scope of a coherent notion cannot go beyond the powers conferred by the Treaties, excluding from the analysis the forms of delegation which involve the EU but are not specifically occurring within the powers conferred on it.[549] However, considering the peculiar understanding of the principle of legality and of the hierarchy of norms in the EU legal system, the definition cannot be limited to the phenomena of delegation which have a textual basis in the

[547] See TRIDIMAS Takis, *op. cit.* (2009), p. 257.
[548] See Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306, para. 46: "In that context and as regards the 'principle of institutional balance', it is sufficient to recall that that principle is intended to apply only to relations between Community institutions and bodies." However, JACQUE' points out that the autonomy of each institution in its organisation cannot be exercised in a way that violates the institutional balance and the principle of sincere cooperation, overstepping the boundaries of the power conferred to the institution. See JACQUE' Jean Paul, *op. cit.* (2012), p. 225.
[549] The reference here is to the disputed qualification of the conferral of powers to the EU by the Member State as a "delegation of powers", which will not be discussed in this thesis. For some observations, see *supra* para. 3, note 256.

Treaties, but it should also comprise the forms of delegation which have developed in the shadow of the Treaties by the practice of the institutions and in the case law of the Court.

Secondly, a relevant difference has emerged in EU law between the delegation which involves the transferral of powers from one institution or body to another (inter-institutional delegation) and the one which takes place within a certain institution or body (intra-institutional delegation). The latter being motivated by merely organisational needs and less problematic in relation to the institutional balance, the research will not consider the intra-institutional forms of delegation. Conversely, it will focus on the inter-institutional delegation, which represents the most significant phenomenon from a constitutional perspective.

Thirdly, in light of the absence of an organic separation of powers in EU law, a definition which does not refer to the division between the executive, legislative and judicial branches, and to their traditional functions, appears more in line with EU law. Although in the evolution of the State legal systems the delegation of legislative powers has constituted the most important phenomenon from a constitutional perspective, the controversial identification of legislative powers in EU law suggests adopting a broader perspective. Therefore, it is preferred to avoid specifying the nature of the powers delegated, leaving it open to a wide array of functions (decision-making *stricto sensu*, advice, information gathering, hearing concerned parties, etc.).[550] However, in order to be a delegation of powers, a certain amount of *power* needs to be involved, determining the exercise of a public authority by the delegated institution or body.

16.2. The Notion of Power and the Formal Definition of Delegation

Although considering a wide array of functions, the definition of delegation of powers needs to be limited to the situations in which the exercise of public *power* is at stake, in particular decision-making power. With regard to the EU legal system,[551] the landmark work on the notion of power remains the remarkable study of Vlad Costantinesco on competences and powers in the EU.[552] Considering that the notion of competence describes the domain of action reserved to a certain

[550] See LENAERTS Koen, *op. cit.* (1993), p. 25.

[551] On the notion of power, there is abundant literature also in domestic law. With reference to Italian literature, see *inter alia* LIGNOLA Enzo, *La Delegazione Legislativa* (Giuffrè, 1956), pp. 128-129; MIELE Giovanni, *Principi di diritto amministrativo,* (Cedam, 1945), p. 45; ROMANO Santi, *Frammenti di un dizionario giuridico,* (Giuffrè, 1947), p. 190; SANDULLI Aldo, "Per la delimitazione del vizio d'incompetenza degli atti amministrativi", in *Rassegna di diritto pubblico* (1948), p. 9; ZANOBINI Giudo, *Corso di diritto amministrativo,* (Giuffrè, 1950), p. 143; GUARINO Giuseppe, *Potere giuridico e diritto soggettivo,* (Jovene, 1949), p. 21; CARNELUTTI Francesco, *Teoria generale del diritto,* (Foro Italiano, 1940), p. 243. With reference to French literature, CARRE' DE MALBERG, *Contribution à la théorie générale de l'Etat,* (), p. 259; HECQUARD-THERON M., *Essai Sur la notion de réglementation,* (LGDJ, 1977), p. 66; JEZE G., "Essai de théorie générale de la competence pour cl'accomplissement des actes juridiques en droit français*", RDP* (1923), p. 58.

[552] COSTANTINESCO Vlad, *op. cit*. (1974).

EU institution, the author highlights the relationship of complementarity and necessity between the notions of competence and power. Indeed, competence without power is ineffective, while power without competence is illegal.[553] Thus, the notion of power emerges as the condition of effectiveness of the competence attributed to a certain authority.[554]

The exercise of the competence is expressed in the creation of legal acts, since the ultimate function of the attribution of competence is precisely allowing an institution to act, i.e. to modify the legal system through its acts.[555] In this sense, the legal acts represent the manifestation of the exercise of the competence, which is effective only when it is associated with a power.[556] In other words, there is a strong correlation between the competence and the power, and the manifestation of these notions corresponds to the adoption of acts which have legal effects and modify the legal system.

Therefore, it is clear that, from a formal perspective, the essential element to consider in relation to the notion of power is the adoption of legal acts. Accordingly, a delegation of powers occurs whenever the delegated institution or body enacts, in its own name, acts which, according to the order of competences defined in primary law, are the competence of the delegating authority. Therefore, the definition encompasses the cases where, by a unilateral act of the delegator, an institution or body is granted the power to adopt measures which, as we have seen, may be of general or individual application.[557] The transferral of decision-making powers from the delegator to the delegate, thus, is evident in the formal exercise of these powers and the enactment of the corresponding acts.

16.3. Integrating the Definition with a Substantive Approach

In the light of the described institutional principles and of the practice developed, however, this formal definition of the delegation of powers appears somehow unsatisfactory, since the formal situation may not correspond to the actual exercise of the powers.[558] Focusing solely on the

[553] Ibidem, p. 83. See also GAUTIER Yves, *La délégation en droit communautaire,* PhD thesis (Université de Strasbourg, 1995), pp. 46-47; CHAMON Merijn, *op. cit.* (2016), p. 232.
[554] COSTANTINESCO Vlad, *op. cit.* (1974), p. 83. For a recent analysis of the notion of competence in EU law, see also AZOULAI Löic, *The Question of Competence in the European Union* (Oxford University Press, 2014), esp. pp. 2-3.
[555] COSTANTINESCO Vlad, *op. cit*. (1974), p. 78. In the author's view, it has no bearing whether the legal acts are binding or not, although it may be tempting to correlate the enactment of a binding legal act and the existence of the competence. However, the notion of competence is broader than the scope identified by looking only to binding legal acts (see p. 85).
[556] COSTANTINESCO Vlad, *op. cit.* (1974), p. 84.
[557] See Case 16/88, *Commission v Council,* EU:C:21989:397, para. 11.
[558] HARTLEY Trevor, *op. cit.* (2014), p. 128; OTT Andrea, VOS Ellen and COMAN-KUND Florin, "European Agencies on the Global Scene: EU and International Law Perspectives" in EVERSON Michelle, MONDA

adoption of legal acts risks missing the phenomena of the transferral of powers where some decision-making powers are in fact exercised by an institution or body, although the formal order of competences is apparently not modified. Therefore, it is arguable that the formal criterion to determine whether a delegation has taken place needs to be integrated with a more substantive approach, which considers other factors in the assessment. In order to identify a criterion suitable for a legal understanding of the phenomenon, guidance should be sought in the legal principles underpinning the EU institutional structure. In this regard, the reflections developed in relation to the principle of institutional balance appear to be particularly relevant. As was seen earlier, the meaning of this principle has been interpreted as going beyond the mere application of the Treaty provisions, prohibiting any form of encroachment or disregard of their prerogatives by the action of the other institutions or bodies.[559] Through a systematic reading of the EU Treaties, the Court has thus guaranteed the role and the independence of the institutions, including in their internal decision-making procedures, from the abuse of other institutional actors.[560]

Accordingly, the definition of delegation of powers should encompass not only the case of an institution or body formally exercising the powers of another institution, but also the case where that institution or body is granted powers which, in their exercise, potentially encroach upon or overtake the powers of another institution. In this regard, at least two cases of mismatch between the formal allocation of powers and *de facto* exercise of them can be envisaged.

On the one hand, the formal powers may remain in the hands of the institution defined in primary law, but the real powers may be actually exercised by another institution or body. In particular, there may be the case of a *de facto* delegation, where the competent institution or body formally adopts the acts or decisions, but in fact its role is merely to rubber-stamp the text decided by another institution without questioning its content.[561] This is the case, for example, where certain preliminary tasks for the adoption of legal measures are entrusted to another institution or body, because the delegator does not possess the power or the necessary expertise or scientific knowledge to carry out the task. For the same reason, it will not be able to exercise an autonomous assessment of the content of the measure and will accept passively the decisions taken elsewhere, *de facto* abdicating from the exercise of the power conferred. Taken to the extreme, where the possibility to object to the content is of little significance, it is clear that the ultimate decision-maker is no longer the institution formally designated by the law.[562]

Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 99-100.

[559] See *supra*, para. 7, espec. 7.2.

[560] See Case 70/88, *Parliament v Council (Chernobyl*), EU:C:1991:373.

[561] HARTLEY Trevor, *op. cit.* (2014), p. 129.

[562] See HARTLEY Trevor, *op*. *cit*. (2014), p. 129.

On the other hand, the power to act may formally be conveyed to another institution without any actual transfer of responsibility.[563] Where the final word is reserved for the delegator, it is doubtful whether the delegate is left with any discretion in the adoption of the act.[564] In this regard, the academic literature on accountability and delegation has pointed out that a delegate cannot be considered responsible for his/her actions where the delegating authority controls his/her action to such an extent that he/she acts as a mere "extension" of the delegator without a real separation from its will.[565] In other words, a certain degree of autonomy or independence is needed to identify a true delegation of powers. Therefore, attention must be paid to the autonomy enjoyed by the delegated authority in adopting the act in its own name.[566]

In these cases, attention should be paid to the actual roles and the reciprocal positions of the entities involved. However, it is important to highlight that this does not mean that all the forms of *de facto* influence or interference of an institution or body in the activities of another institution or body can fall within the scope of the notion of delegation of powers. Since the exercise of a *power* - as defined in legal terms - remains essential for a delegation of powers, and in the light of the meaning of the institutional balance, this interference needs to result in a modification of the legal situations of the institutional actors involved. Therefore, the delegated authority needs to exercise a power which potentially encroaches upon or overtakes the powers of the other institutions. In particular, the powers of the competent institution are substantially compromised when departing from the delegate's decision entails a modification of the ordinary procedure or an additional burden for the institution formally vested with the powers. In this case, although the decision is formally taken by the institution competent in accordance to the law, the transferral of certain powers to other institutions or bodies arguably has significant legal effects on the exercise of those powers.[567]

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[563] See OTT Andrea, VOS Ellen and COMAN-KUND Florin, *op. cit.* (2014), pp. 99-100, where the authors analyse the interesting case of agencies' measures in the external action, which are submitted to the previous approval of the Commission.

[564] See also Case 9/56, *Meroni, cit.*, p. 147, where the Court focuses on the concept of "full responsibility" to verify whether a "true delegation" has taken place.

[565] See, *inter alia*, NICOLAIDES Phedon and PREZIOSI Nadir, "Discretion and Accountability: the ESMA Judgment and the Meroni Doctrine", *Bruges European Economic Research Papers* No. 30 (2014), p. 5.

[566] See HARTLEY Trevor, *op. cit.* (2014), p. 129. The author talks about "effective control over the delegate", but in order to avoid confusion with certain oversight mechanisms (which are due to the operation of fundamental principles of EU institutional law and do not affect the definition of delegation) we will prefer to use the term *autonomy*, which is also more in line with the literature on agencies (see, for instance, CURTIN Deirdre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", 13 *European Law Journal* No. 4 (2007), pp. 523-541; BUSUIC Madalina and GROENLEER Martijn, "The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 175-200.

[567] Albeit being a more substantial approach, it is important to underline that this definition of delegation insists on an interference with the powers of another institution which have a legal effects, modifying the

17. The Proposed Definition of the Delegation of Powers

In light of the considerations developed, it is clear that the definition of the delegation of powers needs to be shaped according to certain factors, both of a formal and substantive nature, which can guide a legal analysis of the phenomenon. Accordingly, in order to determine whether a "true" delegation of powers has taken place, attention should be paid to the following elements: (i) the order of competences; (ii) the transferral of a decision-making power which has legal effects; (iii) the autonomy of the delegate in exercising the power; and (iv) the autonomy left to the other institutions after the exercise of the power.[568]

17.1. Formal Delegation and De Facto *Delegation*

Therefore, in order to identify whether a delegation of powers has taken place, a two-step approach is proposed. Firstly, adopting a formal perspective, the order of competences established in the Treaties needs to be considered to determine the institution which is ordinarily competent to adopt certain acts, i.e. the delegator. Thus, a delegation of powers in the EU legal system can be described as a transferral of the exercise of decision-making powers conferred on an institution, body or agency by the Treaties, to another institution, body or agency of the Union, according to an act of EU law.[569] This transferral of powers is clearly identified where the delegated institution or body adopts acts or measures which are the competence of the delegating authority. This case, thus, constitutes a delegation of decision-making powers in the formal sense,

procedure to be followed or the legal obligation of the institution involved. Therefore, it still maintains a meaningful value for a legal analysis.

[568] Compare with the criteria adopted by HARTLEY Trevor, *op. cit.* (2014), p. 129: In sum, the author proposes a definition of delegation which gives value to three elements: (i) the margin of discretion granted to the delegated authority; (ii) the control exercised over the delegate; and (iii) the *de facto* exercise of the powers by the delegating authority. See also OTT Andrea, VOS Ellen and COMAN-KUND Florin, *op. cit*. (2014), pp. 99-100: "In order to determine whether true delegation has taken place three factors seem decisive: (i) the nature of the powers delegated (wide discretionary or narrowly circumscribed executive powers), (ii) the amount of control that the delegating authority can exercise over the delegate and (iii) the actual exercise of the powers (by the delegate or the delegating authority). As explained *supra*, although sharing the idea to look at the actual dynamics of delegation, we prefer to focus on the *autonomy* of the institutional actors rather that resorting to the concept of "control", which may be confused with the oversight duly exercised on the delegate's action according to the institutional principles. See also VOS Ellen, "The Fall of Committees?", in DE ZWAAN Jaap, JANS Jan and NELISSEN Frans, *The European Union. An Ongoing process of integration* (TMC Asser Press, 2004), p. 115. Moreover, albeit strictly linked to this point, we will not refer to the *discretion* of the institutional actors since the discretionary nature of the powers is essentially relevant for the legality of the delegation in the case law. See Chapter 4, para. 3.2.1.

[569] This definition can be compared to the one proposed by Lenaerts: "transfer of authority by one branch of government in which such authority is vested to some other branch or administrative agency." (LENAERTS Koen, *op. cit*. (1993), p. 24.) The definition is taken also from the Black's Law Dictionary, in the context of American law. However, although recognising the value of this definition, we cannot adopt it in light of the possible confusion with the delegation of authority, i.e. the transferral of authority within the same institution.

in line with the notion of delegation *stricto sensu* analysed by the traditional literature on the issue in State legal systems.

Secondly, in light of the institutional balance defined in the Treaties, a transferral of powers may also occur when the exercise of the powers granted to an institution or body has the effect of encroaching upon the powers of another institution in a substantial way. The prerogatives of the institution are considered encroached upon, emblematically, where it has no autonomy in the exercise of its powers. This may occur, on the one hand, in cases where the delegate is controlled to such an extent that the decision-making power is actually exercised by the delegator, making the delegation nugatory in fact. On the other hand, it is also the case where the exercise of certain tasks by other institutions or bodies *de facto* deprives the competent authority of its prerogatives, shifting the full responsibility of adopting the acts to the delegate. In both cases, the formal scenario does not correspond with the actual exercise of the powers. From this perspective, focusing on the autonomy enjoyed by the institutional actors, the delegation of power results more in "a matter of degree" than in a "yes or no answer".[570] However, to mitigate the indeterminateness of the criterion, the need that a certain *power* must be exercised limits the definition to the cases where there is an effective modification of the legal positions of the institutions or bodies involved.

17.2. Limiting the Scope of the Research

Within the scope of EU powers and according to the notion thus identified, the analysis will consider the different forms of delegation of power which occur horizontally at the EU level, where the principle of institutional balance operates. Firstly, the definition *prima facie* includes the delegation of powers to the Commission. Since the definition does not give value to the nature (implementing, legislative or quasi-legislative) of the powers exercised, both the implementing acts and delegated acts will be taken into consideration in the analysis. Secondly, the delegation to other EU institutions, such as the Council and European Central Bank, will be considered, examining in detail in which cases this can be considered a true delegation of powers. Finally, this definition also comprises the delegation of powers to EU bodies and agencies.[571] However, although the agencification of EU administration represents an interesting phenomenon from a plurality of perspectives,[572] the definition provided does not allow including all the tasks and functions conferred to EU agencies (varying from gathering and collecting information to adopting decisions) in the delegation of powers. Therefore, for the purposes of this analysis, the focus will

[570] OTT Andrea, VOS Ellen and COMAN-KUND Florin, *op. cit.* (2014), p. 100.
[571] *Contra* see GAUTIER Yves, *op. cit.* (1995), p. 402. See also CHAMON Merijn, *op. cit*. (2016), pp. 240-241.
[572] CRAIG Paul, *EU Administrative Law* (Oxford University Press, 2012), p. 148.

be on the transferral of power to EU agencies which results in the adoption of binding acts or that legally affects the decision-making powers of the institutions.

Conversely, the proposed definition excludes from the scope of analysis the transfer of powers which does not take place between institutions, bodies or agencies of the Union, disregarding other phenomena which have been occasionally described as the delegation of powers in EU law.[573] In particular, the scope of the research will not include delegation to international organisations,[574] to private actors[575] and to Member States.[576] Albeit bearing some similarities in the mechanism and in the principles underpinning them, these phenomena will be considered to be outside the scope of this research, which will thus admittedly limited to the inter-institutional delegation for the described reasons.

18. Conclusion

The analysis of the notion of delegation in State legal systems, with particular regard to the delegation of legislative powers, has allowed the main features of this legal instrument to be identified. Recognising that the delegation of powers represents a legal mechanism for the transferral (in full or in part) of the exercise of decision-making powers from a delegator, which has ordinary competence, to the delegate, its value for the organisation of the exercise of public power has been underlined. Hence, having focused our attention on the delegation of legislative powers, *i.e.* the transferral of powers from the Parliament to the executive branch, it was seen how this phenomenon is problematic in State legal systems from a constitutional point of view, especially in relation to the principles of legality and democracy. Moreover, the interplay between delegation and the separation of powers has been thoroughly considered, pointing out its

[573] See, for instance, TRIDIMAS Takis, *op. cit.* (2009), p. 253, where the *passerelle* provisions are considered delegation of powers in favour of the Council.
[574] Analysed as comprised in the definition of delegation of powers in LENAERTS Koen, *op. cit.* (1993), pp. 23-49.
[575] For a debate on whether this can be considered a delegation of powers see: JOERGES Christian, SCHEPEL Harm e VOS Ellen, "The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the New Approach", *EUI Working Paper*, 1999, p. 14; PREVIDI Ernesto, "The Organisation of Public and Private Responsibilities in European Risk Regulation: An Institutional Gap Between Them?", in JOERGES Christian, LADEUR Karl-Heinz and VOS Ellen, *Integrating Scientific Expertise into Regulatory Decision-Making*, (Baden-Baden, 1997), p. 236; LAFFINEUR J.L., GRUNCHARD M., LEROY C., "Les possibilités de recours contre une norme technique dans l'Union européenne", *Revue européenne de droit de la consommation* (2009), p. 827. See, more recently, the Opinion of Advocate General Campos Sanchez Bordona in Case C-613/14, *James Elliott Construction Limited v Irish Asphalt Limited,* EU:C:2016:63, where the New Approach is described as a "case of 'controlled' legislative delegation" (para. 55).
[576] Although they are considered within the scope of the institutional balance (see *supra* para. 7.3), the vertical dimension of the phenomenon implies considerations on the allocation of powers to the EU which partially differ from those relevant for a horizontal delegation of powers. See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), pp. 244-247.

ambivalent relevance. Thus, this analysis of the notion of the delegation of powers has unveiled the main elements of this notion and the functions it has acquired in the evolution of the institutional structure of State legal systems.

Building from these reflections, the search for a notion of delegation of powers suitable for the EU context has led to a consideration of the institutional structure and the constitutional principles of this supranational entity. In this regard, the peculiar order of competences established by the Treaties according to the principle of conferral has demonstrated the need for a specific legal basis of the exercise of the powers of the institutions or bodies of the Union, as well as the need to respect the fundamental principles of the EU legal system. The principles of rule of law and institutional balance appear to be particularly relevant, as they have the potential to function as a limit to the delegation of powers in the EU legal system. Arguably, the interaction between these principles, which govern the division of competences and the exercise of the powers by the EU institutions and the notion of delegation of powers determines the extent and the modalities according to which this legal institution can operate in the EU legal system.

In light of these considerations, a definition of delegation of powers has been proposed, integrating a formal concept with a more substantial approach. Consequently, a delegation of powers is considered to take place not only when an institution or body adopts acts or measures which, according to the Treaties, are the competence of another EU institution, but also when the institution or body is granted powers which have the legal effect of potentially encroaching upon the EU institutions' powers, for instance modifying the procedures for the adoption of certain acts or imposing additional requirements.

Thus, similar to the separation-of-powers doctrine in State legal systems, the institutional balance principle has an ambivalent role in relation to the delegation of powers. On the one hand, it is a logical antecedent in relation to the definition of this notion, identifying the cases where the prerogatives of the institutions are encroached upon and their powers substantively delegated. On the other hand, as will be seen, it represents a limit to the delegation of powers in the EU legal system, inspiring the development of criteria and conditions for the assessment of the legality of these phenomena.

Through the analysis of the fundamental principles which shape the delegation of powers at the European level, the main characteristics of this legal framework have also been described. In particular, a fragmented picture of the acts of EU law, characterised by a peculiar hierarchy of norms, as well as of the institutions and bodies exercising the executive power,[577] has emerged. In

[577] As already noted by CURTIN Deirdre, *op. cit*. (2009).

this composite institutional structure,[578] the role and the functioning of the delegation of powers can be fully appreciated in light of its function as a collaboration tool between different institutions or bodies. In this sense, by looking at the EU institutional structure through the prism of this particular legal institution, the interinstitutional dynamics at the European level can be understood and analysed in legal and institutional terms.

Furthermore, bearing in mind the function of the delegation of powers in the State legal system, the emergence of different phenomena of delegation at the European level can be seen as part of a more general tension between effective public action and the democratic concerns which also pertain to the European Union as a constitutional legal order of an inter-individual character.[579] Therefore, applying the proposed notion of delegation, the single phenomena which can be identified in the EU institutional practice will be analysed. This analysis of the different forms of delegation, which will be conducted in the following chapters, will thus serve as a basis for understanding not only this legal institution, but more in general the described tendencies within the EU institutional dynamics.

[578] See VOS Ellen, "European Agencies and the Composite EU Executive" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 11-48; JENSEN Oswald and SCHONDORF-HAUBOLD Bettina (eds.), *The European Composite Administration,* (Intersentia, 2011).
[579] See *supra* para. 10. See CORTESE Bernardo, *op. cit.* (2015), pp. 227-271; CORTESE Bernardo, *op. cit.* (2018).

Chapter 2
The Delegation of Powers to the Commission and to the Council

1. Introduction

The analysis of the notion of delegation of powers, and of the peculiarities of the EU institutional structure, has clarified the legal framework and the constitutional principles which are relevant in the operation of this legal mechanism. Reflecting on the order of competences as laid down in the Treaties, the fundamental principles which govern the exercise of powers by the EU institutions, and the theoretical elements that the delegation of powers presents in the EU law were highlighted.

However, equally relevant for a full understanding of the delegation of powers in the EU is the historical perspective on its evolution and the peculiar features that emerged in practice. In the 60 years of its existence, the EU has grown into a regulatory entity in charge of the regulation and implementation of a wide number of policies.[580] The inherent need for efficiency in rule-making pushed the EU institutions to find more flexible and expendient ways to enact the necessary measures, often resorting to the delegation of powers. The tension between this need for efficiency and the respect for institutional principles - such as the institutional balance and the principle of conferral, as well as the constitutional principles already identified – has, as expected, characterised the use of the delegation of powers by the EU institutions. A mapping of the forms of delegation as manifested in the historical development of EU law is thus essential to describe the dynamics and tendencies which characterise this legal institution in practice. In this regard, it is interesting to investigate the way in which this legal system has accommodated the problems related to the delegation of powers in its evolution, pointing out unresolved issues which will require further reflection in light of the described institutional and constitutional principles.

Therefore, the different forms of delegation of powers experienced in the EU institutional landscape will be singled out, starting with the delegation to the Commission and the Council. Adopting a historical approach to these phenomena, firstly the origin of comitology and its subsequent evolution will be described, focusing on the most significant elements of this

[580] See, *inter alia*, MAJONE Giandomenico (ed.), *Regulating Europe,* (Routledge, 1996); HOFMANN Herwig, "Agencies in the European Regulatory Union", *TARN Working Paper* 5/2016 (June 2016), pp. 1-18; BURKARD Eberlein and GRANDE Edgar, "Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State", 12 *Journal of European Public Policy* (2005), pp. 89-112.

mechanism for the control of the Commission's activities. Moreover, particular attention will be paid to the discussions which led to the introduction of the delegated and implementing acts established by the Lisbon Treaty and the issues that the resulting Treaty text poses. Secondly, the case of the delegation of powers to the Council, will be considered, reflecting on the legal mechanisms at stake in the rule-making activities of this institution. In describing the evolution of these phenomena, the structure and characteristics of each form of delegation of powers will emerge, thus paving the way for the analysis of the constitutional limits of this legal institution.

2. The Delegation of Powers to the European Commission

In approaching the analysis of the forms of delegation of powers from an historical perspective, the first phenomenon to consider is certainly the empowerment of the Commission since it represents the longest standing form of delegation in time and the most relevant one in terms of acts adopted. The Commission is generally the institution which, in cases of EU direct administration, stands in the front line in realation to the implementation of EU legislation and policies. Yet, this role of the Commission stems not only from the powers directly conferred on it in primary law, but it is often the result of a delegation by the EU legislator. As will be seen, the origin of the delegation to this institution dates back to the establishment of the common agricultural policy (hereinafter, CAP) in the 1960s and it has expanded progressively in all the policy areas to become an established part of the EU institutional practice.

However, this expansion of the role of the Commission in the exercise of implementing powers was far from being unproblematic from a political and legal perspective. The Member States resisted to surrender relevant powers to this central institution, pushing for the creation of an oversight mechanism in realtion to its activities, the so-called "comitology system". Comitology is a highly idiosyncratic system, whose complexity can prove both confusing and obscure. However, some of that complexity can be unravelled if one considers that it stems from a peculiar historical experience linked to the issues posed by the delegation of powers. Thus, understanding how comitology evolved can help to clarify and explain much about its current nature and functioning.

2.1. The Origins of Comitology

2.1.1. The European Commission in the Original Institutional Context

The Treaty of Rome did not contain any general provision on delegating rule-making powers to the European Commission.[581] In general, the adoption of acts of secondary law followed a procedure often summarised in the phrase "the Commission proposed, and the Council disposed".[582] In relation to the legislative function, the Commission participated in the rule-making procedure, exercising the right of initiative, but the institution charged with the adoption of legislation was the Council. In this context, the position of the Commission was strengthened by the fact that the Council could amend the Commission's proposal only by a unanimous decision and the Commission could modify the original proposal before the adoption of the act by the Council.[583] In such a rule-making procedure, the Assembly – as it was called at the time the Parliament – had advisory and supervisory powers.[584]

The Commission had "its own power of decision" in the cases provided for in the Treaties, such as in competition law.[585] Moreover, the Treaty of Rome offered a flimsy basis for the exercise of power derived from a previous act of secondary law by the Commission. Indeed, Article 155 EEC Treaty provided that, in order to ensure the functioning and development of the common market, the Commission would "exercise the competence conferred on it by the Council for the implementation of the rules laid down by the latter."[586] However, although the text suggested the possibility of conferring powers to the Commission through an act of the Council, this provision was merely optional and it referred only to implementation, without defining the exact scope of the concept. Little in the text could anticipate how the delegation of powers system would develop after the 1960s. Indeed, political reality and administrative practice, more than institutional provisions, are at the basis of the creation of comitology.

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[581] CHALTIER TERRAL Florence, "Les actes délégués et d'exécution de l'Union européenne: la comitologie revisitée", *Petites affiches* n° 239 (2013), p. 6.
[582] CRAIG Paul, "Case C-133/06, European Parliament v. Council (Delegation of legislative power), judgment of the Grand Chamber of 6 May 2008, [2008] ECR I-3189", 46 *Common Market Law Review* (2009), p. 1274.
[583] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 112.
[584] Article 137 EC Treaty.
[585] See Articles 155 and 89 EC Treaty.
[586] Article 155 EC Treaty: "Article 155 - In order to ensure the proper functioning and development of the common market, the Commission shall: (i) ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied; (ii) formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary; (iii) have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly [European Parliament] in the manner provided for in this Treaty; (iv) exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter."

2.1.2. The Genesis of a System

The origins of the committee system are inextricably linked to the establishment of the CAP.[587] In this regard, the EEC Treaty established a common market which was extended to agriculture and trade in agricultural products[588] and required the establishment of a system of common agricultural organizations.[589] These organisations were to be established progressively, during a transitional period, but the Treaty did not specify the content and the actual means to this end.[590] Following the Conference of Stresa in 1958,[591] the European Commission was required to submit proposals concerning the working out and putting into effect of the CAP. It is precisely within this context that the first traces of the system which was destined to become the general implementing system of European law appeared. In the preparatory works, it was soon clear that a common market organisation required not only common rules to be enacted but also entities to be established which would be in charge of implementing and managing such rules, working under defined operating lines. In other words, in order to work and function properly, the to-be-established common organisations should rely on organs capable of adopting and implementing the acts constituting the substance of the organisation. [592] The Council did not possess the technical knowledge and the administrative structure to monitor the agricultural markets effectively,[593] and the procedures set forth in the Treaty for the adoption of Council's acts did not guarantee the necessary flexibility and speed for the management of such an organisation.

In light of these considerations, the European Commission proposed the creation of a European administration in charge of managing the common organisations. In particular, for cereals, dairy products and sugar, it proposed the creation of European Offices with this purpose.[594] However, given the cold reception of the first draft, the Commission modified its proposal slightly: In the final version adopted by the College of Commissioners in 1960, the European Offices were to be

[587] For a detailed analysis of the origins of comitology within the CAP, see BIANCHI Daniele, *De Comitatibus. L'origine et le rôle de la comitologie dans la politique agricole commune*, (L'Harmattan, 2012).
[588] Article 38 EEC Treaty.
[589] Article 39 EEC Treaty. See also BERGSTRÖM Carl Friedrik, *Comitology. Delegation of Powers in the European Union and the Comitology System*, (Oxford University Press, 2005), p. 43.
[590] See European Commission, *First General Report on the Activities of the European Economic Community 1958*, (Office for Official Publication, 1959), pp. 76-83.
[591] Pursuant to article 43 EEC, during the transitional period the Member States had to convene an intergovernmental conference, which represented the first step in the establishment of general principles for the CAP. It is interesting to note that the Commission also invited at this Conference professional organisations established in the Member States, such as farmers associations, trade unions and industrial organisations, as observers, see BIANCHI Daniele, *De Comitatibus. L'origine et le rôle de la comitologie dans la politique agricole commune*, (L'Harmattan, 2012), p. 51.
[592] BIANCHI Daniele, *op. cit.* (2012), p. 32.
[593] ESPOSITO Antonio, *La delega dei poteri dal Consiglio alla Commissione,* (Philos, 2004), p. 41.
[594] See VI/COM(59)140 (Brussels, 2 November 1959), Projet des propositions concernant l'élaboration et la mise en oeuvre de la politique agricole commune en vertu de l'article 43 du Traité instituant la CEE, cited in BIANCHI Daniele, *op. cit.* (2012), p. 62.

assisted by expert committees with an advisory role. These entities can be considered the forerunners of the comitology system since they were composed of the Member States officials who managed national agricultural markets.[595]

2.1.3. The debates in the Council

The proposals of the Commission in 1960 opened the debate in the Council. While the discussions relating to the content and the financing of the CAP proceeded quickly,[596] an agreement on its administrative aspects was far from being reached. The proposal of giving relevant powers to the Commission assisted by consultative committees - a solution already accepted in other fields of activity such as competition policy[597] – appeared unacceptable in the CAP.[598]

Arguably, three issues in the debates deserve particular attention. Firstly, it was immediately clear that the Member States preferred a form of consultation that would be conducted with all Member States together and that would guarantee the transparency of each other's views. Therefore, the compulsory and collective consultation of all Member States appeared a fundamental requirement for the exercise of decision-making powers by the European Commission.[599] However, in the view of most of the delegations, the mere consultation of the national experts was considered insufficient, as the Member States strived to have a stronger influence on the decision-making of the Commission.[600]

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[595] At the request of the Commission, they were to adopt reports or opinions on all the issues relating to the products within their competence. The presidency of the Directors' Committees was to be held by the Commission, which, being the opinion of the committee merely consultative, remained the ultimate decision-maker in the procedure. See BIANCHI Daniele, *op. cit.* (2012), pp. 64-80.

[596] The discussions led notably to the passage to the second stage of the transitional period (Council Decision 62/101/EEC of 14 January 1962 concerning the passage to the second stage of the transitional period, OJ 1962 10/164) and the establishment of common organisations for the markets in cereals, pork, eggs, poultry, fruit and vegetables, and wine (Council Regulation 19/62/EEC of 4 April 1962 on the progressive establishment of a common organisation of the market in cereals, OJ 1962 30/933; Council Regulation 20/62/EEC of 4 April 1982 on the progressive establishment of a common organisation of the market in pork, OJ 1962 30/945; Council Regulation 21/62/ECC of 4 April 1964 on the progressive establishment of a common organisation of the market in eggs, OJ 1962 30/953; Council Regulation 22/62/EEC of 4 April 1962 on the progressive establishment of a common organisation of the market in poultry, OJ 1962 30/959; Council Regulation 23/62/ECC of 4 April 1964 on the progressive establishment of a common organisation of the market in fruit and vegetables, OJ 1962 B 30/965; Council Regulation 24/62/ECC of 4 April 1964 on the progressive establishment of a common organisation of the market in wine, OJ 1962 30/989.

[597] Council Regulation 17/62/EEC of 6 February 1962 implementing articles 85 and 86 of the EEC Treaty, OJ 1962 P 13/204; Council Decision 61/1104/EEC of 9 October 1961 concerning a consultation procedure in respect of the negotiations of agreements concerning commercial relations between Member States and third countries, OJ 1961 71/1273; see also Statutes of the Euratom Supply Agency of 6 November 1958, OJ 1958 B 27/534.

[598] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 47.

[599] BIANCHI Daniele, *op. cit*. (2012), p. 93.

[600] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 47. It is remarkable that only the Dutch delegation consistently claimed that the Commission should have retained extensive implementation powers, without any "tutelage of intergovernamental organs".

Secondly, a crucial question in the negotiations was the division of competences between the Commission and the Council. The initial Commission proposal contained a number of provisions giving it competence to decide relevant aspects, especially those of a technical or urgent character.[601] Therefore, the technical nature and the urgency of the matter, as criteria for attribution to the Commission of decision-making powers gained general consent among the Member States representatives.[602] Hence, three categories of decisions started to be recognised: the political decisions, which were deemed the competence of the Council; the technical decisions, which in principle could be delegated to the Commission; and some urgent political decisions, which for the sake of expediency could be adopted rapidly by the Commission, subject to the overruling power of the Council.[603]

Thirdly, among the variety of solutions discussed in the negotiations, the French delegation put forward the idea that the competence to manage the organisation should be attributed not to offices of the European Commission, but rather to freestanding organs,[604] namely independent agencies, composed of representatives of the Member States, which could issue binding decisions.[605] However, this solution appeared to be controversial immediately. In particular, from a political point of view, at the time it was deemed inopportune to discharge the Commission of its institutional responsibilities and to disseminate them in multiple autonomous administrations, to the detriment of the consistency of the general development of common policies. From a legal perspective, questions were also raised as to the possibility of judicial review of the decisions of these organs and on the implications for the institutional balance, especially in light of the positions of the Court of Justice in the *Meroni* case.[606] For these reasons, the French proposal was rejected by the other Member States' delegations, but the issues raised in discussion present a relevant interest, as they were destined to reappear in the future development of the EU institutional framework.[607]

Following the discussions, the Commission put forward a new proposal, which substituted the vague reference to the "consultation with the Member States" with an elaborate procedure,

[601] BIANCHI Daniele, op. cit. (2012), p. 89.
[602] However, the German government insisted that in all cases the final decision should be taken by the Council or, at least, the Commission's competence should be limited to strictly technical decisions. Accordingly, on 21 November 1961 the German delegation submitted a proposal for discussion, which provided strong limitations to the Commission's action. For further details, see BIANCHI Daniele, *op. cit.* (2012), p. 105.
[603] BIANCHI Daniele, *op. cit.* (2012), p. 89.
[604] Proposition française du 9 novembre 1961 relative aux problèmes institutionnels poses par les organisations communes de marché (transmise au CSA le 174 novembre 1961), doc. S/584/61 (CSA 64), cited in BIANCHI Daniele, op. cit. (2012), p. 97.
[605] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 48.
[606] Case 10-56, *Meroni, cit.* For an analysis of the Meroni doctrine, see Chapter 3, para. 4.2.1.
[607] See Chapter 4, para. 4.2.

constituting the embryo of the first comitology procedure.[608] In the meeting held on 12-22 December 1961, thanks to the commitments of the Commission in the so-called Hallstein declarations,[609] the Council reached an agreement on a text which enabled the Commission to manage the common market organisations in close cooperation with the newly established "management committees", which became the archetype for the management committee procedures.[610]

It has been argued that such a rapid decision at the Council, after the long discussions on the previous proposal, might be due to the pressure exercised by the European Parliament, which, during the negotiations, issued a Resolution demanding the possibility to give its opinion before the decision was taken.[611] In order to avoid a stronger intervention of this new player in such a

[608] See Article 23 *bis* of the Proposal on the Common Organisation of the Market in Cereals, cited in BIANCHI Daniele, op. cit. (2012), p. 110.

[609] Annex I and II of doc. T/38/62 of 10 January 1962 cited in BIANCHI Daniele, *op. cit*. (2012), p. 115. The first declaration reads as follows: *"La Commission déclare qu'elle exercera le droit de procéder à la suspension des mesures, qui lui appartient en vertu de la troisième phase du paragraphe 3 de l'article 23 ter, lorsqu'il ne s'agira ni d'un cas d'urgence ni d'une décision de portée économique générale pour laquelle une décision devrait être prise au niveau de Conseil des ministres. Le Conseil prend acte de cette déclaration de la Commission*". The second declaration, concerning the duration of the management procedure, consists in an agreement on a general revision: "*A la fin de la période de transition, le Conseil, statuant à la majorité qualifiée sur proposition de la Commission, décide, compte tenu de l'expérience acquise, le maintien ou la modification des dispositions*".

[610] The original French version of the agreed text read as follows: "*Article 23 bis 1. Il est institué un Comité de gestion des Céréales (ci-après dénommé Comité) composé des délégués des Etats membres et présidé par un représentant de la Commission. 2. Au sein du Comité les voix des Etats membres sont affectées de la pondération prévue à l'article 148, paragraphe 2 du traité. Le président ne prend pas part au vote. Dans les cas au des dispositions prévoient expressément l'application des règles de procédure définies au présent article le Comité est saisi par la Commission de mesures projetées. 3. Le Comité donne son avis sur ces projets. L'avis est acquis à la majorité de neuf voix. Tant que le Comité n'a pas statué, la Commission peut modifier son projet initial en tenant compte notamment des observations présentées. Dans le cas où la Commission ne modifie pas son projet, le Comité ne peut proposer d'amendements que si ceux-ci sont adoptés à l'unanimité. 4. La Commission peut prendre des mesures conformes à l'avis du Comité ou soumettre des propositions au Conseil. Celui-ci statue à la majorité qualifiée dans le délai d'un mois. Dans les cas prévus aux articles 8 § 1 et 21 § 1, la Commission peut prendre des mesures conformes aux propositions soumises au Conseil si celui-ci n'a pas statues dans le délai d'un mois prévu à l'alinéa précèdent. 5. Par dérogation aux dispositions du paragraphe 3 ci-dessus, les mesures prévues aux articles 8 § 2, 9 § 2 et 3, 16 § 2, peuvent être prises provisoirement par la Commission même si elles n'ont pas fait l'objet d'un avis conforme du Comité préalablement consulté. Celles-ci sont immédiatement applicable ; elles sont aussitôt communiquées au Conseil qui, statuant à la majorité qualifiée, peut les modifier dans le délai d'un mois à partir de cette communication.*"

[611] Résolution du 20 décembre 1961 sur les attributions de la Commission européenne dans la mise en œuvre de la politique agricole commune, *in Annuaire-Manuel 1961-62*, pp. 468-469, cited by BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 52. The Parliament had already expressed its concerns about the proposed creation of European Offices, see Doc. No 7, 1960-1961, Rapport fait au nom de la Commission agriculture sur les propositions de la Commission CEE pour une politique commune dans le secteur des céréales par M. J. Legendre, Rapporteur, March 1960, page 7, point III, which reads as follows: "*Le bureau européen des céréales aura une mission d'exécution mais aussi un rôle de conseil technique permanent de la Commission de la CEE. Il sera composé exclusivement des fonctionnaires, ce qui fera encourir le reproche – injustifié certes, mais souvent formulé – de vouloir faire une Europe technocratique*.", cited in BIANCHI Daniele, *op. cit*. (2012), p. 73.

complex game, the Member States might have overcome their disagreements, subjecting the system to a future revision.[612]

2.1.4. The management committee procedure

The solution agreed upon by the Council entailed that, in the management of the CAP, the Commission was entrusted with relevant implementing powers, precluding the Council from being blocked by the workload implied in the regulation of minor aspects.

In the same Regulations conferring powers to the Commission, committees composed of representatives of the Member States were established. The Commission was bound to consult the committees prior to adoption of any decision. Where the opinion of the committee was positive or the committee, voting by qualified majority, failed to issue an opinion, the decision could be adopted. On the contrary, in case of a negative opinion of the committee, the proposed decision had to be notified to the Council. In both cases, the measures could be adopted and were applicable immediately, but in the event of a negative opinion the Commission was allowed to suspend the application and the Council, acting within one month from the communication by the Commission, could adopt a different decision, overruling the Commission's decision.[613]

In addition to the original version of the management committee procedure, which in the comitology jargon is known as "variant a" and which allowed the Commission to issue an immediately applicable measure notwithstanding the negative opinion of the committee, the practice developed a "variant b" procedure also. Accordingly, in the case of negative opinion of the committee, the Commission was obliged to suspend the application of the implementing measure for the period of time indicated by the basic act from the Communication to the Council. During this time, acting by majority voting, the Council could modify or repeal the Commission's proposal.[614]

Considering the debates that led to the final approval of the text, the abovementioned procedure constituted a balanced solution, which permitted the delegation of relevant powers to the Commission and at the same time attributed to the Council a strong control function.[615]

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[612] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 52.
[613] See Articles 23-25 of Réglement No. 19 portant établissement graduel d'une organisation commune des marchés dans le secteur des céréales, *OJ* 30, 20.4.1962, p. 933–945.
[614] BIANCHI Daniele, *op. cit.* (2012), p. 130.
[615] In this regard, there is relevant literature on the dynamics and understanding of comitology from a political science perspective. In particular, two opposite images were proposed. On the one hand, the image of "interinstitutional bargaining" according to which comitology is a mechanism for the control of the Member States on the Commission, where Member States negociate in an intergovernmental manner (see, *inter alia*, STEUNENBERG Bernard, KOBOLDT Christian and SCHMIDTCHEN Dieter, "Policymaking, Comitology and the Balance of Power in the European Union", 16 International Review of Law and

Originating from the need of guaranteeing an influence of the Member States over the powers exercised by the Commission, the first committees proved to be efficient and effective tools for the management of the agricultural markets. Composed of experts and national officials working in the particular field, they were also conceived as a way of providing the Commission with the expertise and technical information needed to work out of its policy.[616] The involvement of national representatives , moreover, had the positive effect of facilitating the interactions with the administrators who were afterwards in charge of the application of the rules at the national level.[617]

The management committee procedures, in their different variants, were introduced for a limited time.[618] However, in light of the described positive spillovers of the system, the Council decided to retain the management committee procedure on a permanent basis in its Regulation (CEE) No. 2602/69.[619] Moreover, the model was also introduced in other areas of the CAP and, especially in the 1970s, it was extended to other fields of EU law.[620]

In this regard, it has been noted that the events which characterised the second half of the 1960s, commonly addressed as "the empty chair crisis" from the decision of the French Government to abandon the Council, significantly contributed to the diffusion of comitology.[621] Indeed, in the paralysis and malaise that followed the Luxembourg Compromise in the Council, the recourse to a delegation of powers to the European Commission constituted an important mechanism contributing to the functioning of the European Community.[622] The control guaranteed by the operation of the committees facilitated the acceptance of the delegation of powers to the Commission by the Member States, and permitted the adoption of legislative acts in cases that the

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Economics (1994), pp. 329-344; POLLACK Mark A., *The Engines of European Integration,* (Oxford University Press, 2003); FRANCHINO Fabio, "The Commission's Executive Discretion. Information and Comitology", 12 *Journal of Theoretical Politics* (2000), pp. 155-181; BALLMANN Alexandre, EPSTEIN Albert and O'HALLORAN Sharyn, "Delegation, Comitology and the Separation of Powers in the European Union", 5 *International Organisation* (2002), pp. 551-574). On the other hand, the image of "deliberative supranationalism" according to which committees have evolved into forums of discussion among experts, based on persuasion and dialogue (see, *inter alia*, JOERGES Christian and NEYER Jürgen, "From Intergovernamental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", 3 *European Law Journal* No. 3 (1997), pp. 273-299; DEHOUSSE Renaud, "Comitology: Who Watches the Watchmen?", 10 *Journal of European Public Policy* (2003), pp. 798-813). See BLOM-HANSEN Jens and BRANDSMA Gijs Jan, "The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?", 47 *Journal of Common Market Studies* (2009), pp. 719-740.

[616] VOS Ellen, "The Rise of Committees", 3 *European Law Journal* No. 3 (1997), p. 210.

[617] CRAIG Paul, *op. cit.* (2012), p. 113. See also DELLA CANANEA Giacinto, "Cooperazione e integrazione nel sistema amministrativo delle Comunità europee: la questione della "comitologia"", *Rivista trimestrale di diritto pubblico* No 3 (1990), pp. 655-702.

[618] Corresponding to the transitional period expiring on 31st December 1969.

[619] ESPOSITO Antonio, *op. cit*. (2004), p. 43.

[620] BIANCHI Daniele, *op. cit.* (2012), p. 133.

[621] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 78.

[622] VOS Ellen, "50 Years of European Integration, 45 Years of Comitology", *Maastricht Working Papers, Faculty of Law* No. 3 (2009), p. 6.

Member States agreed on the general principles for a particular regulation, but disagreed on its more detailed ramifications.[623] As a result, in the years following the Luxembourg Compromise the management committees spread relevantly beyond the field of the CAP and developed into the normal decision-making procedure by the Commission.[624]

2.1.5. The regulatory procedure

The extension of the system created within the CAP to different policy areas implied taking into account different needs of the Member States, which often required more restrictive rules for the delegation of powers to the European Commission. The negotiations of a new scheme for development aid gave the Member States the first opportunity to explore different solutions for comitology.

In this particular domain, the Member States could not accept that the Commission's proposal could enter into force without the consent of the committee. Therefore, the Council agreed on the creation of a committee following a different procedure, which prevented the Commission from adopting the decision without a positive opinion by the committee.[625] This solution represents the first appearance of the so-called "regulatory committees" procedure,[626] which experienced a significant expansion after 1968, especially within the domain of the common commercial policy.[627]

In later regulations, the procedure was improved with the insertion of the following clause: "If, within three months of the proposal being submitted to it, the Council has not acted, the proposed provisions shall be adopted by the Commission".[628] Therefore, if the Council did not decide within the defined time, the Commission could regain its powers to adopt the proposed measures,

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[623] CRAIG Paul, *op. cit*. (2012), p. 113.
[624] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 78.
[625] In particular, if the Commission departed from the submitted proposal, the opinion of the committee was negative or no opinion was reached, the Commission could only withdraw the proposal or submit it to the Council. See article 11 de l'Accord interne relatif au financement et à la gestion des aides de la Communauté, JOCE 93 du 11.6.1964 p. 1493; 64/356/CEE Règlement financier du Fonds européen de développement institué par l'accord interne relatif au financement et à la gestion des aides de la Communauté, JOCE 93 du 11.6.1964, p. 1498.
[626] It is interesting to notice that the original name for this kind of committee was "legislative committee", cfr. European Commission, Second General Report on the Activities of the European Community 1968 (Office for Official Publications, 1969), point 484.
[627] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 81. See, for instance, Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods, JO L 148 du 28/6/1968; Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes, *OJ L 148, 28.6.1968, p. 6–12*; Council Directive 69/73/EEC of 4 March 1969 on the harmonisation of provisions laid down by law, regulation or administrative action in respect of inward processing, OJ L 58, 8.3.1969, p. 1–7.
[628] Article 12-14 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods, OJ L 148, 28.6.1968, p. 1–5.

avoiding that the Council's *impasse* affects the governability of the policy. This mechanism, which assures that a decision is always taken with in a certain time, is referred to as the *filet* or "safety net".[629]

The system was extended progressively to other areas, such as transports and the internal market. However, in areas of relevant political sensitivity,[630] the regulatory committee procedure was adopted in a different variant: even if the Council could not decide by qualified majority the measures to be taken in place of those proposed by the Commission, the Council could still prevent the Commission from acting after the expiry of the given period, voting by simple majority.[631] Thanks to this variant, called the *contrefilet* or "the double safety net", the Council enjoyed relevant review powers in relation to the Commission's activities and, arguably, this contributed to its acceptance to confer upon the Commission rule-making powers of a more general and more permanent nature than ever before.[632]

2.2. The Reactions to the Comitology System

The exercise of delegated powers by the Commission under the oversight of the committees presented a number of advantages, which made the system flourish in different policy areas. However, the establishment of such entities represented an institutional innovation which had the potential to collide with the position and powers of other European institutions.[633] The establishment and functioning of the management and regulatory committee constituted a potential threat to the institutional balance of powers, as it allegedly decreased the Commission's discretion in its implementing tasks and, consequently, the Parliament's right of control.[634]

2.2.1. The Reaction from the Parliament

In light of these considerations, the reaction of the Parliament was not long coming. Before the formal establishment of the management committees, the Parliament reacted strongly to the first proposals, criticising the envisaged solution of creating new administrative bodies.[635] According

[629] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 83. For a clear example of the procedure in its complexity, see Articles 15-17 of Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (OJ L 148, 28.6.1968, p. 6–12).
[630] See, for instance, Council Resolution of 12 March 1968 on Community measures to be taken in the veterinary sector, OJ C 22, 18.3.1968, p. 18–21.
[631] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 88.
[632] In this regard, it has been noted that the policy areas where the regulatory committees were established were domains which, at the time, the EU competence was not clearly defined in relation to the Member States' prerogatives, necessitating thus a more nuanced – and controlled - delegation of powers. See BIANCHI Daniele, *op. cit*. (2012), pp. 144-146.
[633] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 54.
[634] VOS Ellen, *op. cit*. (2009), p. 7.
[635] European Parliamentary Assembly, Resolution on the attributions of the Eruopean Commission in the implementation of the common agricultural policy, OJ 72 of 17.01.1962.

to the Parliament, such innovation would have weakened the powers of the Commission, which alone was responsible with regard to the European Parliament. This initial reaction was followed by the closer analysis contained in the Deringer Report of 5 October 1962,[636] which, although recognising the positive effects of the new system on the cooperation between the Commission and the national administration, warned against the "disorder" that the proliferation of such committees could entail and the difficulties for the Parliament to exercise political supervision over the Commission's activities and to maintain its consultation role in the adoption of legislation.[637]

The Parliament reiterated its concerns about comitology in a number of resolutions during the 1960s, asking for a reduced influence of the committees on the Commission's activities and for the creation of effective tools for parliamentary oversight.[638] In particular, in its Resolution of October 1969 it expressed its discontent in relation to the growing tendency to adopt not only technical-scientific measures but also relevant political choices via the comitology system, to the detriment of Parliament's role.[639] Although recognising the need for the delegation of powers in the management of Community's policies, it expressed "its legitimate concern with an institutional evolution which it could not criticise on legal grounds but which could very well be dangerous on the political plan."[640] Therefore, it argued for the necessity to keep the Parliament informed about the committees' activities and to provide it with an opportunity to give an opinion on the measures.[641] This claim for a "*droit de regard"*, meaning the right to be kept informed and to render

[636] Rapport du 5 octobre 1962 fait au nom du comité des présidents sur le cinquième Rapport général sur l'activité de la CEE (rapporteur: Arved Deringer), PE Doc 74-1962, cited in BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 54.
[637] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 55.
[638] ESPOSITO Antonio, *op. cit.* (2004), p. 45.
[639] European Assembly, Resolution concerning the Community procedures for the implementation of secondary law, OJ 1986 C108/37, cited in ESPOSITO Antonio, *op. cit*. (2004), p. 45. Similar concerns had emerged in the most insightful report on the topic, the so-called Jozeau-Marigné Report, presented by the Parliament's legal committee on 30 September 1968. See Rapport du 30 Septembre 1968 fait au nom de la commission juridique sur les procedures communautaires d'exécution du droit communautaire derivé (rapporteur: Jozeau-Marigné), PE doc 115/68, p. 5, para. 2 and 4: "The growth of the Community and the gradual development of "derived" Community law, which includes regulations, decisions and directives implementing the Treaties, as distinct from "primary" Community law (constituted by the Treaties) has been matched by a corresponding increase in the tasks facing the Commission and this has given rise to a problem which is at once legal, technical and political. The legal aspect is the devolution of Community powers and the powers vested in the Commission to administer common policies. The technical aspect is that the Commission is obliged to have recourse to representatives of the Member States or national experts who help to guide its work in the spheres it is called upon to regulate or administer. The political aspect is the freedom of decision left to the Commission and, in particular, the limits of this freedom". It is interesting to note that in this report the first classification of advisory, management and regulatory committees is used. See also BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 89; BRADLEY Kieran St Clair, "Comitology and the Law: Through a Glass, Darkly", 29 *Common Market Law Review* (1992), p. 695..
[640] Rapport du 30 Septembre 1968 fait au nom de la commission juridique sur les procedures communautaires d'exécution du droit communautaire dérivé (rapporteur: Jozeau-Marigné), PE doc 115/68, p. 27, para. 44.
[641] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 92.

an opinion when matters of importance are concerned, would become a central point in the position of the Parliament towards the comitology system.[642]

During the 1970s, the preoccupation with the comitology system remained profound among the Parliament members. Several remarks were introduced in the opinions concerning the specific enabling acts adopted under the consultation procedure or in *ad hoc* resolutions.[643] However, it is when the parliamentary powers on the budget were reinforced by the Luxembourg[644] and Brussels[645] Treaties that the Parliament acquired real teeth to increase its influence on the development of comitology. Consequently, during the 1980s the Parliament repeatedly blocked the budget items of the Commission's expenses concerning the functioning of committees, for instance making the release of the necessary resources for the running of committees conditional on the publication of the list of existing committees and to the suppression of certain bodies.[646] However, such interventions - more expression of *ad hoc* reactions than application of a consistent strategy[647] - had limited results. Therefore, criticism from the Parliament on the functioning of the committee system continued to be expressed without the main issues being actually tackled.[648]

2.2.2. The Comitology System before the Court of Justice

Not surprisingly, such institutional tensions caused by the establishment and functioning of the committees gave rise to litigation before the Court of Justice. Although the case law of the Court on the limits to delegation will be analysed in more detail *infra*,[649] it is important to recall some fundamental principles established in the early years of the comitology system in order to understand the subsequent development of the legal framework better.

The first challenge to the legality of the delegation of powers by the Council to the Commission was brought in the *Chemiefarma* case, dismissed by the Court.[650] The legality of the management

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[642] See, *inter alia*, European Parliament, Resolution of 17 October 1967 on the legal problems connected with the consultation of the European Parliament in *Bulletin EC* 12-1967/51.
[643] ESPOSITO Antonio, *op. cit*. (2004), p. 45.
[644] Treaty amending Certain Budgetary Provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Luxembourg on 22nd April 1970.
[645] Treaty amending Certain Financial Provisions of the Treaty establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Brussels on 22nd July 1975.
[646] ESPOSITO Antonio, *op. cit*. (2004), p. 45.
[647] BRADLEY Kieran St. C., "The European Parliament and Comitology: On the Road to Nowhere?", 3 *European Law Journal* No. 3 (1997), p. 234.
[648] See, *inter alia*, European Parliament, Resolution on Committees for the Adaptation of Directives to Technical and Scientific Progress, OJ C 172 of 2.7.1984, p. 6, cited in ESPOSITO Antonio, op. cit. (2004), p. 46.
[649] See Chapters 4-6.
[650] Case 41/69, *ACF Chemiefarma v Commission*, EU:C:1970:71. Here the Court rejected the contestation to the comitology system merely by referring to article 155 EC Treaty.

committees system was again questioned in the *Köster* case, which the Court decided on 17 December 1970.[651] The case originated from a preliminary question posed by a German administrative court in relation to Commission Regulation No. 102/64/CEE,[652] based on a Regulation which introduced a procedure for export certificates of certain agricultural products and, contextually, established a management committee to implement it. The applicant in the main proceedings contested, firstly, the possibility of creating a simplified procedure for enacting rules in the CAP and, secondly, the impact of such a procedure on the institutional balance.[653]

In its judgment, the Court started by clarifying that the power to adopt the system under dispute belonged in principle to the Council pursuant to policy-specific provision.[654] However, even in the absence of a clear provision on delegation,[655] the legislative scheme established by the Treaty, with particular regard to Article 155, and the consistent institutional practice give the possibility to adopt measures not only according to the procedure established in the Treaty, but also on the basis of derived law intended to ensure their implementation.[656] Therefore, Article 43 could not be interpreted as meaning that all the details of the regulations concerning the CAP had to be drawn up by the Council, but "it is sufficient for the purposes of that provision that the *basic elements of the matter* to be dealt with have been adopted in accordance with the procedure laid down by that provision."[657]

Therefore, the legislative act shall determine the essential elements of the matter and the power to fix such elements cannot be delegated to the Commission. The other elements of the matter can be delegated to the Commission. However, this does not mean that the legislator's competence is limited to the essential elements: The legislator is always free to provide all the elements of the matter in the basic act, not leaving any room for implementation.[658] In other words, in *Köster*, the

[651] Case 25/70, *Köster, cit*. See also the twin judgment: Case 30/70, *Otto Scheer v. Einfuhr und Vorratsstelle fur Getreide und Futtermittel*, judgment of the Court, 17 December 1970.
[652] Règlement n 102/64/CEE de la Commission, du 28 juillet 1964, relatif aux certificats d'importation et d'exportation pour les céréales, les produits transformés à base de céréales, le riz, les brisures et les produits transformés à base de riz, OJ 126, 5.8.1964, p. 2125–2128.
[653] In particular, he claimed that the management procedure was incompatible with the Community structure and the institutional balance since the management committee interferes in the legislative work of the Commission and creates a sort of "pouvoir de cassation" to the benefit of the Council against the implementing measures adopted by the Commission. Moreover, such system made the obligation to consult the Parliament nugatory, thus distorting the relationship established in the Treaty. For an analysis of the arguments of the parties in the *Köster* case, see BIANCHI Daniele, op. cit. (2012), pp. 173-180.
[654] Namely, the third subparagraph of Article 43 (2) of the Treaty. See Case 25/70, *Köster, cit.*, para. 5.
[655] From the perspective of the tripartite vision of delegation elaborated by the German literature, we can see that at the time there was no explicit *Delegationsnorm* in the Treaty. Article 155 EC, on which the Court bases its reasoning, foresees the delegation of powers only implicitly.
[656] Case 25/70, *Köster, cit.*, para. 6.
[657] Ibidem.
[658] JACQUE Jean-Paul, "Pouvoir législatif et pouvoirs exécutif dans l'Union européenne", in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen,* II ed. (Bruylant, 2014), p. 47.

Court established a domain reserved to legislation, but this does not imply that there is an equally reserved domain for implementation.

With regard to the interference of the Council in the implementing activities of the Commission, the Court clarified that the comitology system does not entail a delegation of powers to the committees.[659] Rather, it underlined that the Council was free to reserve implementing tasks for itself, or to delegate them to the Commission, imposing conditions on its implementing action on the basis of the principle "*qui peut le plut peut le moins*".[660] Therefore, the establishment and functioning of a management committee did not violate the Treaty nor upset the institutional balance. Those findings of the Court confirmed the legality of the comitology procedures, paving the way to their consolidation and further expansion.[661] While the institutional implications of the judgment will be analysed in detail in the following chapters, it is important to remark here how the Court referred to the existing practice of the Institutions to justify the legality of this non-Treaty based system, thus problematically using this element to consecrate a structure born of necessity.[662]

The positive assessment towards the comitology system was confirmed in the following case law of the Court, which, as we will see, further elaborated the limits and the requirements of the delegation of powers. In particular, in the judgment in *Rey Soda* of 1975 the Court, adopting a broad concept of "implementing powers", held that:

> *"When the Council has thus conferred extensive power on the Commission the limits of this power must be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word."*[663]

[659] Case 25/70, *Köster, cit.*, para. 9: "Article 155 provides that the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. This provision, the use of which is optional, enables the Council to determine any detailed rules to which the Commission is subject in exercising the power conferred on it. The so-called Management Committee procedure forms part of the detailed rules to which the Council may legitimately subject a delegation of power to the Commission. […] The Management Committee does not therefore have the power to take a decision in place of the Commission or the Council. Consequently, without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary."

[660] LENAERTS Koen and VERHOEVEN Amaryllis, "Towards a legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision", 37 *Common Market Law Review* (2000), p. 652.

[661] BIANCHI Daniele, *op. cit*. (2012), p. 180.

[662] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 225.

[663] Case 23/75, *Rey Soda v Cassa Conguglio Zucchero*, EU:C:1975:142, para. 14.

However, the Court also clarified that implementing acts cannot derogate from the basic act,[664] unless the possibility is expressly provided for in the enabling measure.[665] In the subsequent case law, the Court consistently rejected the objections advanced against comitology, remaining unsympathetic to the arguments of both the Parliament and the Commission.[666] Also the *contre-filet* variant of the regulatory committee procedure, which confers strong powers on the Council and may lead to an impasse in the decision-making process, was upheld, noting that the committee's veto is not the final decision, as the Commission was always free to propose a new measure.[667] Overall, the role of the Court towards the evolution of comitology appeared far from active, as "not only has it proved itself unwilling to reduce the room for political negotiations but it has also demonstrated a surprising ability to adapt itself to their result."[668]

2.3. The Single European Act

While the Court gave a clear response to the issue of the validity of the comitology system from a legal perspective, the political debate over such an institutional development was far from being settled.[669] In this context, the institutions engaged in a reflection on the executive power of the Community.[670] Accordingly, a number of projects on the topic underlined the need for enhancing the role of the Commission as the executive organ of the Community and for increasing the recourse to the delegation of powers.[671]

In this regard, it has been noted that the position of the Member States was ambiguous.[672] On the one hand, also in light of the increasing number of legislative proposals of a technical nature pending before the Council, the advantage of conferring more implementing powers on the Commission was explicitly recognised by the Heads of the Member States.[673] On the other hand, the Member States appeared reticent with regard to the idea of conferring an exclusive power of implementation on the Commission or in relation to widening the scope of application of Article 155 EC Treaty.[674]

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[664] Case 38/70, *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1971:24.
[665] Case 100/74, *Société CAM SA v Commission*, EU:C:1975:152.
[666] VOS Ellen, *op. cit.* (2009), p. 8.
[667] Case 5/77, *Tedeschi v Denkavit Commerciale Srl*, EU:C:1977:144.
[668] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 319.
[669] BIANCHI Daniele, *op. cit.* (2012), p. 181.
[670] Ibidem, p. 183.
[671] See, *inter alia*, Rapport de Trois Sages (Dell, Biesheuvel et Marjolin), presented at the European Council in October 1979; Rapport Spinelli adopted by the European Parliament on 14 February 1984.
[672] BIANCHI Daniele, *op. cit.* (2012), p. 181.
[673] See Conclusions to the Sommet of Head of State and Governements held in Paris in December 1974, cited in BIANCHI Daniele, *op. cit*. (2012), p. 181. See also Rapport Tindermans sur l'Union européenne, presented on 2nd April 1976 before the European Council in Luxembourg.
[674] BIANCHI Daniele, *op. cit*. (2012), p. 182.

Such considerations appear to be reflected in the text of the Single European Act, which modified the Treaty provision concerning the delegation of executive powers to the Commission. In particular, it added the following paragraph to Article 145 EC Treaty:

> *"[The Council shall] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament."*[675]

Three relevant aspects may be underlined in relation to this textual insertion. Firstly, a specific *Delegationsnorm* for the delegation to the Commisson was introduced, explicitly allowing the transferral of powers from the Council through acts of secondary law. The institutional role of the delegation of powers was, thus, consecrated in primary law.

Secondly, by providing that the Council "shall" confer the powers, it seems to introduce an obligation on the Council to delegate implementing powers to the Commission in order to achieve the Treaty objectives,[676] where in the past such a conferral was considered purely optional.[677] However, it is arguable that the amendment is not so incisive. What the new version of the article suggests is that the rule/exception relationship is reversed. While in the previous legal framework the rule was that the Council held the executive powers with the possibility of optional delegation to the Commission, the new rule appears to be the delegation of powers to the Commission, with the exception of reserving powers for the Council in specified cases.[678]

Thirdly, with the view of rationalising the conditions and modalities for the exercise of the delegated powers, Article 145 requires the enactment of a framework decision which lays down principles and rules for the comitology system in advance.[679] Until that moment, in the absence of

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[675] Article 10 of the Single European Act.
[676] BRADLEY Kieran St Clair, *op. cit.* (1992), p. 703. It is also reported that the proposal to oblige the Council only to delegate some implementing powers ("des compétences d'exécution") was rejected by the intergovernmental conference.
[677] See Case 25/70, *Köster, cit.*, para. 9.
[678] BIANCHI Daniele, *op. cit.* (2012), p. 187.
[679] The need for a predefinition of the rules governing the comitology system is reiterated in a Declaration annexed to the Single European Act, concerning the powers of implementation of the Commission: "The Conference asks the Community authorities to adopt, before the Act enters into force, the principles and rules on the basis of which the Commission's powers of implementation will be defined in each case", see Annex 1 to the Single European Act, Declaration on the powers of implementation of the Commission.

a general regulation defining the committee procedures, the particular procedure to be followed was to be found in the specific act enabling the Commission to adopt the implementing acts. As the enabling act was the result of political compromises, the committee procedures presented divergences and variants which contributed to the complexity and opaqueness of the system.[680] In contrast with these *ad hoc* provisions determining the proliferation of variants and exceptions, the regulation of the comitology system was to be fixed in a Council decision, giving a clear framework to the system.

2.4. The First Comitology Decision

In compliance with such a requirement, on the 13 July 1987 the Council adopted the Decision 83/373/EEC laying down the procedures for the exercise of implementing powers conferred on the Commission.[681] That Decision, known as the "First Comitology Decision", did not actually bring relevant innovations to the comitology system since it merely codified the existing practice.

2.4.1. The Procedures

The First Comitology Procedure provided that each committee was composed of representatives of the Member States and chaired by a Commission's official without voting rights.[682] When entrusted with implementing powers by a basic act, the Commission had to submit to the committee a draft of the measures to be adopted, and the committee had to deliver an opinion within the time limit established by the chairperson, according to the urgency of the matter. The effect of the opinion depended on the type of procedure regulated in the Comitology Decision and identified in each basic act.

In particular, the Decision envisaged three committee procedures, i.e. the management and regulatory committee procedures with two variants each, and two safeguard procedures.[683] While in the advisory committee procedure the Commission had just to "take the utmost account" of the opinion of the advisory committee,[684] in the management committee procedure, in case of negative opinion, the measures were communicated to the Council, which could adopt a different

[680] ESPOSITO Antonio, *op. cit.* (2004), p. 44.
[681] Decision No. 83/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred to the Commission, OJ L 197/33 of 18/07/1987. The actual text of the decision strongly differs from the proposal of the Commission: see Proposta di Regolamento (CEE) del Consiglio che stabilisce le modalita di esercizio delle competenze di attuazione conferite alla Commissione, COM(85)35 def., GU C 70 del 25.3.1986, p. 6–7.
[682] See Comitology Decision; BRADLEY Kieran St Clair, *op. cit.* (1992), p. 704.
[683] The safeguard procedures, however, do not involve the participation of commitees; see BRADLEY Kieran St Clair, op. cit. (1992), p. 704.
[684] Article 2, paras. 1-4, First Comitology Decision.

decision by qualified majority voting.[685] However, the Commission retained a relevant power of decision because, although a negative opinion could defer the application of the measure, the substitution of the proposed measure required a qualified majority voting to be adopted. Therefore, a blocking minority could be able to reject the Commission's proposal, but not to obtain sufficient votes to push forward an alternative measure.[686]

Conversely, in the regulatory committee procedure, the Commission's proposal could be adopted only in case of positive opinion of the Member States' representatives. In case of negative opinion, or in the absence of an opinion, the Commission had to submit a proposal to the Council, which could act either under the described *filet* or *contrefilet* procedures.[687] Finally, the Decision provided for a safeguard procedure,[688] with two variants, which allowed the Commission to adopt some urgent measures immediately without the *ex ante* assistance of the committees.[689] This procedure was used, in particular, for antidumping decisions.[690]

2.4.2. The Limits of the First Comitology Decision

The first Comitology Decision was subject to criticism, not only for the limited innovative contribution, but also for the absence of clear criteria on the choice between procedures regulated. The discretion of the Council with regard to the choice of the procedure to include in the basic act, indeed, was maintained.[691] More in general, while the Decision regulated the various types of procedures in detail, it did not contain any sort of "principles" governing the choice of the supervisory procedure, or the functioning of the system as a whole.[692] The word of Article 145 EC, referring both to "rules and principles" seemed, thus, incompletely fulfilled.

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[685] The committee had to take its decision by qualified majority voting, and the Commission's measures were immediately applicable. While under variant (a) the Commission could defer the application of the measures for not more than one month, and within this period the Council could react; under variant (b) the Commission was obliged to defer their application. See Article 2, paras. 5-11, First Comitology Decision.
[686] BRADLEY Kieran St Clair, *op. cit*. (1992), p. 707.
[687] Article 2, paras. 12-17, First Comitoloogy Decision.
[688] Article 3 First Comitology Decision. In this regard, it is noteworthy that the original regulations concerning the common market organisations (with the exception of the wine OMC) already provided for a safeguard procedure, which allowed the Commission to adopt immediately applicable measures in case of risks in the agricultural markets. See BIANCHI Daniele, *op. cit*. (2012), p. 131.
[689] The Commission had to notify *ex post* the measure to the Council and the Member States, and the Council could take a different decision by qualified majority voting in the given time limit. While under variant (a) the failure to adopt a different decision by the Council determined the maintenance of the Commission's measure, the variant (b) foresaw that, in this case, the decision of the Commission is considered as revoked. See Article 3 First Comitology Decision.
[690] ESPOSITO Antonio, *op. cit*. (2004), p. 47.
[691] In particular, the decision did not adopt the criterion contained in the annexed Declaration, which recommended "to give the advisory committee procedure in particular a predominant place in the interests of speed and efficiency in the decision-making process." See Annex 1 to the Single European Act, Declaration on the powers of implementation of the Commission.
[692] BRADLEY Kieran St Clair, *op. cit.* (1992), p. 703.

2.4.3. The Position of the Parliament and the Plumb-Delors Agreement

The new legal framework for the comitology system fell short of addressing the pressing demands of the Parliament. In this respect, the Single European Act required the Parliament to be consulted before the adoption of the Comitology Decision.[693] However, having a purely advisory role, the Parliament could not - and did not -[694] have an actual impact on the content of the decision of the Council. Therefore, the Parliament continued to be excluded from the operation of the supervisory arrangements in relation to the Commission implementing powers.[695] As a consequence of its discontent, the Parliament challenged the Comitology Decision before the Court of Justice in Case 302/87.[696] However, the Court did not even consider the merits of the case, since the application was considered inadmissible.[697]

With regard to the information of the Parliament on the committees' activities, the Interinstitutional agreement of 14 March 1988 represented a step forward. The Plumb-Delors Agreement, named after the President of the Parliament and that of the Commission, established the obligation of the Commission to communicate to the Parliament the draft of the measures to be submitted to the committees, which were of "normative nature" and not of urgent character.[698] However, the application of such an agreement, whose compliance was dependent on the Commission's willingness and ability to keep the Parliament informed, was limited, constituting a bitter disappointment for the Parliament.[699]

2.5. The Maastricht Treaty and the 1995 Modus Vivendi

In spite of the Commission's intention to rethink the legal instruments at the European level and its role in the implementation of European law, the Intergovernmental Conference of 1991 did not address the pending issues related to comitology.[700] Therefore, the Treaty on the European Union,

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[693] Article 145.
[694] Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Regulation laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ C 297 of 24.11.1986, p. 94.
[695] BRADLEY Kieran St. C., "Delegated Legislation and Parliamentary Supervision in the European Community" in in EPINEY Astrid, HAAG Marcel and HEINEMANN Andreas (eds.), *Die Herausforderung von Grenzen - Le défi des frontières - Challenging boundaries. Festschrift für Roland Bieber - Mélanges en l'honeur de Roland Bieber - Essays in honor of Roland Bieber* (Nomos, 2007), p. 287.
[696] Case 302/87, *Parliament v Council*, EU:C:1988:461.
[697] As we have seen, such position was overruled a couple of years later in *Chernobyl*: Case 70/88, *Parliament v Council (Chernobyl),* EU:C:1991:373.
[698] The obligation was extended to the implementing measures of structural fund regulations by the Klepsch-Millan agreement of 6 May 1993 (OJ C 255/19 of 20 September 1993), which was repealed by the Gil-Robles-Delors agreement of 6 May 1999. See ESPOSITO Antonio, *op. cit*. (2004), p. 50.
[699] BRADLEY Kieran St. C., *op. cit*. (1997), p. 237.
[700] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), pp. 212-217.

signed in Maastricht in 1992 and entered into force in 1993, did not result in any amendment to Article 145 EC.

2.5.1. The Co-Decision Procedure and Its Implications

The introduction of the co-decision procedure, putting the Parliament at an equal footing to the Council, raised new arguments for the Parliament to claim a more incisive role in supervising the implementing powers of the Commission.[701] In particular, in the fields where the co-decision procedure was applicable, the vote of the Parliament was necessary to approve the delegation of powers to the Commission and the conditions for this delegation.[702] Therefore, the chain of delegation changed as the Parliament became co-delegator, sharing this position with the Council.

For this reason, the Parliament claimed that, since in those fields it had a legislative competence, an oversight competence on the implementation should have been recognised as well.[703] Arguing from the *littera* of Article 145 EC, which continued to refer to "the acts which the Council adopts", the Parliament contended that the First Comitology Decision was inapplicable to the acts adopted by the co-decision procedure.[704] Hence, a new Decision, adopted jointly by the Council and the Parliament, was necessary to regulate the delegation of powers in those cases, granting at least a *droit de regard* to the Parliament.[705]

The position of the Parliament, albeit supported by the Commission, was ill received by the Council, which was not willing to share its powers of political oversight over the Commission's implementing powers.[706] The Parliament, however, made use of its newly acquired legislative powers to influence the content of basic acts, especially in relation to the choice of the committee procedures.[707] It is interesting to note, in this respect, that the very first proposal to be adopted under the co-decision procedure failed to enter into force specifically as a consequence of the strong opposition between the Council and the Parliament on the committee procedure to be used, which resulted in a deadlock at the conciliation committee.[708] In addition to such resistance on the

[701] FORCELLA Mariagrazia, "Il dibattito sulla comitatologia fra le istituzioni dell'Unione europea dopo Maastricht", *Rivista Italiana di Diritto Pubblico Comunitario* (1995), pp. 1275-1276.
[702] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 219.
[703] ESPOSITO Antonio, *op. cit*. (2004), p. 51.
[704] Rapport de M. De Giovanni, *Rapport de la commission institiutionnelle sur les problèmes de comitologie liés à la perspective de l'entrée en vigueur du traité de Maastricht*, A3. 0417/93, 6 December 1993; endorsed by European Parliament Resolution of 16 December 1993, OJ 1994 C 20/179.
[705] ESPOSITO Antonio, *op. cit*. (2004), p. 51.
[706] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 221.
[707] ESPOSITO Antonio, *op. cit*. (2004), p. 52.
[708] Commission Proposal of 28 August 1992 for a Council Directive on the application of open network provision (ONP) to voice telephony, OJ 1992 C 263/20. See BERGSTRÖM Carl Friedrik, *op. cit*. (2005), pp. 222-224.

single proposals, the Parliament resorted again to its budgetary powers to put pressure on the development of the comitology system.[709]

2.5.2. The Modus Vivendi

In such a breakdown of the institutional co-operation, which risked paralysing the rule-making activities of the Union, after the rejection of an initial proposal of interinstitutional agreement by the Commission,[710] the Council proposed a temporary cease-fire, a *Modus Vivendi* to be signed by the Parliament, the Commission and the Council.[711] According to this *Modus Vivendi*, the Governments committed themselves to discussing the exercise of implementing powers in the Intergovernmental Conference to be held 1996, while a *droit de regard* was to be accorded to the Parliament, which could thus be informed of committees' activities.[712]

Even though the *Modus Vivendi* was a step forward for the transparency of the comitology system and for the oversight of the European Parliament, its scope was limited to the acts adopted according the co-decision procedure, and did not address fundamental issues, such as the criteria for the choice among committee procedures.[713]

2.6. The Amsterdam Treaty and the Second Comitology Decision

The negotiations during the Intergovernmental Conference in 1996, preceding the Treaty of Amsterdam, apparently represented the perfect opportunity for the reconsideration of the subject matter as demanded in the *Modus Vivendi*. However, the intensified debates and the pressure by the Parliament and the Commission did not achieve the desired result. The Member States decided not to amend Article 145 (renumbered Article 202 EC), and to defer the reform of the comitology system to a revision of the First Comitology Decision, urging the Commission to submit a proposal for amendments by the end of 1998.[714]

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[709] ESPOSITO Antonio, *op. cit*. (2004), p. 52.
[710] See Draft Inter-Institutional Agreement between the European Parliament, the Council and the Commission of 19 April 1994 on the rules for exercising the powers to implement acts adopted jointly by the European Parliament and the Council in accordance with the procedure laid down in Article 189b of the EC Treaty, SEC (94) 645 final.
[711] BERGSTRÖM Carl Friedrik, op. cit. (2005), p. 227.
[712] See *Modus Vivendi* of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty, OJ 1996 C 102/1. Under the pressure of the budgetary powers of the Parliament, the *Modus Vivendi* was integrated with the *Samland-Williamsen* agreement, whereby the Commission committed to communicate the agenda and the vote results of each management and regulatory committee, as well as to consider the request of a Parliament's representative to participate in specific committee meetings.
[713] ESPOSITO Antonio, *op. cit.* (2004), p. 53.
[714] Declaration No. 31 annexed to the Amsterdam Treaty of 2 October 1997 on the Council Decision of 13 July 1987, OJ 1997 C 340/137. See also BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 248.

2.6.1. The Proposal of the Commission

Accordingly, the proposal of the Commission,[715] which provided for an entirely new decision rather than mere amendments to the existing one, aimed at overhauling the comitology system in order to make it "less complex, less opaque and more open to parliamentary control".[716] However, since the legal framework at the primary level remained unchanged, the margin for reform was strictly limited.

Interestingly, in its report on this proposal,[717] the Parliament highlighted the problem of the "sliding" on powers, meaning the risk that "an increasing number of matters of political significance would be dealt with outside the normal legislative process in accordance with procedures from which the European Parliament itself was excluded" and repeated its concerns on the proliferation and opaqueness of the committees. Demanding for further negotiations with the Commission and the Council,[718] the Parliament adopted two Resolutions on the matter, taking a powerful stand on the Commission's proposal.[719]

2.6.2. The Second Comitology Decision

Decision 99/468/EC, the Second Comitology Decision, was eventually adopted on 28 June 1999.[720] It innovated the existing rules on comitology in three aspects. Firstly, it determined a simplification of the existing procedures, especially the management and the regulatory procedures.[721] With regard to the management committee procedure, in the new Decision variant (b) was deleted, but the period in which the Council can modify or amend the measures proposed by the Commission was extended to three months.[722] Similarly, with regard to the regulatory

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[715] Commission Proposal of 24 June 1998 for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1998 C 279/5.

[716] Statement of the Commission Vice-President Neil Kinnock in the Debates of the European Parliament on 5 May 1999, OJ 1999 C 279/160, cited in BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 249.

[717] The so-called Aglietta Report: Report of 3 August 1998 drawn up on behalf of the Committee on Institutional Affairs on the modification of the procedures for the exercise of implementing powers conferred on the Commission-comitology (Rapporteur: Marie Adelaide Aglietta), EP Doc A4-292/99, cited in BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 253.

[718] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 255.

[719] European Parliament Resolution of 16 September 1998 on the modification of the procedures for the exercise of implementing powers conferred on the Commission, OJ 1998 C 313/101; Legislative Resolution embodying Parliament's opinion on the proposal for the Council Decision lying down the procedures for the exercise of implementing powers conferred on the Commission, COM (98)0380, OJ 1999 C279/404. See LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2000), p. 649.

[720] Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.

[721] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 266. In this resepct, it is noteworthy that the safeguard procedure is also amended, deleating one of the two described variants.

[722] Article 4 of the Second Comitology Decision read as follows: "Management procedure - 1. The Commission shall be assisted by a management committee composed of the representatives of the Member States and chaired by the representative of the Commission. 2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the

committee procedure, satisfying the requests of the Commission and the Parliament, the *contrefilet* mechanism was abolished.[723] However, in response to the concerns of the Member States, the procedure was amended in the sense that, in the case of a negative opinion or no opinion delivered by the committee, the Commission had to submit the proposal to the Council. The latter could, then, adopt or amend it, or "oppose" to it, obliging the Commission to re-examine the proposal and either re-submit it or present a new proposal.[724] The advisory procedure, conversely, remained unchanged.[725] The Decision did not provide for an alignment of the existing procedures with the new ones.[726]

Secondly, the Second Comitology Decision addressed some of the concerns of the Parliament, and in particular the issue of the sliding powers. The Parliament had for a long time been asking for

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draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote. 3. The Commission shall, without prejudice to Article 8, adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication. 4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3." In a declaration on the Decision, the Commission stated its commitment to take account of the position of the committee members and "to muster the widest support within the committee", see LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2000), p. 675.

[723] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 268.

[724] Article 5 of the Second Comitology Decision read as follows: "Regulatory procedure - 1. The Commission shall be assisted by a regulatory committee composed of the representatives of the Member States and chaired by the representative of the Commission. 2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The chairman shall not vote. 3. The Commission shall, without prejudice to Article 8, adopt the measures envisaged if they are in accordance with the opinion of the committee. 4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament. 5. If the European Parliament considers that a proposal submitted by the Commission pursuant to a basic instrument adopted in accordance with the procedure laid down in Article 251 of the Treaty exceeds the implementing powers provided for in that basic instrument, it shall inform the Council of its position. 6. The Council may, where appropriate in view of any such position, act by qualified majority on the proposal, within a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of referral to the Council. If within that period the Council has indicated by qualified majority that it opposes the proposal, the Commission shall re-examine it. It may submit an amended proposal to the Council, re-submit its proposal or present a legislative proposal on the basis of the Treaty. If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission."

[725] Article 3 of Second Comitology Decision.

[726] It confirmed the operation of the old procedures for the existing measures, but the Council agreed in a declaration to pursue an adjustment of the old procedures on a case-by-case basis. See BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 269.

equality in the oversight on the exercise of Commission's implementing powers, at least in the field of application of the co-decision procedure.[727] The compromise reached entailed the introduction of a mechanism which allowed the Parliament to react when it considered that a proposal of the Commission "exceeds the implementing powers provided for in [the] basic instrument".[728] In that case, the Parliament could inform the Council and issue a Resolution which has to be taken into account by the Commission in the mandatory re-examination of the proposal. However, the Commission could submit a new proposal to the committee, maintain the initial one or initiate a legislative procedure on the matter.[729] The Parliament was thus conferred a "right of scrutiny"[730] in relation to measures which are *ultra vires,* to supervise compliance with the principle of legality and defend its prerogatives against possible infringements by the Commission.[731]

Thirdly, the new Decision aimed at enhancing the transparency of the system, which was often criticised for being opaque and unreadable in the eyes of the Parliament and the public. This problem was tackled from two different angles. On the one hand, the Commission proposed to introduce binding criteria for the choice of committee procedures in order to increase the consistency and predictability of the system.[732] However, to the disappointment of the Commission and the Parliament, the Council agreed to insert in to the text of the Decision certain criteria but only made it clear in the Preamble that "such criteria are of a non-binding nature."[733]

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[727] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 270. See also TUFANO Maria Luisa, "La comitologia e le misure di esecuzione degli atti e delle politiche comunitarie", *Il Diritto dell'Unione Europea* (2008), pp. 173-174.

[728] Article 5 (5) of Second Comitology Decision.

[729] Article 8 of Second Comitology Decision reads as follows: "If the European Parliament indicates, in a Resolution setting out the grounds on which it is based, that draft implementing measures, the adoption of which is contemplated and which have been submitted to a committee pursuant to a basic instrument adopted under Article 251 of the Treaty, would exceed the implementing powers provided for in the basic instrument, the Commission shall re-examine the draft measures. Taking the Resolution into account and within the time-limits of the procedure under way, the Commission may submit new draft measures to the committee, continue with the procedure or submit a proposal to the European Parliament and the Council on the basis of the Treaty.
The Commission shall inform the European Parliament and the committee of the action which it intends to take on the Resolution of the European Parliament and of its reasons for doing so."

[730] BRADLEY Kieran St. C., *op. cit.* (2007), p. 292. LENAERTS and VERHOEVEN, instead, call it "right to review".

[731] LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2000), p. 681.

[732] See Article 2 of Commission Proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, COM/98/0380 final, *OJ C 279, 8.9.1998, p. 5.*

[733] Recital 5 of Second Comitology Decision. As to the substance of the criteria, it is stated that the management procedure should be followed for the adoption of "management measures", exemplified by measures relating to the application of the CAP and CFP, or to the implementation of programmes with substantial budgetary implications (Recital 6 and Article 2 (a) of Second Comitology Decision). Conversely, the regulatory procedure should be applied to "measures of general scope designed to apply essential provisions of basic instruments" and to "measures designed to adapt or update certain non-essential provisions of a basic instrument" (Recital 7 and Article 2 (b) of Second Comitology Decision). The last criterion, pertaining to the advisory procedure, provides for little guidance as it states that "the advisory

On the other hand, the transparency of the comitology system was improved by granting a right to information to the European Parliament, recasting and extending the scope of the provisions of the *Modus Vivendi*.[734] In line with the *Rothmans* case,[735] the responsibility for providing such information rested on the Commission, which was asked to set up a public register containing those documents.[736] In addition to the Parliament's right of information, then, the public was also given access to that register, as well as to the annual report of the Commission laying down the list of committees and their working.[737] Moreover, all the committees adopted or adapted their rules of procedure on the basis of standard rules, published in the Official Journal,[738] thus contributing to the transparency of the workings of the committees.[739]

2.7. The Constitution for Europe

Just one year after the adoption of the Second Comitology Decision, a new Intergovernmental Conference was convened to amend the Treaty in view of the enlargement of the EU.[740] The resulting Treaty of Nice, again, did not address important issues relating to the future of the European Union.[741] Therefore, a Declaration was annexed to the Treaty of Nice, calling for a "deeper and wider debate about the future development of the European Union" in a new Intergovernmental Conference.[742] To this end, wide-ranging discussions with all interested

procedure should be used in any case in which it is considered to be the most appropriate" (Recital 8 and Article 2 (c) of Second Comitology Decision).

[734] Pursuant to Article 7 of the Second Comitology Decision, the Parliament acquired the right to "be informed by the Commission of committees proceedings on a regular basis", including on "agendas for committee meetings, draft measures submitted to the committees [...], and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong" and the transmissions to the Council. See Article 7 (3) of Second Comitology Decision.

[735] Case T-188/97, *Rothmans International BV v Commission*, EU:T:1999:156. On 24 June 1997, *Rothmans International BV*, a Dutch company, had challenged the Commission's decision to refuse it access to the minutes of the "Customs Code Committee". The applicant, backed up by the Swedish Government, argued that committee, as well as the other comitology committees, should be considered "an integral part of the Commission" and, thus, fall within the scope of the rules on public access. On the contrary, the Commission contended that those documents did not fall within the scope of the rules on public access since the committee was solely responsible for their deliberation and the Commission only provided "the secretarial services". The judgment, delivered after the adoption of the new Decision, upheld the applicant's claim and recognised that the responsibility of assuring the public access to their documents of the committees lay with the Commission. See also European Ombudsman Decision of 29 January 1999 on complaint 633/97/PD against the Commission.

[736] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 275.

[737] Article 7 (4) of Second Comitology Decision.

[738] Article 7 (1) of Second Comitology Decision.

[739] BERGSTRÖM Carl Friedrik, *op. cit*. (2005), p. 275.

[740] BERGSTRÖM Carl Friedrik, *op. cit.* (2005), p. 320.

[741] Treaty of Nice of 26 February 2001 amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, OJ 2001 C 80/1.

[742] Declaration on the future of the European Union annexed to Treaty of Nice of 26 February 2001 amending the Treaty on the European Union, the Treaties establishing the European Communities and

parties (including national parliaments and public opinion representatives) were encouraged, with a view to presenting a report in Leaken in 2001.[743] Among the points to be discussed, the simplification of Union instruments and a reform of the "horizontal" division of powers in a more democratic sense represented crucial elements, which were destined to affect the legal framework for the delegation of powers at the European level significantly.

2.7.1. The Lamfalussy arrangements

In the same years, another development which affected the operation of the comitology system was the so-called Lamfalussy arrangements in the field of security markets regulation.[744] A Committee of independent experts was called to formulate "a more effective approach towards the transposition and implementation" of Community measures in that field. The resulting report, issued on 15 February 2001, proposed a four-level regulatory scheme, whereby the intervention of the European legislator would be limited only to framework principles (level 1) and technical implementing measures were to be adopted by the Commission under a regulatory committee procedure (level 2).[745] Notwithstanding the loss of power in level 1 regulation, the European Parliament agreed to support such approach, but it asked in return a much greater supervisory role at level 2.[746] Among the conditions posed by the Parliament, an extended timeframe for the assessment of the *ultra vires* character of an implementing measure, and a commitment to amend Article 202 EC were required.[747] Such demands - clearly defined and posed as conditions in such a crucial field - influenced the amendment of the legal framework in the sense indicated by the Parliament.

2.7.2. The White Paper on European Governance

In light of these developments, the Commission took the initiative of giving substance to Parliament's claims and, in its *White Paper on European Governance*, championed the idea of putting the Parliament and the Council on the same footing in the oversight of implementing

certain related acts, OJ 2001 C 80/1. See DE WITTE Bruno, "The Nice Declaration: Time for a Constitutional Treaty of the European Union?", 36 *The International Spectator* (2001), pp. 21-30.

[743] Declaration on the future of the European Union annexed to Treaty of Nice of 26 February 2001 amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, OJ 2001 C 80/1.

[744] See BRADLEY Kieran St. C., *op. cit*. (2007), p. 292.

[745] See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Alexandre Lamfalussy, of 15 February 2001, available at <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> (last accessed 10.06.2017). The Lamfalussy system included other two levels: (i) Level 3 foresees the assistance of committees of national supervisors; and (ii) Level 4 entails a stronger role for the Commission in ensuring the correct enforcement of EU rules. These levels will be analysed *infra* in relation to the delegation to EU agencies.

[746] BRADLEY Kieran St. C., *op. cit*. (2007), p. 293.

[747] Ibidem, p. 293.

powers. In its view of refocusing the Institutions on their core tasks, the Commission restated its central role in the implementation of EU law and highlighted the need to review the conditions under which it adopts those implementing measures.[748]

In particular, it pleaded for a re-assessment of the very existence of the comitology system and for the establishment of "a simple legal mechanism [which] allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation."[749] Therefore, considering that after the extension of the co-decision procedure Article 202 EC "has become outdated", it announced its intention to launch a reflection on the modification of that article in the Intergovernmental Conference.[750]

2.7.3. The Communication of the Commission to the Convention

The result of this reflection is enshrined in the Communication of the Commission to the Convention for the Future of Europe of 11 December 2002, where its vision on the future institutional architecture of the EU is explained thoroughly.[751] Firstly, in an attempt to enhance the democratic legitimacy of the EU in a way which arguably mirrors the structure of State legal systems, the Commission proposed to reform the classification of legal instruments, introducing the categories of "institutional laws", "laws" adopted under codecision procedure, and "regulations" to be adopted by the Commission in EU law.

Secondly, with reference to the implementation of European legislation, the Commission argued that the implementing powers should be entrusted exclusively to the Commission, doing away with the double role of the Council as a legislative and executive body. Hence, the Commission would be solely responsible for implementation, while being overseen by the two branches of the legislature in order to guarantee the democratic control of its actions.[752] In this regard, it reaffirmed that the Council and the Parliament should be given the same supervisory powers, consisting of the possibility to give their opinions or, in certain cases, express their objections to the proposed measures.[753] Thirdly, the Commission asserted the need to give only an advisory function to the committees, making more clear and unambiguous the autonomous powers of Commission in the implementation of EU legislation.[754]

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[748] European Commission, European governance - A white paper, COM/2001/0428 final, OJ C 287, 12.10.2001, p. 1–29.
[749] Ibidem, p. 26. See VOS Ellen, *op. cit.* (2009), p. 16.
[750] European Commission, European governance - A white paper, COM/2001/0428 final, OJ C 287, 12.10.2001, p. 1–29.
[751] European Commission, Communication on the Institutional Architecture. For the European Union Peace, Freedom, Solidarity, COM (2002) 728 final/2.
[752] Ibidem, p. 8.
[753] Ibidem, p. 13.
[754] Ibidem, p. 13.

Finally, the Commission introduces the idea of delegation of legislative powers in EU law: "The laws might make provision for the power of legislation to be delegated to the Commission for the purposes of amending legal instruments adopted by the legislator, for instance, with a view to adapting them in the light of technical progress."[755] Such delegated powers would be exercised within the limits and the conditions of the delegation defined in the act of secondary law and under the *ex post* control of the Council and the Parliament. It is interesting to remark that the proposal of the Commission refers to the delegation of legislative powers (literally, "the power of legislation"), thus characterising these new instruments by the nature of their content and by the effect they can have on the acts adopted by the legislator (*i.e.* the power to amend legislative acts). In other words, the legal institution of the delegation of powers, which was used so far for the delegation of implementing powers,[756] is thus to be used to confer on the same institution, the Commission, a different kind of powers, defined as "legislative" in the sense of the new hierarchy of norms proposed in the same Communication.[757]

2.7.4. The Debates in the Convention

The proposal of the Commission was debated in the works of the European Convention, in particular in the Working Group IX on "Simplification".[758] In a wider reflection concerning the opportunity of establishing a separation of powers and hierarchy of norms in the European legal system, the Working Group proposed a three-level hierarchy of legal instruments. Firstly, the "legislative acts", in the form either of "laws" or "framework laws", would be adopted on the basis of the Treaty and contain the essential elements of a certain field.[759] Secondly, the "delegated acts", adopted on the basis of a legislative act, could supplement and amend the basic act, subject to the conditions and the oversight of the Council and the Parliament.[760] Thirdly, the "implementing acts", at the lower level of the hierarchy, would execute the legislative or delegated acts when uniform conditions for implementation are needed at the European level.[761]

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[755] Ibidem, p. 7.
[756] The possibility of amending the basic act was, however, already recognised in implementing acts. See Case 100/74, *Société CAM SA v Commission*, EU:C:1975:152.
[757] *Contra* BRADLEY who reads the Commission proposal as making a distinction between "implementation which amends basic legislation" and "ordinary implementation". See BRADLEY Kieran St. C., *op. cit.* (2007), p. 294.
[758] Secretariat de la Convention Européenne, *Documents de travail préparatoires de la Convention européenne* (Office des publications officielles de la Communauté européenne, 2004).
[759] Secretariat de la Convention Européenne, *Documents de travail préparatoires de la Convention européenne* (Office des publications officielles de la Communauté européenne, 2004), p. 339. It refers to the Report of the Working Group IX to Convention members issued on 29 November 2002.
[760] Secretariat de la Convention Européenne, *Documents de travail préparatoires de la Convention européenne* (Office des publications officielles de la Communauté européenne, 2004), p. 340.
[761] Ibidem, p. 341.

This proposal stimulated heated debates in the plenary, where the need to amend the comitology system was also linked to the discussion.[762] In spite of the initial caution of some Convention members towards the category of delegated acts, the proposal of introducing such acts was largely endorsed in the end. Consequently, the text of Treaty establishing a Constitution for Europe, adopted on 29 October 2004, introduced the categories of "delegated European regulations"[763] and "implementing acts".[764] Although the Constitution for Europe never entered into force, the described debates and the categorisation of acts should be kept in mind in the analysis of the subsequent reform of the architecture of the European Union, later realised by the Lisbon Treaty.

2.8. The 2006 Decision

In parallel with the elaboration of the new text of the Treaty, the Commission launched a debate on law-making and on the exercise of the executive responsibilities, with the aim of addressing the need for a clearer and more transparent policy execution.[765] Aware that the entering into force of a new Treaty would have taken a long time, the Commission announced its intention to issue a proposal for the amendment of the Second Comitology Decision, without waiting for the reformulation of Article 202 EC.[766] Accordingly, the proposal for a Council decision amending the existing Comitology Decision was presented to the Council in 2002.[767]

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[762] Ibidem, p. 615.

[763] ARTICLE I-36: "Delegated European regulations. 1. European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power. 2. European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows: (a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law. For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority."

[764] ARTICLE I-37: "Implementing acts. 1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts. 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article I-40, on the Council. 3. For the purposes of paragraph 2, European laws shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. 4. Union implementing acts shall take the form of European implementing regulations or European implementing decisions."

[765] European Commission, *Communication from the Commission. European Governance: Better Lawmaking*, COM (2002) 275 final.

[766] Ibidem, p. 4.

[767] European Commission, Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final.

2.8.1. The Reactions to the Proposal

Restating the need to put the Parliament on an equal footing with the Council in matters governed by the codecision procedure, the Commission proposed to increase the oversight role of the Parliament, by giving it a say on the substance of the draft implementing measure.[768] In particular, it proposed to amend the regulatory procedure by distinguishing two phases, namely the "executive phase", during which the drafted measures would be examined by a committee, and a "supervisory phase" of one month, during which the Parliament and the Council could object to such measures on an equal footing.[769] A binding criterion was also introduced, determining the use of such a revised regulatory procedure "whenever the executive measures are designed to widely implement the essential aspects of the basic instrument or adapt certain other aspects of it."[770] This decision was intended to be a temporary measure, adopted "pending the advent of a new system for delegating powers in the new Treaty."[771]

The proposal was approved by the Parliament with amendments[772] and, after accepting half of them, the Commission adopted an amended version of the proposal on 22 April 2004.[773] However, the Council could not adopt the amended proposal.[774] In this regard, it is noteworthy that the presentation of the proposals in 2002 and 2004 was heavily criticised, also in light of the fact that the debates were still ongoing at the European Convention.[775] However, after the referenda in France and in the Netherlands, the situation changed. The rejection of the Constitutional Treaty determined a renewed interest in the modification of the existing comitology rules within the framework of the existing treaty, and thus the proposal returned on the table of the Council.

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[768] Ibidem, p. 5. See Article 1(4) adding an Article 5a(5) which read as follows: "If the European Parliament, by an absolute majority of its members, or the Council, by the majority provided for by Article 205(2) of the Treaty, express any objections to the final draft of the executive measures presented by the Commission within one month, which may be extended by another month, of its being forwarded, the Commission must either withdraw its draft and present a proposal for an instrument in accordance with the procedure in Article 251 of the EC Treaty, or adopt the proposed measure, possibly amending its draft to take account of the objections."

[769] For an analysis, see BRADLEY Kieran St. C., *op. cit*. (2007), p. 294.

[770] Article 1 of European Commission, Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final.

[771] European Commission, Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final, p. 2.

[772] European Parliament, Legislative Resolution on the proposal for a Council decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (COM(2002) 719 - C5-0002/2003 - 2002/0298(CNS)), *OJ C 76E , 25.3.2004,* p. 82–85.

[773] European Commission, Amended proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (presented by the Commission in accordance with Article 250(2) of the EC Treaty), COM/2004/0324 final.

[774] See BRADLEY Kieran St. C., *op. cit*. (2007), p. 294.

[775] See VOS Ellen, *op. cit.* (2009), p. 17.

Finally, a Decision amending the Second Comitology Decision was adopted by the Council on 17 February 2006.[776]

2.8.2. The RPS Procedure

This Decision - conceived as an amendment rather than a replacement of the existing one - introduced a new procedure, the so-called "regulatory committee procedure with scrutiny" (RPS or, in the French acronym, PRAC). Inspired by the need to improve the role of the democratically-elected assembly, this procedure gave to the Parliament the power to oppose the adoption of the implementing measures by absolute majority where "the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality".[777] In other words, pursuant to Article 5a, the Parliament could oppose on three different grounds, not merely confined to the *ultra vires* assessment of the proposed measures. Although the grounds are still legal in character, they needed only to be "indicated" to impede their adoption in application of Article 5a(3)c of the Decision, making this provision a relevant political instrument.[778]

Moreover, it is remarkable that the recourse to this procedure is established in compulsory terms (e.g. "shall be adopted", "it is necessary to follow", etc.) by the insertion of a criterion in Article 2 of the Comitology Decision, even though the "non-binding nature" of any criteria aiming at guiding the choice between procedures remains clearly stated in the Preamble.[779] According to this criterion, the RPS procedure was applicable for the adoption of "measures of general scope designed to amend non-essential elements of that instrument, *inter alia* by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements".[780] It was argued that this notion of "measures of general scope" should be interpreted, according to the case law of the Court of Justice, in contrast with "individual measures".[781] Therefore, the RPS procedure is not applicable to measures of an individual character, leaving controversial acts

[776] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006, pp. 11–13.
[777] Article 1(7) of Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006.
[778] BRADLEY Kieran St. C., *op. cit.* (2007), p. 297.
[779] Ibidem, p. 297.
[780] Article 1(5) of Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006.
[781] BRADLEY Kieran St. C., *op. cit.* (2007), p. 297.

outside the scope of this procedure (and consequently, of the enhanced oversight of the Parliament), such as GMO authorisations.[782]

In general, the 2006 Decision appeared to give to the Parliament the substantial oversight role it has fought for so long. However, the scope of application of the newly introduced RPS procedure was still limited to certain measures, which constituted a small portion of the comitology galaxy. Indeed, it could be used only for the implementation of acts adopted under co-decision.[783] Moreover, some of the important innovations requested by the Parliament, such as the introduction of "sunset clauses", were simply ignored.[784] The entering into force of the Lisbon Treaty, with its innovative discipline on the delegation of powers to the Commission, not surprisingly entailed reigniting the debate about the comitology system.[785]

2.9. The Lisbon Treaty

Having risen from the ashes of the Constitution for Europe, the Treaty of Lisbon was signed by the Member States on 13 December 2007 and entered into force on 1 December 2009. Albeit less ambitious than its predecessor, this Treaty represents a significant development in the system of delegation of powers in EU law and the relevant legal framework for the analysis of this phenomenon as currently in force.

In the 2007 mandate, the Member States decided to go back to the original nomenclature for Union's acts, discarding the innovative categories of "laws" and "framework laws" which the European Convention had elaborated.[786] Indeed, in the diplomatic negotiations following the referendum *débâcle*, the de-constitutionalisation impetus also hit the systematisation of legal instruments, determining the return to the more familiar terms of "regulations", "directives" and "decisions".[787] However, in substance, the Treaty of Lisbon is considered to have preserved most of the innovations of the Constitutional Treaty, especially with regard to the system of the delegation of powers to the Commission.[788]

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[782] VOS Ellen, *op. cit.* (2009), p. 18.
[783] Article 1 (5) inserting in Article 2 the paragraph (b)2.
[784] VOS Ellen, *op. cit.* (2009), p. 19. For a more positive assessment of the Decision, see PIRIS Jean-Claude, *Il Trattato di Lisbona*, (Giuffrè editore, 2013), p. 118.
[785] For a critical appraisal of the Decision, see also BLOM-HANSEN Jens, "Interests, Instruments and Institutional Preferences in the EU Comitology System: The 2006 Comitology Reform", 17 *European Law Journal* (2011), pp. 344-365.
[786] PIRIS Jean-Claude, *op. cit.* (2013), p. 110.
[787] DE WITTE Bruno, "Legal Instruments and Law-Making in the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, (Springer, 2008), p. 86.
[788] TURK Alexander, "Law-making after Lisbon", in BIONDI Andrea, EECKHOUT Piet and RIPLEY Stephanie (eds.), *EU Law after Lisbon*, (Oxford University Press, 2012), p. 74; CRAIG Paul, *The Lisbon Treaty*, (Oxford University Press, 2010), p. 57; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law*

In particular, the new categorisation of legal acts, as we have seen, distinguishes between legislative acts and non-legislative acts.[789] Among these non-legislative acts, the idea of "delegated European regulations" of the Constitutional Treaty was retained in the category of "delegated acts", now regulated in Article 290 TFEU:

> *1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.*
> *2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:*
> *(a) the European Parliament or the Council may decide to revoke the delegation;*
> *(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.*
> *For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.*
> *3. The adjective "delegated" shall be inserted in the title of delegated acts.*

Expressly mentioning for the first time the notion of delegation, Article 290 TFEU provides for the transferral to the Commission of powers to adopt measures of general application "to supplement or amend certain non-essential elements of the legislative act". The content of these measures, thus, appears to reflect the scope of application of the RPS procedure as regulated in the 2006 Decision.[790] However, the control over the exercise of the power delegated to the Commission is no longer carried out through comitology procedures, but Article 290 TFEU establishes a brand new regime for the adoption of these acts, which aims to put the Council and the Parliament on equal footing in the control of this kind of delegation.[791]

Conversely, in line with the conclusions of the European Convention,[792] the mechanism for the adoption of "implementing acts" is regulated in Article 291 TFEU:

> *1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*

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and Policy of the European Union, (Oxford University Press, 2011), p. 236; TOVO Carlo, *Le agenzie decentrate dell'Unione europea*, (Editoriale Scientifica, 2016), p. 71; DE WITTE Bruno, *op. cit.* (2008), p. 88. *Contra* Opinion of Advocate General Kokott in Case C-583/11 P, *Inuit Tapiriit Kanatami and others v Parliament and Council*, EU:C:2013:21, para. 42.

[789] Article 289 TFEU. On the formalism and inconsistency of this definition, see Chapter 1, para. 14.1.

[790] Article 1(5) of Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006.

[791] PIRIS Jean-Claude, *op. cit.* (2013), p. 120. For an analysis of this aspect, see Chapter 6, para. 2.5.

[792] See Article I-37 of the Treaty establishing a Constiution for Europe.

> *2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.*
> *3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*
> *4. The word "implementing" shall be inserted in the title of implementing acts.*

This provision confers the primary responsibility of implementing EU law on the Member States, giving express formulation in primary law to a principle already emerging in the case law.[793] However, when uniform conditions for implementation are required, the legislator shall confer implementing powers on the Commission or, "in duly justified specific cases", on the Council, which thus retains its executive role.

Similar to the previous legal framework,[794] the exercise of the Commission's implementing powers shall be governed by rules and general principles laid down in advance, in particular by regulations adopted jointly by the Council and the Parliament. To this end, Regulation No. 182/2011 was adopted on 16 February 2011,[795] laying down the rules for the exercise of implementing powers by the Commission. Therefore, the adoption of implementing acts is still subject to the comitology system.[796]

2.10. The Significance of the Reform

The rules and procedures for the adoption of delegated and implementing acts, as well as the issues that emerged from their application, will be analysed in detail in the following chapters. For the purpose of this analysis, however, it is important to clarify first the significance of the reform brought about by the Lisbon Treaty, reflecting upon the distribution of powers resulting from it

[793] See Joined Cases 205-215/82, *Deutsche Milchkontor and others v Germany*, EU:C:1983:233, para. 17.
[794] Immediately underlining the continuity with the previous regime, *inter alia*, PONZANO Paolo, "Executive and delegated acts: The situation after Lisbon", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, (Springer, 2008), p. 135; CRAIG Paul, *op. cit.* (2010), p. 60.
[795] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18. See Chapter 5, para. 3.
[796] On the post-Lisbon functioning of comitology, see, *inter alia*, COSTATO Luigi, "La comitologia dopo Lisbona", *Rivista di Diritto Agrario* (2010), pp. 128-140; GENCARELLI Fabio, "Il Trattato di Lisbona e la Nuova Comitologia", *Diritto comunitario e degli scambi internazionali* (2012), pp. 1-13; RUGGERI Antonio, "Fonti europee e fonti nazionali al giro di boa di Lisbona: Ritorno al passato o avventura nel futuro?", *Diritto pubblico comparato ed europeo* No 1 (2008), pp. 124-142; CRAIG Paul, "Delegated Acts, Implementing Acts and the New Comitology Regulation", 31 *European Law Review* No. 5 (2011), pp. 671-687.

and the legal mechanisms involved. Indeed, some problematic aspects of the new system already emerge from the text of the Treaty provisions, affecting the operation and the content of the delegation of powers to the Commission.

2.10.1. The Vertical Aspect of Article 291 TFEU

With the splitting to two halves of what previously constituted a single regime for the implementation of EU law, the Lisbon Treaty appears to address the issues of delegation and implementation in EU law separately. In relation to the latter, it expressly establishes the responsibility of the Member States to execute legally binding acts of the EU, innovatively introducing in primary law the principle emerging from the case law.[797]

Although it is expressed in terms of obligation for the Member States to adopt the necessary measures, the provision is considered to mean more than the general duty of "sincere cooperation" codified in Article 4 TEU, which obliges them to "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."[798] Indeed, Article 291(1) TFEU embraces the model of executive federalism (*Vollzugsföderalismus*) more clearly, according to which the competence to implement legislative acts is reserved for the Member States.[799] Thus, it not only confirms and constitutionalises the rule that, in line with the needs of subsidiarity,[800] implementation of EU law is carried out by indirect administration at the national level, but, according to some authors, it also recognises an "autonomous national competence" of the Member States".[801] Therefore,

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[797] See Joined Cases 205-215/82, *Deutsche Milchkontor and others v Germany*, EU:C:1983:233, para. 17: "According to the general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States, it is for the Member States, by virtue of Article 5 of the Treaty, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory." See also Joined Cases 89 and 91/86, *L'Étoile commerciale and Comptoir national technique agricole (CNTA) v Commission*, EU:C:1987:337, para. 11; Case C-476/93 P, *Nutral v Commission*, EU:C:1995:401, para. 14.

[798] See SCHUTZE Robert, "From Rome to Lisbon: "Executive Federalism" in the (New) European Union, 47 *Common Market Law Review* (2010), p. 1398.

[799] See, *inter alia*, SCHUTZE Robert, *op. cit.*, p. 1391; JACQUE' Jean-Paul, "Pouvoir législatif et pouvoirs exécutif dans l'Union européenne", in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen*, II ed. (Bruylant, 2014), p. 50.

[800] Referring to "executive federalism" as a "specific application of the principle of subsidiarity", CHAMON Merijn, "The Influence of Regulatory Agencies on Pluralism in European Administrative Law", 5 *Review of European Administrative Law* No. 2 (2012), p. 66. While we can share the idea that the executive federalism responds to "philosophy of subsidiarity" (in the sense proposed by DEHOUSSE Renaud, "Community competences: are there limits to growth?", in DEHOUSSE Renaud (ed.), *Europe After Maastricht: An Ever Closer Union?*, (Springer, 1994), *passim*; PIRIS Jean-Claude, "La comitologie: vers l'épilogue d'une longue saga?", in *Chemins d'Europe . Mélanges en l'honneur de Jean Paul Jacqué*, (Paris, 2010), p. 552; TOVO Carlo, *op. cit.* (2016), p. 97), it is important to recall that the principle of subsidiarity does not affect the allocation of competences between the EU and the Member States, but it is a guiding principle for the exercise of EU competences (see LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2000), p. 655). On the fact that the subsidiarity principle also includes executive action, see SCHUTZE Robert, *op. cit.* (2010), p. 1411.

[801] SCHUTZE Robert, *op. cit.*, pp. 1397-1398.

Article 291 TFEU should "not be viewed from a horizontal separation of powers perspective, but be viewed – instead – from a vertical perspective that places Article 291 TFEU within the context of Europe's executive federalism".[802]

Conversely, pursuant to Article 291(2) TFEU, where uniform conditions are needed, the EU is entitled to implement its own legally binding acts, allocating at the EU level the implementation which would be otherwise carried out by the Member States. From this perspective, the role of the Member States in the control on the exercise of implementing powers by the Commission finds its logic in the interplay between the different levels. As effectively expressed by Advocate General Cruz Villalón, "Article 291(2) TFEU is therefore primarily a rule that empowers the European Union, through the Commission, to use, in a subsidiary manner, a competence that belongs to the Member States."[803] Therefore, it represents the legal basis for implementation at the EU level when justified by an "objective cause",[804] i.e. the need to provide uniform conditions in the application of binding acts throughout the Union's territory. However, it is noteworthy that, in the composite reality of EU administration, the distinction between direct and indirect administration is becoming increasingly blurred,[805] making the vertical division of competences probably more complex than the image enshrined in Article 291 TFEU.[806]

2.10.2. An Autonomous Executive Competence of the Commission?

In addition to the vertical perspective, Article 291 TFEU also needs to be considered from the perspective of a horizontal division of powers among EU institutions, especially in the light of the separation-of-powers considerations which permeated the discussion in the European Convention. In this regard, it is questionable whether Article 291(2) TFEU should be interpreted as an autonomous legal basis for Commission executive action or whether its meaning should be limited to the interinstitutional dimension.[807]

In the aftermath of the entry into force of the Lisbon Treaty, some authors read Article 291(2) TFEU as conferring autonomous powers of implementation on the Commission, making it the

[802] SCHUTZE Robert, *European Constitutional Law* (Cambridge University Press, 2012), p. 241. See also HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), pp. 497-498.
[803] Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, para. 49.
[804] Ibidem, para. 50.
[805] See, *inter alia*, CASSESE Sabino, "European Administrative Proceedings", 68 *Law and Contemporary Problems* (2004), pp. 21-36; DELLA CANANEA Giacinto, "The European Union's Mixed Administrative Proceedings", *68 Law and Contemporary Problems* (2004), pp. 197-218.
[806] HOFMANN Herwig, *op. cit.* (2009), p. 498.
[807] SCHUTZE Robert, *op. cit.* (2012), p. 1398.

holder of executive powers in the EU institutional architecture.[808] According to this view, between Article 202 EC and 291(2) TFEU there is a radical shift in the concept since, where uniform conditions for implementation are needed, the decision to confer implementing powers on the Commission "is taken out of the hands of the legislator and objectivised".[809] Because of the operation of the "objective cause" established in the Treaty, the implementing powers of the Member States are conferred directly on the Commission,[810] which is thus called to exercise them not on the basis of a delegation, but as a prerogative directly based on primary law.[811] Therefore, the evolution of primary law, and the Lisbon reform in particular, would have led to the Commission recognising an autonomous executive competence established directly by primary law.[812]

However, although the "natural vocation" of the Commission to exercise the executive function is undeniable,[813] this interpretation does not appear fully convincing in the light of the actual application of the reform. Indeed, while the existence of the "objective cause" is certainly significant for the vertical level, determining the implementation of the acts at the EU level rather than at the national one, it does not result in an automatic empowerment of the Commission from a horizontal perspective. Indeed, as become clear from the text of Article 291(2) TFEU, a legally binding Union act is still needed to transfer the implementing powers to the Commission. The action of the legislator, thus, is still decisive in conferring the powers on the Commission or on the Council, within the limits established in the Treaties.[814] As emerges from the *Short Selling* case, the legislator may confer those powers even on other institutional actors, such as decentralised agencies,[815] a practice which will be at odds with a strict reading of Article 291 TFEU. In other

[808] See, *inter alia*, JACQUE' Jean-Paul, "Le Traité de Lisbonne: Une vue cavalière", 44 *RTDE* (2008), p. 480; BARATTA Roberto, "Sulle fonti delegate ed esecutive dell'Unione europea", *Il Diritto dell'Unione europea* (2011), p. 312; CHAMON Merijn, *op. cit.* (2016), p. 237; TOVO Carlo, *op. cit.* (2016), p. 97. For an argument in this sense before the Lisbon Treaty, see LENAERTS Koen and VERHOEVEN Amaryllis, *op. cit.* (2000), p. 655.

[809] CHAMON Merijn, *op. cit*. (2016), p. 237.

[810] TOVO Carlo, *op. cit.* (2016), pp. 97-98; TOVO Carlo, "Delegation of legislative powers in the EU: how EU institutions have eluded the Lisbon reform", 42 *European Law Review* No. 5 (2017), p. 703.

[811] BARATTA Roberto, *op. cit.* (2011), pp. 312 and 315.

[812] As the Commission claimed in its Communication on the Institutional Architecture. For the European Union Peace, Freedom, Solidarity, COM (2002) 728 final/2.

[813] To use the words of BLUMANN Claude, "La Comitologie: l'exercice de la fonction exécutive dans la Communauté européenne", in ENGEL Christian and WESSELS Wolfgang (eds.), *From Luxembourg to Maastricht: Institutional Change in the European Community after the Single European Act,* (Europa Union, 1992), p. 96, cited in CHAMON Merijn, *op. cit*. (2016), p. 237. See also VOS Ellen, *op. cit.* (1997), p. 214; CRAIG Paul, *op. cit*. (2012), p. 115.

[814] In this regard, it is important to underline that the existence of limits and principles which embed the discretion of the legislator (such as the "objective cause" or the "duly justified specific cases" for the empowerment of the Council) does not deprive the legislator of its powers, but it is the expression of the principle of legality a substantive sense, as described in Chapter 1, para. 5.

[815] See Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18.

words, "the Commission holds an executive power, but only where it is prescribed by [a legally binding EU act]" containing a delegation.[816] In this respect, neither the use of "shall"[817] nor the meaning of "confer",[818] which were already in Article 145 of the EEC Treaty, contradicts this conclusion.

Furthermore, from a systematic perspective, Article 291 TFEU is hardly conceivable as an autonomous legal basis for the Commission's executive action separate from the order of competences established in relation to EU policies which the implementing acts are meant to execute. In exercising the conferred powers, the legislator enjoys discretion[819] and may even regulate the details of the matter, thus compressing the scope of implementation,[820] as in EU law there is no "executive reservoir" or a reserved domain for the executive.[821] In any case, this innovative reading of Article 291 TFEU has not been upheld in the practice of EU institutions and it finds no confirmation in the case law.[822] In this sense, the line between legislative and executive functions in the EU institutional architecture does not appear to be clear-cut after the introduction of Articles 290 and 291 TFEU,[823] but, on the contrary, more issues and doubts are raised.

Finally, it is noteworthy that a textual hook for the recognition of an executive power for the Commission may be seen in Article 17 TEU, which for the first time states that the Commission "shall execute the budget and manage programmes", as well as it "shall exercise coordinating, executive and management functions, as laid down in the Treaties.[824] However, it is arguable that

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[816] JACQUE' Jean-Paul, "The Evolution of the Approach to Executive Law-Making in the EU", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 24.

[817] See Article 10 of the Single European Act. In this regard, the introduction of "shall" into the text was already read as a significant shift. However, this did not amount to the creation of a "*competence propre*" of the Commission, but at most of an obligation on the part of the Council to confer powers to the Commission, see GAUTIER Yves, *op. cit.* (1995), p. 384; JACQUE' Jean-Paul, *op. cit*. (2016), p. 23.

[818] Also "confer" was already used in the Single European Act, and always interpreted as a "movement" of powers from the Council to the Commission. In this regard, it is noteworthy that the Treaty provisions conferring autonomous powers on the institutions generally do not have this semantic connotation, but refer directly to the measures and actions to be adopted (e.g. "shall adopt the provisions", "the Commission shall ensure the application" in Article 105 TFEU).

[819] Recent case law has confirmed the full discretion enjoyed by the legislator, provided that the criteria and conditions set in the Treaties are respected, see Case C-427/12, *European Commission v European Parliament and Council (Biocides)*, EU:C:2014:170; Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499. See CHAMON Merijn, *op. cit.* (2015a), p. 1630.

[820] BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *RTD eur.* (2012), p. 93. See also Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, para. 59.

[821] SCHUTZE Robert, *op. cit*. (2010), p. 1398; JACQUE' Jean-Paul, *op. cit*. (2014), p. 55; TUFANO Maria Luisa, *op. cit.* (2008), pp. 181-182.

[822] See, *inter alia*, Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2014:170.

[823] See *infra* para. 2.11. See also TUFANO Maria Luisa, *op. cit*. (2008), pp. 181-182.

[824] Article 17(1) TEU. Compare this to Article 211 EC: "In order to ensure the proper functioning and development of the common market, the Commission shall: (i) ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied, (ii) formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission

this provision does not provide an appropriate legal basis for an autonomous executive competence either. On the one hand, it is settled case law that the budgetary powers of the Commission do not represent a separate legal basis which could affect the order of competences set forth by the specific treaty provisions.[825] On the other hand, these executive powers, mentioned generically as "executive functions", can be exercised expressly "as laid down in the Treaties", thus according to the legal bases established in primary law.[826] Therefore, the innovative potential of this provision, which in fact has been consistently overlooked in the practice,[827] also has to be scaled down.

2.10.3. Article 291 TFEU as a Delegation of Powers

The considerations exposed on the allocation of the implementing powers in the order of competences established by the Lisbon Treaty are crucial to understand the legal mechanism underlying Article 291 TFEU. According to the authors which recognise an autonomous executive power in Article 291 TFEU, after the Lisbon reform the exercise of implementing powers by the Commission is no more to understand in terms of delegation of powers by the legislator, as it used to be in the past since *Köster*.[828] As the holder of the executive powers is now the Commission, and not the legislator, the latter could not legally delegate these powers which are no longer in its hands.[829] In line with the legal notions described,[830] the basic act would contain a mere authorisation for the Commission to exercise the powers it already has as directly conferred by primary law. In this sense, the notion of delegation would be unsuited to describe the legal mechanism emerging from Article 291 TFEU.[831] To distinguish it from Article 290 TFEU, this relationship has been described in terms of the"conferral of powers", giving value to the different verbs used in the articles.[832]

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considers it necessary, (iii) have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty, (iv) exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter."

[825] See, *inter alia*, Case 16/88, *Commission v Council*, EU:C:1989:397, paras. 6-10.

[826] See Chapter 1, para. 11.1.

[827] On the lack of discontinuity pre- and post-Lisbon, see BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), p. 909; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 237.

[828] Case 25/70, *Köster, Berodty & Co. v. Einfuhr und Vorratsstelle fur Getreide und Futtermittel*, EU:C:1970:115.

[829] See DRIESSEN Bart, "Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU", 35 *European Law Review* No. 6 (2010), p. 844; TOVO Carlo, op. cit. (2016), p. 98.

[830] See Chapter 1, para. 2.

[831] CHAMON Merijn, *op. cit.* (2016), p. 237. See also Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871.

[832] TOVO Carlo, *op. cit*. (2016), p. 98. The use of the verb "confer" in Article 291 TFEU, however, was already in the preceding treaty articles. Moreover, it is arguable that this terminology is confusing since "conferral" recalls the principle of conferral, in its vertical and horizontal perspectives. Accordingly, in EU law powers

However, it is important to underline that, although the system has undergone important changes,[833] the new Treaty provisions have not modified the order of competences between institutions so radically.[834] Therefore, when uniform conditions for implementation are needed, the legislator exercises its powers conferred according to the specific legal bases in primary law, in this case entrusting the Commission with a centralised implementation. In this, as also demonstrated by the application in practice, the legal mechanism underpinning the empowerment of the Commission has not changed from the previous legal framework, arguably remaining a form of delegation of powers.[835]

In the light of these considerations, the terminology of the Lisbon Treaty appears misleading:[836] In contraposing delegated and implementing acts, it suggests that the latter are not legally "delegated".[837] However, from a formal point of view, the acts issued pursuant to both Articles 290 and 291 TFEU are the result of powers delegated by the legislator to the Commission - being adopted under different regimes, but according to the same legal mechanism.

2.11. The Powers Delegated to the Commission

If the delegated acts and the implementing acts cannot be distinguished according to the legal mechanism underpinning the empowerment of the Commission, it is arguable that what differentiates the two delegation systems lies in the content of the delegation, i.e. the nature of the powers at stake. However, since the signature of the Lisbon Treaty, concerns arose about the identification of clear-cut criteria for the application of Article 290 TFEU, on the one hand, and Article 291 TFEU, on the other. Yet, the identification of such criteria is crucial for "the very constitutional significance of the new system of Union acts".[838]

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are "conferred" by Treaty provisions on the different institutions and to use the term "conferral" for legal mechanisms at the secondary level (being delegation or authorisation) may be misleading.

[833] As remarked also by BIANCHI Daniele, *op. cit.* (2012), p. 83.

[834] See JACQUE' Jean-Paul, op. cit. (2014), p. 48: "*la réforme est en grande partie en trompe-l'œil. On avait modifié les dénominations en conservant très largement la répartition antérieure de pouvoirs*".

[835] JACQUE' Jean-Paul, *op. cit.* (2016), p. 23.

[836] It is interesting to remark that the misleading character of the terminology introduced by the Lisbon Treaty concerns not only the legal mechanism at stake, but also the function of these articles. Indeed, since they are issued as a consequence of the adoption of a legally binding act, they can be seen as providing for implementation of that act, by supplementing or clarifying it. In this sense, delegation was considered a "*sous-catégorie de l'exécution*" and the two regimes "*deux faces de la même médaille*". See BIANCHI Daniele, *op. cit.* (2012), p. 93.

[837] The use of the term "delegated" only for Article 290 TFEU may be explained by recalling the relevance of the delegation of *legislative* powers in constitutional law literature. Therefore, legal scholars tend to associate delegation with this specific form of delegation, whose notion, however, is more limited than the legal institution as such. For examples of this tendency, see PONZANO Paolo, op. cit. (2008), pp. 135-141; JACQUE' Jean-Paul, *op. cit.* (2016), pp. 21-36.

[838] RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v Parliament and Council (Biocides)*", 52 *Common Market Law Review* (2015), p. 250.

2.11.1. A Delegation of Legislative Powers?

While in the literature the risk of overlaps between the two regimes was soon highlighted,[839] it is generally acknowledged that the Treaty drafters meant to design two legal regimes which could be distinguished by the nature of the measures to be adopted.[840] Accordingly, the dividing line between delegated and implementing acts is to be researched in qualitative terms, relating to the content and the function of the measures adopted pursuant to the different regimes.[841]

In this regard, both the Commission and the Parliament appear to endorse a distinction based on the nature of the powers. In its first Communication on the matter, the Commission claimed that Articles 290 and 291 TFEU are "mutually exclusive", thus denying the existence of a "grey zone" between the scopes of their application.[842] Here, while the delegated acts were related to a "quasi-legislative" power, the powers involved in Article 291 TFEU were considered "purely executive".[843] The Parliament remarked that Article 290 TFEU entails the delegation of "part of its own power to the Commission", which is thus "instructed to exercise a power which is intrinsic to the Legislator's own role".[844]

Also in the literature, the introduction of the category of delegated acts, as distinguished from implementing acts, has caused some authors to claim that, while Article 291 TFEU deals with the delegation of "executive" powers, Article 290 TFEU relates to the delegation of "legislative" powers.[845] Indeed, the new concepts, resulting from the elaboration of the Convention for the

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[839] See, *inter alia*, HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), pp. 482-505; DRIESSEN Bart, "Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU", 35 *European Law Review* No. 6 (2010), pp. 837-848; COSTATO Luigi, op. cit. (2010), pp. 128-140; CRAIG Paul, op. cit. (2011), pp. 671-687; BARATTA Roberto, op. cit. (2011), pp. 295-318; XHAFERRI Zamira, "Delegated Acts, Implementing Acts, and Institutional Balance Implication Post-Lisbon", 20 *Maastricht Journal of European and Comparative Law* 4 (2013), pp. 557-575.

[840] See, *inter alia*, MENDES Joana, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design", 19 *European Law Journal* No. 1 (2013), p. 28. See also Final Report of Working Group IX on Simplification (Conv 424/02, WG IX 13), p. 9; VAN DER MEI Anne Pieter, "Delegation of Rule-Making Powers to the European Commission post-Lisbon", 12 *European Constitutional Law Review* (2016), p. 540.

[841] See, *inter alia*, BARATTA Roberto, op. cit. (2011), pp. 299-300; CRAIG Paul*, op. cit*. (2011), p. 672. *Contra* BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *RTD eur*. (2012), p. 94.

[842] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 3.

[843] Ibidem, p. 3.

[844] European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, (2010/2021(INI)), recitals B and C. See also European Parliament, Resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, (2012/2323(INI)).

[845] See SCHUTZE Robert, "Delegated Legislation in the (new) European Union: A Constitutional Analysis", 74 *The Modern Law Review* No. 5 (2011), p. 671. Similarly, describing it as "delegation du pouvoir législatif" see JACQUE' Jean-Paul, *op. cit*. (2014), p. 57; and as "quasi-legislative powers", see CURTIN Deirdre, *op. cit*. (2009), p. 122.

Future of Europe, are undeniably influenced by the "narrative" of enhancing the hierarchy of norms and the separation of powers in the EU legal system.[846]

However, from a theoretical perspective, a distinction based on the nature of the powers appears remarkably controversial, as the academic debates in relation to legislative delegation in State legal systems has shown. Identifying what constitutes a legislative or quasi-legislative rule by its material characteristics proved to be a tricky exercise, as much as classifying rules of general application as regulatory or legislative.[847] In the peculiar context of the EU, such a divide is even more problematic, raising a number of issues which relate to different aspects of the EU institutional architecture.[848] Yet, in this respect, the analysis of the criteria developed in the scholarly tradition of State legal systems calls for some observations.

It is in line with the traditional theory of the formal/substantive separation of powers[849] to argue that, since the delegated acts can consist only of acts of general application, they relate to "legislative" powers in substance.[850] However, it is settled practice that implementing acts can also be of general application, thus this criterion is not decisive to distinguish the two categories of acts when the act is of general scope. Moreover, in light of the deconstruction of this theory in more recent constitutional law literature, it is worth considering the other criteria elaborated for distinguishing "regulatory powers" from "legislative powers",[851] which give value to the hierarchical position and the function of the acts, as well as to the degree of detail of the rule and to the discretion of the delegate.[852] Accordingly, it is arguable that while the effects of certain delegated acts, namely the delegated acts which amend certain non-essential elements of legislative acts, tend to place them within the realm of legislative powers, the hierarchical position and the function of the acts which just "supplement" legislative acts are far more controversial.[853]

In this regard, while in Article 290 TFEU the function of the power "to amend" certain non-essential elements of the basic act is easily identifiable,[854] what constitutes the power "to

[846] See SCHUTZE Robert, *op. cit.* (2005), p. 9; BAST Jürgen, *op. cit.* (2016), p. 161.
[847] See Chapter 1, para. 7.5.2.
[848] Interestingly, CRAIG early identified "five problems"in the divide: (i) the "language problem", related to the difficulty of distinguishing what "supplements" from what "implements" a legislative act; (ii) the "temporal problem", related to the need to decide already in the legislative act what kind of delegation is needed; (iii) the "institutional" problem, related to the inter-institutional dynamics affecting the choice; (iv) the "transitional classification" problem, related to the allignement of the new categories to the previous one; and (v) the "formalism problem", related to the formal defition of "legislative act" in the Treaties. See CRAIG Paul, *op. cit.* (2011), pp. 671-687.
[849] See Chapter 1, para. 7.5.1.
[850] For an application of the correlation general application/legislative nature in EU law, see CRAIG Paul, *op. cit.* (2018), p. 717.
[851] See Chapter 1, para. 7.5.2.
[852] See, in particular, CARLASSARE Lorenza, *Regolamenti dell'esecutivo e principio di legalità,* (Cedam, 1966), p. 27 and 98.
[853] For a discussion on the hierarchical position of the acts under examination, see Chapter 6, para. 3.
[854] See Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity)*, EU:C:2015:499.

supplement" is less clear. According to the Commission, a measure which "supplements" the basic instrument "specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission."[855] However, it has been noted that any secondary measure involves some addition to the basic act.[856] In particular, the measures which are also considered "to implement" inevitably result in adding further details to the basic act.[857] Therefore, a "grey zone" of measures which can be considered both supplementing and implementing a legislative act emerged, making the distinction between the two concepts very difficult on these grounds.

2.11.2. The Elusive Position of the Court

In the light of these issues, controversially debated in literature,[858] a clarification by the Court of Justice was much awaited. The opportunity to take a clear stance on the divide between delegated and implementing acts arose for the first time in the *Biocides* case.[859] The Commission challenged a Regulation, which empowered the Commission to adopt measures setting the fees payable to ECHA under Article 291 TFEU,[860] claiming that this power should have been conferred under Article 290 TFEU and that the choice between the delegated and implementing acts should be based on objective and clear factors amenable to judicial review.[861]

While the Advocate General Cruz Villalón analysed the two provisions from a substantive perspective[862] and recognised in the discretion enjoyed by the Commission the key criterion for

[855] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 4.
[856] CRAIG Paul, op. cit. (2011), p. 673; BIANCHI Daniele, *op. cit.* (2012), p. 93.
[857] See Opinion of Advocate General Jääskinen in Case C-270/12, *UK v Council of the European Union and European Parliament* (*Short Selling*), EU:C:2013:562, para. 78.
[858] See, *inter alia*, BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), pp. 885-928; HOFMANN Herwig, *op. cit.* (2009), pp. 482-505; BARATTA Roberto, op. cit. (2011), pp. 295-318; VOSA Giuliano, "Delegation or implementation? The ambiguous divide", 42 *European Constitutional Law Review* No. 5 (2017), pp. 737-750.
[859] Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170. For a comment, see RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in Commission v. Parliament and Council (Biocides)", 52 *Common Market Law Review* (2015), pp. 243-258; CHAMON Merijn, "Clarifying the Divide between Delegated and Implementing Acts?", 42 *Legal Issues of Economic Integration* No. 2 (2015b), pp. 175-190; BUCHANAN Camilla, "The Conferral of Power to the Commission Put to the Test", 5 *European Journal of Risk Regulation* No. 2 (2014), pp. 267-272.
[860] Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 167, 27.6.2012, p. 1–123, esp. Article 80(1).
[861] See Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170, paras. 21-30. Therefore, this case concerned the first of the Craig's five problems, as noted by CHAMON Merijn, *op. cit.* (2015b), p. 178.
[862] Analysing the text of the provisions, he highlighted that Article 290 TFEU concerns "a sphere of activity that is essentially normative, relating thus to regulation, which remains unconnected to the later implementation stage", which is conversely related to Article 291 TFEU. In this sense, while delegated acts represent "a continuation of legislative activity in substantive terms", Article 291 TFEU pertains to "a

distinguishing delegation from implementation,[863] the Court acknowledged that the concepts of implementing acts and delegated acts are interrelated, being the one to be understood in relation to the other.[864] However, it emphasised that "the EU legislature has discretion" in deciding to confer a delegated power under Article 290 TFEU or an implementing power under Article 291 TFEU.[865] This discretion may be only limitedly reviewed by the Court, which is called to assess only whether the legislator has made manifest errors of assessment in its choice.[866]

In *Biocides*, thus, the Court refrained to provide a clear-cut criterion to distinguish between delegated and implementing acts, merely pointing out the different functions of the acts as laid down in the Treaties in an elusive manner.[867] Although the examination of the contested Regulation was in fact rather thorough,[868] the Court expressly gave much leeway to the EU legislature in the choice between the two regimes. Following this landmark decision, the difficulties of the divide between delegated and implementing acts continued to emerge in more recent cases brought before the Court.[869] Although clarifying more precisely some fundamental

different functional realm, namely that of implementation". See Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, paras. 26-47.

[863] Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, paras. 62-63. Already identified in the scholarly tradition of State legal systems (see, *inter alia*, GUARINO Antonio, "Sul carattere discrezionale dei regolamenti", *Foro italiano* (1953), p. 541), this criterion enjoyed also a certain consensus in EU literature, see *inter alia* BARATTA Roberto, *op. cit*. (2011), p. 303; JACQUE' Jean-Paul, *op. cit.* (2014), p. 252.

[864] Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170, para. 35.

[865] Ibidem, para. 40. In relation to the use of the term "discretion" (instead of "freedom"), it has been remarked that, considering the meaning of discretion in Italian administrative law, the Court intended to recognise that binding rules are imposed on the legislature. See VOSA Giuliano, "Delegation or implementation? The ambiguous divide", 42 *European Constitutional Law Review* No. 5 (2017), pp. 743-744. However, transposing national law concepts to EU law requires the most rigorous analysis, especially since the notion of discretion is not unknown in the case law in other matters. Moreover, it is worth recalling that, according to the principle of legality in its substantive sense, the legislature never exercise an absolute freedom, but needs to abide by the rule of law.

[866] Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170, para. 40.

[867] See, *inter alia*, RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in Commission v. Parliament and Council (Biocides)", 52 *Common Market Law Review* (2015), p. 251. *Contra* CHAMON Merijn, *op. cit*. (2015b), p. 186. This approach was expected by BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *RTD eur*. (2012), pp. 75-116, who, long before the Biocides case, argued against a distinction based on the nature of the measure, and for leaving at the legislator's discretion the choice between delegated and implementing acts. See also BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), pp. 885-928.

[868] RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in Commission v. Parliament and Council (Biocides)", 52 *Common Market Law Review* (2015), p. 254.

[869] In particular, Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499; Case C-65/13, *Parliament v Commission (EURES)*, EU:C:2014:2289; Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579; Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183.

concepts enshrined in Articles 290 and 291 TFEU, these cases appear to throw into sharp relief the conundrum of the distinction between the two regimes.[870]

In particular, in *Visa Reciprocity*[871] the Court followed the approach of *Biocides*, confirming the limited scope of review of the Court on the legislator' choice and the irrelevance of the criterion of discretion of the Commission,[872] but it clarified that the legislator's discretion is qualified by the need to comply with the criteria and conditions laid down in primary law.[873] In this respect, in *EURES*,[874] the Court affirmed that "in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements."[875] Therefore, it is arguable that the Treaty actually does provide at least one criterion for the distinction: The legislator cannot use Article 291 TFEU for the delegation of the power to amend a legislative act.[876]

However, in what precisely the power "to supplement" consists remains controversial. Indeed, in *Connecting Europe*,[877] confronted with the issue of the difference between the power "to amend" and the power "to supplement" within Article 290 TFEU, the Court put forward that the power "to

[870] See CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, 2018), p. 728.

[871] Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499. The case concerned a reciprocity mechanism on visa requirements for third country nationals. In particular, Regulation 1289/2013 (OJ L 347, 20.12.2013, p. 74–80) allowed the Commission to temporarily suspend the exemption from visa requirements vis-à-vis certain countries, through a delegated act inserting a footnote in the basic act. The Commission brought action, claiming that such power entails the implementation, not the supplementation of the basic act. Considering that in this it has no discretion, the suspension power should have been conferred under Article 291 TFEU. For a comment, see CHAMON Merijn, "The Dividing Line between Delegated and Implementing Acts, Part Two: The Court of Justice Settles the Issue in Commission v. Parliament and Council (Visa Reciprocity)", 52 *Common Market Law Review* (2015a), pp. 1617-1634; VAN DER MEI Anne Pieter, "Delegation of Rule-Making Powers to the European Commission post-Lisbon", 12 *European Constitutional Law Review* (2016), pp. 538-548.

[872] In the Court's words: "neither the existence nor the extent of the discretion conferred on [the Commission] by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU". See Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499, para. 32. Conversely, the Advocate General used "the breath of discretion, greater or lesser, that is conferred to the Commission" as the distinguishing criterion, see Opinion of Advocate General Mengozzi in Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:304, para. 25.

[873] Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499, para. 28.

[874] Case C-65/13, *Parliament v Commission (EURES)*, EU:C:2014:2289. Here, the Parliament sought the annulment of an implementing act, which was considered to have supplemented, rather than implemented, the basic act.

[875] Ibidem, para. 45.

[876] VAN DER MEI Anne Pieter, *op. cit.* (2016), p. 543. See also Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579.

[877] Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183. The case concerned Regulation 1316/2013 (OJ L 348, 20.12.2013, p. 129–171) establishing the Connecting Europe Facility, which contained a provision empowering the Commission to adopt delegated acts "detailing the transport funding priorities". As the Commision adopted a delegated act adding certain elements to the Annex of the basic act, the Parliament argued that it exceed its powers, which were limited to the supplementation of the act. For a comment, see VAN DER MEI Anne Pieter, *op. cit.* (2016), pp. 545-548. See also CRAIG Paul, *op. cit.* (2018), p. 728.

supplement" corresponds to the power "to flesh out" the basic act, developing "in detail [its] non-essential elements".[878] Yet, in *Biocides* and in *Visa Reciprocity* the power "to provide further detail in relation to the content of a legislative act" designated precisely the content of implementing acts.[879] Therefore, in the attempt to clarify the meaning of Article 290 TFEU, the Court appears to make the dividing line with Article 291 TFEU even more blurred.[880]

2.11.3 Remaining Uncertainties

In the light of these judicial developments, it appears that the Lisbon reform, which aimed to achieve a simplification of EU acts, actually raised a number of doubts and issues, which the EU institutions, including the Court, are still struggling to settle. Recognising the problematic nature of the divide, the Parliament, the Council and the Commission agreed in 2016 to enter into negotiations with the goal of "providing for non-binding criteria for the application of Articles 290 and 291 TFEU."[881] This commitment, however, remained only on paper.

Among the unsettled aspects of the Lisbon reform, the conceptual distinction between the new subcategories of non-legislative acts is crucial not only to understand the nature of the powers delegated under Articles 290 and 291 TFEU, but also the constitutional rationale inspiring the new system of delegation of powers introduced by the Lisbon treaty.[882] This rationale is basically undermined by the approach of the Court, which leaves the discretion to the legislator in the choice between the two regimes, provided that the criteria and conditions set forth in primary law are observed.[883]

In this respect, the approach of the Court appears problematic not only from the perspective of the principle of legality in its substantive sense, but also for the major implications that that choice has from a constitutional perspective.[884] From that choice, in particular, as we will see, the involvement and prerogatives of the different institutional actors depend, so that the institutional balance is ultimately affected. It is arguable, thus, that such effect would require, in line with the

[878] Ibidem, para. 41.
[879] Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170, para. 39; Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499, para. 30.
[880] CRAIG Paul, *op. cit.* (2018), p. 728.
[881] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 28. Other aspects of the agreement will be analysed in detail *infra,* see Chapters 4 and 5.
[882] See, *inter alia*, BERGSTROM Carl Fredrik and RITLENG Dominique, "Patterns and Findings: Five Central Themes", in BERGSTROM Carl Frederik and RITLENG Dominique, Rulemaking by the European Commission. The New System for Delegation of Powers, (Oxford University Press, 2016), p. 258.
[883] CRAIG Paul, *op. cit.* (2018), p. 729.
[884] See CRAIG Paul, *op. cit*. (2018), p. 726; RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in Commission v. Parliament and Council (Biocides)", 52 *Common Market Law Review* (2015), p. 252; VAN DER MEI Anne Pieter, *op. cit.* (2016), pp. 540-541.

case law on judicial bases,[885] not to be left to legislature's discretion, but to be based on "clear and objective factors amenable to judicial review".[886]

However, it is undeniable that, in the new system, there are some clear points. Thus, from a textual reading of Article 290 TFEU, acts of individual application can be adopted only as implementing acts, thus being arguable that, in this case, these acts pertain to the executive sphere.[887] Moreover, according to the Court, only a delegation of powers under Article 290 TFEU can empower the Commission "to amend" or "to supplement" the basic act. However, while the notion of "amendment" has been clarified and reserved to Article 290 TFEU,[888] what identifies the "supplementation" of the legislative act, and how this can be distinguished from "implementation" of that act, still appears to be problematic. Therefore, although there are powers which clearly fall within the scope of application of Article 290 TFEU and others within the scope of Article 291 TFEU, a relevant grey zone - constituted by borderline cases - still escapes a clear systematisation.

3. The Delegation of Powers to the Council

Considering now the delegation of power to the Council, from the analysis of the evolution of the comitology system the role of the Council as a competing institution to the Commission in the implementation of EU law has already emerged. However, its peculiar position in the institutional balance and its functions as legislator determine the need to consider this case of delegation of powers and its limits more carefully. Indeed, while in the case of the Commission the powers to implement a certain regulation appeared clearly derivative from the powers conferred by the Treaties on the legislator, the case of the Council is more complex, since this institution participates in the enactment of the basic act, being at the same time legislator and implementer of the EU law.

Therefore, an accurate legal analysis is essential to define precisely which legal mechanism is at stake and to what extent we can refer to the notion of delegation in this case. Accordingly, in the following pages, the evolution of the role of the Council in the implementation of EU law will be described, paying particular attention to the application of the notion and structure of delegation as elaborated on in the preceding analysis. Here, some relevant issues will be underlined, thus

[885] See Chapter 1, para. 11.1 and case law cited therein.
[886] RITLENG Dominique, *op. cit.* (2015), p. 253; VAN DER MEI Anne Pieter, *op. cit.* (2016), p. 544; BRADLEY Kieran St. C., "Delegation of Powers in the European Union. Political Problems, Legal Solutions?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers*, (Oxford University Press, 2016), p. 79. It is interesting to note that the Court's approach is more similar to the one emerging from the judicial review of subsidiarity, see CRAIG Paul and DE BURCA Grainne (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), pp. 98-100.
[887] See Chapter 1, para. 14.1.
[888] See Case C-88/14, *Commission v Parliament and Council (Visa Reciprocity),* EU:C:2015:499, para. 42.

paving the way for a more detailed discussion of the limits to this delegation of powers in the following chapters.

3.1. The Implementing Powers of the Council in the Treaty of Rome: A Delegation of Powers?

In the original Treaty, the Council was the main rule-making institution, which had the power to adopt the acts of secondary law within the competences attributed to it by primary law. In the absence of a distinction between legislation and implementation, the provisions conferring the power to the Council to adopt measures for the attainment of the objectives of the Community represented the legal basis not only for exercising the powers attributed by primary law,[889] but also for introducing in legislative acts enabling provisions to exercise further implementing powers. Accordingly, as emerges in *Köster*, [890] the Council was conceived as the holder of the implementing powers,[891] which could then be exercised by the Commission or by the *Council itself* on the basis of a legislative act.

Scholars referred to the empowerment of the Council with implementing powers - which remained unquestioned in the *Köster* judgment - as a "practice of internal delegation", whereby the Council delegated implementing powers to itself.[892] However, it is doubtful that such an exercise of implementing powers by the Council should be considered a *delegation* of powers in proper terms. Even without considering the fact that the Court does not mention the term "delegation" in this context, the described notion of delegation implies a transferral of powers from one subject to another one. In this case, the difference between the exercise of the powers directly on the basis of the Treaty, or on the basis of a provision inserted in a legislative act lay not in the institution adopting the act, but principally on the procedure followed for their enactment.[893] The identity between the delegator and the delegate, both constituted by the Council in the case, arguably impedes the qualification of such a situation as the legal notion of delegation.[894] In other words, in the original legal framework, the exercise of implementing

[889] For a general power to adopt decision, see Article 145 EEC: "To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty: (i) ensure co-ordination of the general economic policies of the Member States; (ii) have power to take decisions."
[890] Case 25/70, *Köster,* EU:C:1970:115, para. 6.
[891] JACQUE Jean Paul, *Droit institutionnel de l'Union européenne*, 7ème ed., (Dalloz, 2012), p. 332.
[892] See, *inter alia*, LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), p. 34.
[893] See Case 25/70, *Köster*, EU:C:1970:115, para. 6.
[894] The situation is not caught by the notion of "delegation of authority" or administrative delegation either, which refers to the transferral of powers within an institution or body. Also in this case, there is the need to identify at least two different organs within the same institution.

powers by the Council did not occur on the basis of a delegation of powers as we have identified it, but arguably a different legal mechanism was put in place, namely a reservation of powers.

3.2. The Single European Act: The Limits to the Reservation of Implementing Powers

3.2.1. A Reservation of Powers

The legal configuration appears more clearly after the amendments made by the Single European Act to Article 145 ECC.[895] As already noted, the novel version of the article made clear, first and foremost, that the original holder of the implementing powers was the Council, which was thus in the position of conferring them to the Commission. Moreover, it expressly stated that "the Council may also reserve the right, in specific cases, to exercise directly implementing powers itself". Therefore, the exercise of implementing powers by the Council is defined as a form of *reservation* of the powers rather than a delegation of them, confirming the assertion that this does not fall within the scope of the notion of delegation.

However, the fact that this conferral of implementing powers did not denote a delegation of powers, but a reservation to the benefit of the Council does not imply that there are no inherent limits to the exercise of those powers. As already noted, the reservation of implementing powers for the Council in a secondary act allows the enactment of rules according to a procedure which is not the procedure in accordance with the Treaty, which guarantees a role for the European Commission and, in certain cases, for the European Parliament.[896] Therefore, such a possibility entails the risk that, by inserting enabling provisions into the basic acts, the Council may be tempted to decide alone on a number of matters which should otherwise be subject to the decision-making procedures laid down in the Treaties, thus violating the prerogatives of the other institutions and blurring the line between legislative and executive acts.[897] In other words, the problem of the "sliding powers" highlighted by the Parliament with reference to the empowerment of the Commission under the comitology system appears far greater in connection to the reservation of powers for the Council. In this regard, the Court of Justice has developed clear boundaries in its case law for the exercise of implementing powers by the Council.

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[895] See Article 10 of the Single European Act: "Article 145 of the EEC Treaty shall be supplemented by the following provision: 'confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.'"

[896] LENAERTS Koen, *op. cit.* (1993), p. 35.

[897] Ibidem. On the recent case law on the prohibition to establish secondary legal bases, see infra Chapter 4, para. 2.7.

3.2.2. A Reservation Limited to "Specific Cases"

As already noted, although from Article 145 it emerged that the Council is the holder of the implementing powers, the rule is the delegation of powers to the Commission. The reservation by the Council, therefore, is considered the exception and limited to "specific cases".[898] The Court gave a restrictive interpretation of such provision, linking it to the obligation to state the reasons under Article 190 EEC.[899] Therefore, in *Commission v Council* it held that "after the amendments made to Article 145 by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision".[900] As clarified in a later judgment:

> *"That means that the Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power."*[901]

However, such an interpretation has not impeded the Court from upholding the validity of a Council implementing measure, even if the reasons appeared "general and laconic", when the grounds justifying the reservation of powers were sufficiently clear from the context of the act.[902] In fact, the scrutiny of the Court on the fulfilment of this requirement appears rather marginal.[903]

3.2.3. Further Limits in the Case Law

In the field where the Council detained powers both legislative, on the basis of the Treaty, and implementing, on the basis of secondary law, the Court has arguably drawn a line between legislative acts and implementing acts.[904] Thus, for instance, with reference to an antidumping measure adopted on the basis of a Regulation *ex* Article 113 EEC, the Court stated that:

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[898] Article 145 as modified by the Single European Act.
[899] LENAERTS Koen, *op. cit*. (1993), p. 34.
[900] Case 16/88, *European Commission v Council,* EU:C:1989:397, para. 10.
[901] Case C-257/01, *Commission of the European Communities v Council of the European Union*, EU:C:2005:25, para. 51.
[902] Case C-257/01, *Commission of the European Communities v Council of the European Union*, EU:C:2005:25, paras. 53-61.
[903] CHAMON Merijn, "Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty", 53 *Common Market Law Review* (2016a), p. 1531.
[904] LENAERTS Koen, *op. cit*. (1993), p. 35.

> *"The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom the law applies."*[905]

Therefore, the Council implementing acts are bound to abide by the provisions in the legislative acts, even where the institution adopting them corresponds, thus respecting the institutional balance established in the Treaties and the legal positions of the individuals.

In the same vein, in the field of the CAP, where Article 43 EEC required the consultation procedure for legislative acts, the Court referred to the *Köster* case to assess the validity of a Council Regulation enacted on the basis of a legislative act. By restating that there is no need for the legislative act to draw up all the details of the regulations and that it is sufficient to adopt "the basic elements of the matter", it added that provisions implementing basic regulations might be adopted by the Council according to a procedure different from that laid down in the Treaty. However, an implementing regulation adopted without consultation of the European Parliament, must respect the basic elements laid down in the basic regulation after consultation of the European Parliament.[906] The judicial developments on this aspect will deserve further attention.[907]

3.3. From the Maastricht Treaty to the Treaty of Lisbon

The considerations exposed are referring to the legal framework of the early decades of the European Community, which has changed considerably. As noted, under the Rome Treaty the Council exercised the rule-making powers within the competences attributed at the EU level, according to procedures which involved the European Commission and, to various degrees, the European Parliament. In such a context, especially after the amendments of the Single European Act to Article 145 EEC, the implementing powers were within the powers conferred to the Council.[908]

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[905] Case 119/77, *Nippon Seiko KK and others v Council and Commission*, EU:C:1979:93, para. 24.
[906] Case 46/86, *Albert Romkes v Officier van Justitie for the District of Zwolle,* EU:C:1987:287, para. 16.
[907] Cf., in particular, the cases on secondary legal bases in the field of the CAP, whose legislative acts after the Lisbon Treaty shall be adopted according the ordinary legislative procedure. See, for instance, Joined Cases C-124/13 and C-125/13, *European Parliament and European Commission v Council of the European Union (Multiannual Cod Plan)*, EU:C:2015:790; Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v Council of the European Union (Venezuela)*, EU:C:2014:2400. The issue of secondary legal bases will be addressed in Chapter 5, para. 2.7.
[908] JACQUE Jean Paul, *op. cit.* (2012), p. 332.

The introduction of the co-decision procedure in the Treaty of Maastricht, which rendered the European Parliament co-legislator along with the Council in a number of policy areas, brought a significant innovation in the legal configuration of the exercise of those powers. Arguably, the legal basis for the enactment of European Union acts, when requiring the use of the co-decision procedure, were to be interpreted as conferring those powers to the Council and the Parliament on an equal footing. Therefore, the Council could no longer be considered the sole rule-making authority, being bound to share its powers with the other institution.

3.3.1. A True Delegation of Powers

From a delegation perspective, such involvement of the Parliament modifies the order of competences at the EU level. The holder of the powers is no longer the Council alone, but rather the Council and the Parliament jointly. Accordingly, a legislative act enabling the Council to exercise implementing powers determines a transferral of powers from a collective body of two institutions (Parliament and Council) to a single institution (the Council). Therefore, there is no more identity between the original holder of the implementing powers and the institution exercising it. Hence, in the policy fields where the co-decision procedure is applicable, it is arguable that it is a form of delegation in the proper meaning of this legal institution.

This reasoning mirrors the considerations which underpinned the growing demand of the European Parliament for greater oversight in relation to the implementing activities.[909] As expressed in the De Giovanni Report, the Parliament claimed that Article 145 ECC, which continued to refer to "the acts which the Council adopts", was applicable only in the fields where the co-decision procedure was not required.[910] However, as was seen earlier, albeit in line with the wording of the text, this interpretation was not accepted by the other institutions, especially the Council.

3.3.2. The Treaty Amendments

The subsequent amendments of the Treaties, in particular in Amsterdam and Nice, contributed to increasing the mismatch between the wording of primary law and the practice of the EU institutions. On the one hand, the conferral of implementing powers to the Council continued to be identified as a "reservation" of powers in Article 145 ECC.[911] On the other hand, the scope of application of the co-decision procedure progressively expanded to other policy areas, thus guaranteeing the active involvement of the Parliament in most fields of EU legislation. The

[909] ESPOSITO Antonio, *op. cit.* (2004), p. 51.
[910] Rapporto De Giovanni, endorsed by European Parliament Resolution of 16 December 1993, OJ 1994 C 20/179.
[911] JACQUE Jean Paul, *op. cit*. (2012), p. 333.

continuing pressure of the Parliament, backed up by the Commission, and the innovative reflections stemming from the Convention for Europe eventually resulted in the novel legal framework which was set forth in the Treaty of Lisbon.

With the Treaty of Lisbon, the co-decision procedure became the generally applicable procedure for the enactment of Union acts, under the name of the ordinary legislative procedure.[912] Moreover, as already described, it brought significant innovations in the conception and regulation of the implementation of EU law. In the new legal framework, in specific cases provided in the Treaties, the Council maintains its rule-making powers, which can take the form of either legislative or non-legislative powers.

In particular, firstly, the Council can adopt regulations, directives or decisions not only jointly with the Parliament, but also with the mere participation of the Parliament. These acts shall be considered legislative acts according to Article 289 TFEU, being enacted through the ordinary legislative procedure or through special legislative procedures.[913] Secondly, the Council is empowered directly by the Treaties to adopt other measures, considered more of an executive nature,[914] such as the fixation of prices and quotas in the CAP,[915] measures concerning competition and State aid,[916] and the economic and monetary policy.[917] These constitute non-legislative acts adopted directly on primary law, also called "autonomous acts"[918] or "sui generis" acts.[919] Thirdly, the Council can still be empowered by provisions of secondary law to adopt implementing acts under Article 291 TFEU. Although this possibility is limited to specific cases, this implies that the Council remains a possible recipient of powers delegated by the legislator, maintaining a role in the implementation of EU legislation.

In light of this, it is clear that, also after the entry into force of the Lisbon Treaty, the Council maintains a role both in the exercise of legislative powers and implementing powers. As already noted, this double role of the Council as a legislator and implementer is perceived as problematic from a separation-of-powers perspective, and it disappoints the expectations of those who, with the Treaty reform, wished for an overhaul of the EU institutional framework in a sense closer to the order of competences established in State legal systems.[920]

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[912] Article 294 TFEU.
[913] Article 289 TFEU.
[914] JACQUE Jean Paul, *op. cit*. (2012), p. 333.
[915] Article 43 (3) TFEU.
[916] Articles 103 and 109 TFEU.
[917] Article 125 TFEU.
[918] See, *inter alia*, DE WITTE Bruno, *op. cit.* (2008), p. 100.
[919] See CHAMON Merijn, *op. cit.* (2016a), pp. 1501-1544.
[920] See, *inter alia*, LENAERTS Koen and DESOMER Marlies, "Simplification of the Union's Instruments", in DE WITTE Bruno (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, EUI-RSCAS/AEL (2003), p. 113; SCHUTZE Robert, "Sharpening the Separation of Powers through a Hierarchy of Norms?", *EIPA Working*

3.4. The Implementing Powers of the Council after the Lisbon Treaty

In relation to the new regime introduced by Articles 290 and 291 TFEU, some aspects deserve particular attention when considering their significance for the Council implementing powers. First, with the introduction of the category of delegated acts, a significant portion of the powers which under the previous system could be delegated to the Council appears to be removed from the potential scope of its implementing powers. Indeed, according to Article 290 TFEU, the powers to amend or supplement certain non-essential elements of a legislative act can be delegated only to the Commission, and not to the Council.[921] The scope of application of the delegation of powers to the Council, thus, appears reduced.

Moreover, Article 291 TFEU clarifies the conditions for the implementation of EU legislation by the Council. From a vertical perspective, when uniform conditions for implementing Union acts are needed, the implementation is carried out at the EU level either by the Commission or by the Council. Therefore, the first condition for the exercise of implementing powers by the Council is the necessity to carry out the implementation at the EU level, granting uniform conditions throughout the EU.

This being the case, the delegation of powers to the Council is then possible in two scenarios. Firstly, in line with the previous system and with the described case law of the Court, the Council can be delegated such powers "in duly justified specific cases", thus requiring the basic act to state the reasons for this departure from the preferred practice of delegation to the Commission. In this regard, in the light of the stricter wording of Article 291 TFEU,[922] it has been argued that it is now more difficult to empower the Council than in the past.[923] However, the previous judicial approach on this point appears still applicable in the post-Lisbon reality, as demonstrated in recent cases.[924]

Secondly, the Council can exercise implementing powers in the field of the common foreign and security policy in the cases provided for in Articles 24 and 26 TEU. It is interesting to note that those articles provide for the legal basis for the Union's competence in this field, conferring the powers to define and implement it on the European Council and the Council, and excluding the adoption of legislative acts. In other words, the reference to these articles allows the Council to adopt measures in this field not only on the basis of the Treaty provisions but also in the form of

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Paper 2005/W/01, < http://www.eipa.eu/files/repository/product/20070815142533_FC0501e.pdf > (last accessed 08.08.2016).

[921] See, *inter alia*, Case C-65/13, *Parliament v Commission (EURES)*, EU:C:2014:2289,

[922] In comparison to the previous text which read simply "in specific cases", see Article 145 EC.

[923] BLUMANN Claude, "Le système normatif de l'Union européenne vingt ans après le traité de Maastricht", 19 *Revue des affaires européennes - Law & European affairs* No. 2 (2012), p. 251; CHAMON Merijn, *op. cit.* (2016a), p. 1531.

[924] Case C-133/06, *Parliament v Commission*, ECLI:EU:C:2008:257, para. 46; Case C-595/15 P, *National Iranian Oil Company (NIOC) and others v Council*, EU:C:2016:721, para. 56.

implementing acts having their legal basis in secondary legislation. Remarkably, since in this specific field the Council is already the exclusive holder of the power, there is arguably no delegation of powers in proper terms, but it remains a case of the reservation of powers. In this specific field, thus, the Council can reserve the implementing powers for itself.[925]

4. Conclusion

The analysis conducted has unveiled the relevance and the complexity of the system created in connection to the delegation of powers to the Commission and the legal issues related to the delegation of powers to the Council. Both institutions were called from the beginning of the European Community to implement EU legislation, but the evolution and application of these forms of delegation have followed different paths.

In particular, with regard to the Commission, the establishment of comitology was related to the need to provide an efficient management of common agricultural organisations, while at the same time maintaining the control of the Member States over the implementing activities carried out by the Commission. The solution initially adopted paved the way for the creation of a broad number of committees, composed by experts and members of the national administrations, which proved to be not only a valuable form of control, but also a source of expertise for the Commission and of coordination with national administrations for a more effective implementation of EU law.

In spite of its undeniable benefits, the comitology system has proven problematic in several aspects, resulting in political and legal reactions by other EU institutions. Although the Court of Justice has consistently rejected the challenges to the legality of such a system, the need for more transparency and democratic oversight has led to an evolution of the original system towards more homogeneity in the applicable rules and towards an enhanced role of the Parliament. Therefore, several interinstitutional agreements, and the amendments to the Comitology Decision in 1999 and 2006, contributed to making the comitology system "less complex, less opaque and more open to parliamentary control".[926]

These amendments were in principle also justified by the evolution in the order of competences. Indeed, with the expansion of the co-decision procedure, the role of delegator, which was originally played by the Council alone, has been progressively shared with the Parliament. Nevertheless, for a long time, this institution has not been involved in the control of the Commission's activities, entailing a mismatch between the delegation structure and the control

[925] To the detriment of the High Representative, as remarked by JACQUE Jean Paul, op. cit. (2012), p. 333.
[926] Statement of the Commission Vice-President Neil Kinnock in the Debates of the European Parliament on 5 May 1999, OJ 1999 C 279/160, cited in BERGSTRÖM Carl Friedrik, op. cit. (2005), p. 249.

mechanisms in place. At the same time, the rise of the Parliament as co-legislator, entailing the sharing of the rule-making powers previously conferred exclusively to the Council, partially changed the legal mechanisms at stake also in relation to the delegation to the Council. Indeed, while before the introduction of the co-decision procedure the legal mechanism involved was rather a reservation of powers, the empowerment of the Council can now be considered as a delegation of powers, determining the transferral of powers allocated to the two institutions by the Treaties to the exclusive exercise by the Council.

Inspired by considerations on the separation of powers and democratic legitimacy, the Lisbon Treaty has introduced a new categorisation of non-legislative acts, splitting into two halves what previously constituted a unitary regime for the delegation of powers to the Commisssion. Thus, on the one hand, Article 290 TFEU establishes that "delegated acts" are to be adopted by the Commission as measures of general application, amending or supplementing non-essential elements of legislative acts. Although a certain role of national experts cannot be excluded, these acts are removed from the scope of application of the comitology system, being subject to specific control mechanisms of the Council and the Parliament. On the other hand, Article 291 TFEU maintains the operation of the comitology system for the adoption of "implementing acts" but subject it to the control of the Member States. Although the terminology of the Lisbon Treaty appears misleading, the legal mechanism underlying both these regimes was recognised as a delegation of powers since the Commission is still called to exercise these powers not in force of an autonomous competence established in the Treaties, but pursuant to an act of secondary law empowering it.

Moreover, according to Article 291 TFEU, the Council can still be empowered with implementing powers "in duly justified specific cases", thus maintaining its problematic double role in legislation and in implementation. However, within the scope of application of this provision, there are still cases of implementing powers conferred on the Council according to a reservation, rather than a delegation of powers, namely where the special legislative procedures apply and in the CFSP area.

In the light of these considerations, the problematic nature of the powers delegated according to Articles 290 and 291 TFEU has emerged as one of the most relevant issues which, notwithstanding the Court's rulings, remain unresolved in the current institutional system. The fundamental problems relating to the distinction between delegated and implementing acts have both constitutional and pragmatical implications. Such implications will further emerge in the analysis on the limits to the delegation of powers to the Commission in the following chapters, casting a shadow on the significance and application of the Lisbon reform in relation to this legal mechanism.

Chapter 3
The Delegation of Powers to EU Agencies and to the ECB

1. Introduction

The analysis of the different forms of delegation established in the EU institutional panorama calls for a consideration of the case of the delegation to EU agencies and to the ECB. In the evolution of the Union, the expansion of EU competences and the growing complexity of EU rule-making have caused an increasing demand for rules and regulatory outputs from the EU institutions. Not dissimilar from the case of State structures in the 20th century, the EU has faced the pressure to improve the efficiency and expertise of its administration, which has been called more and more to regulate fields of significant technical complexity.[927] In this context, the delegation of powers to existing institutional bodies became insufficient and, in some respects, unsuitable, since the excessive empowerment of the Commission allegedly risked upsetting the existing balance and dynamics.[928]

The solution adopted at the EU level resulted in the empowerment of independent bodies, established *ad hoc*, such as EU agencies, which operate at arm's length from the political actors. Being highly specialised, these non-majoritarian bodies appeared well-equipped to deal with complex technical and scientific issues,[929] while at the same time maintaining a structural independence from political pressures conferring credibility and output legitimacy on them.[930] Thus, an increasing number of EU agencies were created in the last decades and, for the same reasons, relevant powers were delegated to the ECB in the field of banking supervision in reaction to the financial crisis.

Therefore, firstly, the notion and the legal framework for the executive agencies will be described, examining whether their empowerment constitutes a form of delegation of powers. Secondly, the delegation of powers to the decentralised agencies will be considered, reflecting on the

[927] See MAJONE Giandomenico, *Regulating Europe* (Routledge, 1996); EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), p. 180.
[928] DEHOUSSE Renaud, "The Politics of Delegation in the European Union", *Les Cahiers européens de Sciences Po*, No. 4.
[929] BUSUIOC Madalina, *European Agencies: Law and Practices of Accountability*, (Oxford University Press, 2013), p. 25.
[930] TOVO Carlo, *Le agenzie decentrate dell'Unione europea*, (Editoriale Scientifica, 2016), p. 395.

exponential growth of these bodies of EU administrative law and on the powers delegated to these bodies. Thirdly, after having briefly recalled the main institutional features of the ECB, the context and the provisions whereby the ECB is delegated new powers by acts of secondary law will be analysed. The measures taken in reaction to the financial and sovereign debt crisis will be described, focusing on the tasks of prudential supervision conferred on the ECB in this context. In light of these considerations, some reflections on the structure and peculiarities of the delegation of powers to these bodies will be put forward, anticipating some essential elements for the analysis of the limits concerning these forms of delegation.

2. The Delegation of Powers to EU Agencies

The establishment of an EU agency is "a specific institutional arrangement" which stands out within the EU institutional panorama.[931] Often created as *ad hoc* reactions to transnational crises, the EU agencies are significantly diverse, varying in their functions, structure and powers conferred. However, the establishment and empowerment of agencies represents a unitary phenomenon, the so called "agencification", which has been recognised in the literature as one of the most relevant developments in EU institutional and administrative law.[932]

In its Communication of 2002 the Commission designated under the "general umbrella" notion of EU agencies various decentralised organisations, which were characterised by the fact that "they were created by regulation in order to perform tasks clearly specified in their constituent Acts, all have legal personality and all have a certain degree of organisational and financial autonomy".[933] The Commission made a fundamental distinction between the "executive agencies" and the "regulatory agencies". Accordingly, here these two categories of agencies will be distinguished which, for their peculiarities and implications for the institutional balance, deserve separate analysis.

[931] CHITI Edoardo, "European Agencies' Rulemaking: Powers, Procedures and Assessment", 19 *European Law Journal* No. 1 (2013), p. 94.
[932] See, *inter alia*, EVERSON Michelle, MONDA Cosimo, VOS Ellen, *European Agencies in between Institutions and Member States*, (Wolters Kluwer, 2014); CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016); BUSUIOC Madalina, *op. cit*. (2013); CHITI Edoardo, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie* (Cedam, 2002); TOVO Carlo, *op. cit.* (2016).
[933] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 3.

3. EU Executive Agencies

3.1. The Definition of Executive Agency

The executive agencies are EU bodies with legal personality established by the Commission in order to implement all or part of EU programmes on its behalf and under its responsibility.[934] The definition of EU agencies provided by the Commission in 2002 has highlighted the main features of the executive agencies.[935] Remarkably, the executive agencies are created for a limited time to carry out executive and operational tasks related to a specific spending programme,[936] such as the management of the Erasmus or the ERC programmes. In their role, they contribute to the efficiency and consistency of regulation *senso latu*.[937] Therefore, the tasks assigned to the executive agencies are more limited than the variety of powers entrusted to the decentralised agencies. Moreover, the executive agencies, with one exception, are located in Brussels, close to the Commission's headquarters.[938] They are created by the Commission on the basis of Council Regulation (EC) No. 58/2003 and they operate under the Commission's supervision and responsibility.[939]

There are currently six agencies established for the management of a large number of programmes:[940] the Education, Audiovisual and Culture Executive Agency (EACEA); the Innovation and Networks Executive Agency (INEA); the Consumers, Health, Agriculture and Food Executive Agency (CHAFEA); European Research Council Executive Agency (ERCEA); Executive Agency for Small and Medium-sized Enterprises (EASME); and the Research Executive Agency (REA).[941]

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[934] European Court of Auditors, "Delegating Implementing Tasks to Executive Agencies: A Successful Option?", Special Report No. 13 (2009), p. 8.
[935] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 3.
[936] European Court of Auditors, "Delegating Implementing Tasks to Executive Agencies: A Successful Option?", Special Report No. 13 (2009), p. 32.
[937] This understanding of the notion of "regulation" by the Commission has been, however, criticised. See CHAMON Merijn, *op. cit*. (2016), p. 6.
[938] The Consumers, Health, Agriculture and Food Executive Agency (CHAFEA) is located in Luxembourg.
[939] See European Court of Auditors, "Delegating Implementing Tasks to Executive Agencies: A Successful Option?", Special Report No. 13 (2009), p. 31.
[940] See European Court of Auditors, "Delegating Implementing Tasks to Executive Agencies: A Successful Option?", Special Report No. 13 (2009), pp. 29-30. See also the Annual Working Programmes 2016 of each Executive Agency, available at <https://ec.europa.eu/info/publications/annual-work-programme-2016-executive-agencies_en> (last accessed 20.06.2017).
[941] The list can be found at <https://ec.europa.eu/info/departments_en> (last accessed 20.06.2017).

3.2. The Historical Development of Executive Agencies

The origin of this institutional arrangement dates back to the political crisis which faced the Commission at the end of the 1990s.[942] In the preceding years, the exponential increase of the scope of EU policies and programmes required the Commission to carry out a large number of management tasks, bearing a growing financial and administrative burden in relation to the policy programmes.[943] However, the existing resources and staffing level were not sufficient to keep up with the proliferation of such programmes and the complexity of their financial management, determining the need to outsource these tasks to independent contractors from the private sector.[944]

However, these external contractors were assigned certain management tasks without a clear system of monitoring and control of their independence and performance.[945] The mismanagement in these contracts and the shortcomings of the Commission's oversight were unveiled during the scandal which lead to the resignation of the Santer Commission in 1999. A Committee of Independent Experts, appointed by the Parliament, found several inadequacies in the existing practice.[946] In light of these criticisms and with the aim of regaining political credibility, the Commission launched a process of internal administrative reform, proposing the outsourcing of certain "non-fundamental" support tasks in a form which allows the Commission "to retain the appropriate level of control".[947]

One of the proposed innovations was the establishment of executive agencies, bodies with separate legal personality but conceived as "an extension of the Commission itself".[948] In this way, the Commission intended to delegate "internally" some of the technical and administrative duties which are less relevant for its political responsibility.[949] Thus, the Commission was free to concentrate on its core tasks, aimed at the pursuit of the Union's objectives in line with its role and powers under the Treaty.[950]

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[942] See, *inter alia*, CRAIG Paul and DE BURCA Grainne, *EU Law. Text, Cases and Materials*, 5th ed., (Oxford University Press, 2011), p. 70.
[943] CURTIN Deirdre, *op. cit*. (2009), p. 140.
[944] Ibidem, p. 141.
[945] CURTIN Deirdre, *op. cit.* (2009), p. 141.
[946] Committee of Independent Experts, Second Report on "Reform the Commission: Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud", available at < http://www.europarl.europa.eu/experts/default_en.htm> (last accessed 20.06.2017).
[947] European Commission, Reforming the Commission - A White Paper - Part II - Action plan, COM/2000/0200 final, para. 1.
[948] CURTIN Deirdre, *op. cit*. (2009), p. 142.
[949] Ibidem, p. 143.
[950] JACQUE Jean Paul, *Droit institutionnel de l'Union européenne*, 7ème ed., (Dalloz, 2012), p. 419.

To this end, a first regulation of the executive agencies was inserted into the framework of the Financial Regulation of 2002.[951] Afterwards, the enactment of Regulation No. 58/2003[952] provided a general framework for the establishment and empowerment of the executive agencies by the Commission, regulating the scope, the tasks, the functioning, the control and the responsibility of executive agencies.[953]

3.3. Powers, Organisation and Delegation to Executive Agencies

Regulation No. 58/2003 contains the statute of executive agencies, providing clear indications to the Commission for the establishment and empowerment of these bodies. In order to "ensure uniformity of executive agencies in institutional terms",[954] structural, financial and substantive provisions are set forth with the constant concern to "stay within the limits set by the institutional system as laid out in the Treaty".[955] For this reason, a particular focus is put on the responsibilities and control of the Commission, limiting the powers of the agencies to purely managerial tasks.

3.3.1. The Establishment and Empowerment of Executive Agencies

According to Article 3, the decision to set up an executive agency lies with the Commission, with the assistance of the "Committee for Executive Agencies".[956] The decision, thus, is adopted through an examination procedure.[957] The decision establishing the executive agency shall necessarily contain the lifetime of the body, which may be extended repeatedly by Commission's decision -

[951] Article 55 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, p. 1–48. See also DUTHEIL DE LA ROCHERE Jacqueline, "EU Regulatory Agencies: What Future Do They Have?", in BULTERMAN M. *et al.* (eds.), *Views of European Law from the Mountain* (Wolters Kluwer, 2009), p. 358.
[952] Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1–8.
[953] DUTHEIL DE LA ROCHERE Jacqueline, *op. cit*. (2009), p 358.
[954] Recital 5 of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1–8.
[955] Recital 8 of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1–8.
[956] See Article 24 of Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1–8.
[957] The Regulation referred to Articles 5, 7 and 8 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23–26, which are now replaced by Articles 5, 6 and 7 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.

such as in the case of the CHAFEA and the EACEA.[958] Indeed, the executive agencies are meant to operate for the duration of the specific project and to be wound up as soon as the latter is completed.[959]

The executive agency can be entrusted with certain tasks related to the implementation of an EU programme, which may vary from the management of some or all the phases of projects,[960] to the adoption of "instruments of budget implementation" in relation to the programme,[961] as well as the gathering, analysing and transmitting the relevant information.[962] However, the executive agencies are designed to exercise limited discretion under the conditions and criteria established in the relevant empowering measures.[963] In other words, the executive agencies perform non-discretionary functions, limited to purely managerial tasks to assist the Commission in implementing programmes financed by the EU budget.[964] Yet, in their auxiliary role, they make relevant choices on the allocation of grants, awards or funding of the EU programmes.[965]

3.3.2. The Organisation of Executive Agencies

In carrying out these tasks, the executive agencies are subject to the supervision of the Commission. Unlike the decentralised agencies, the structure of the executive agencies does not envisage the involvement of representatives of Member States.[966] The Director and the Steering Committee are appointed by the Commission.[967] Moreover, the Commission performs an internal audit of the agency's activities[968] and reviews the legality of the acts adopted "which injure a third party".[969] Therefore, the Commission carries out a proper examination of the legality of the acts of the agencies and its decision may be brought before the Court of Justice via a direct action.[970]

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[958] Article 3. Four out of six executive agencies have seen their lifetime extended. The CHEFEA and the EACEA were extended twice, while the once extended EACI has been replaced by the EASME, similarly to the TEN-T EA, once extended and then replaced by INEA in 2014.
[959] CURTIN Deirdre, *op. cit.* (2009), p. 143.
[960] Article 6 (2) (a).
[961] Article 6 (2) (b).
[962] Article 6 (2) (c).
[963] Article 6 (1). See also CURTIN Deirdre, *op. cit*. (2009), p. 143.
[964] DUTHEIL DE LA ROCHERE Jacqueline, *op. cit.* (2009), p 358.
[965] CURTIN Deirdre, *op. cit. (*2009), p. 143.
[966] Ibidem, p. 143.
[967] Articles 7-11.
[968] Article 20.
[969] Pursuant to Article 22 of the Regulation, this review of the agencies' acts is activated either on the Commission's own initiative or upon the request of interested parties who are then entitled to be heard by the Commission during the proceedings. See Article 22 (1) and (2).
[970] Article 22(5). See Case T-283/12, *FIS'D v European Commission,* EU:T:2014:933; Case T-357/15 P, *Maria Luisa Garcia Minguez v European Commission*, EU:T:2015:1022. On the judicial review of agencies' acts, see Chapter 7, para. 4.

Moreover, the financial management of the executive agencies is subject to the supervision of the Court of Auditors and of the European Anti-Fraud Office (OLAF).[971] Acting on a recommendation of the Council, the Parliament grants the discharge of the budget of the agencies[972] and the general Financial Regulation adopted by the Commission applies to the executive agencies.[973]

3.3.3. A Delegation of Powers to Executive Agencies?

The picture emerging from Regulation No. 58/2003 shows an EU body which operates under the direct control and responsibility of the Commission, enjoying limited discretion and autonomy. Although endowed with legal personality, these satellite bodies appear strongly attached to the orbit of the Commission,[974] while the relationship with other institutions is limited to the extension of oversight mechanisms otherwise in force for the general control of the Commission's activities. Considering the legal mechanisms at stake in the empowerment of the executive agencies, it is questionable whether this represents a form of delegation of powers.

From this perspective, the delegator may be identified in the Commission, which establishes and empowers the executive agency with its powers.[975] The intervention of the examination committee composed of representatives of the Member States and the *droit de regard* of the Parliament do not constitute decisive elements in the delegation of the powers which are held by the Commission.[976] Accordingly, applying the concepts developed in the context of State legal systems,[977] it can be recognised that Regulation No. 58/2003 functions as a *Delegationsnorm* at the legislative level.[978] An example is given by the "LIFE" programme which provides funding to tackle environmental and climate challenges: Regulation No. 1293/2013 of the European Parliament and of the Council established the programme and conferred the powers to implement the programme on the Commission, thus setting the *Regelnorm* with an act of secondary law.[979]

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[971] Article 20(6).
[972] Article 14 (3). The discharge of the budget of executive agencies is composed of an individual discharge for their administrative budget, while the operational expenditure is part of the general discharge given to the Commission.
[973] See CURTIN Deirdre, *op. cit.* (2009), p. 144.
[974] To echo the astronomic metaphor used by CURTIN Deirdre, *op. cit*. (2009), *passim*.
[975] GRILLER Stefan and ORATOR Andreas, "Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine", 35 *European Law Review No.* 1 (2010), p. 19.
[976] See CURTIN Deirdre, *op. cit.* (2009), p. 143.
[977] See Chapter 1, para. 5.
[978] See CHAMON Merijn, *op. cit.* (2016), p. 239. The authors sees as problematic the fact that the *Delegationsnorm* is an act of secondary law, resorting to the theory conferring a higher rank to this Regulation (See C-378/00, *Commission v Parliament and Council*, EU:C:2003:42, relating to the status of the Comitology decision). However, it is arguable that the implementing powers of the Commission are attributed by way of Regulation and not by the Treaty itself, thus meaning that the *Regelnorm* is of the same rank of Regulation No 53/2003.
[979] Regulation (EU) No 1293/2013 of the European Parliament and of the Council of 11 December 2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation

Pursuant to the general authorisation to delegate its powers to executive agencies enshrined in Regulation No. 58/2003 (*Delegationsnorm)*, the Commission then delegated the powers for the management of the programme to EASME through Decision 2013/771/EU (*delegierende Norm*).[980]

However, taking a closer look at the example, we can recognise that the powers to implement the EU programmes were initially received by the Commission by way of delegation from the legislator, which brought the EU programme into being and entrusted the Commission with its implementation. Since the delegation to the executive agencies follows an upstream delegation of powers from the legislator to the Commission, it is more properly a form of *sub-delegation* from the Commission of powers which are originally vested in the legislator by the Treaties.[981] Therefore, the empowerment of the executive agencies significantly differs in structural terms from the delegation of powers to EU institutions or to decentralised agencies, positioning itself at a subordinate level in comparison to the delegation defined in secondary law.

4. The EU Decentralised Agencies

4.1. The Definition of EU Decentralised Agency

The EU decentralised agencies represent a phenomenon that is clearly distinguishable from the limited executive agencies. Indeed, for its relevance and implications for the institutional balance, the establishment and empowerment of decentralised agencies constitutes a significant innovation in EU administrative law. Nevertheless, to describe this peculiar phenomenon, different words have been used in the literature and in institutional practice, as a formal definition is still lacking.[982]

In its Communication of 2002 the Commission put forward the distinction between "executive agencies" and "regulatory agencies", indicating with the latter term the bodies which "are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector."[983] However, the labelling proposed by the Commission in 2002 was arguably

(EC) No 614/2007, OJ L 347, 20.12.2013, p. 185–208, especially Article 25: "The Commission shall implement the activities in pursuit of the general objectives set out in Article 3 of this Regulation [..]".

[980] Commission Implementing Decision 2013/771/EU of 17 December 2013 establishing the 'Executive Agency for Small and Medium-sized Enterprises' and repealing Decisions 2004/20/EC and 2007/372/EC, OJ L 341, 18.12.2013, p. 73–76, especially Article 3 (1) (b).

[981] HOFMANN Herwig C. H. and MORINI Alessandro, "Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"", 37 *European Law Review* No. 4 (2012), p. 425.

[982] CHAMON Merijn, *op. cit.* (2016), p. 6. See also GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), pp. 3-35.

[983] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 3.

misleading in relation to the nature of the powers delegated to regulatory agencies.[984] Indeed, although the regulatory agencies are often involved in the preliminary phases of rule-making and in some cases are empowered to issue binding decisions, from the same Communication it emerged that, differently from the US regulatory agencies,[985] these agencies were not really entrusted with rule-making powers. Therefore, the definition proposed by the Commission appeared as a sort of oxymoron: "a regulatory agency without regulatory powers".[986] The confusion was further increased by the Commission's identification, within the category of regulatory agencies, of a sub-category of "executive agencies", to be distinguished from the "decision-making agencies" empowered to adopt legal instruments binding on third parties.[987]

In light of this overlap and of the criticism it fostered, the Commission has recently modified its classification, opting for the name of "decentralised agencies" in juxtaposition to the "executive agencies".[988] This new title focuses on the fact that, while the executive agencies are located in Brussels or in Luxembourg, the seats of the decentralised agencies are spread out in different Member States.[989] The decentralisation, thus, refers to a geographical dimension of agencification, but it also captures the process of functional decentralisation of EU agencies within the EU executive, entrusting different bodies with various administrative tasks.[990]

In the literature, more significantly, the definition of EU agencies has been hinged on some particular features of the agencification phenomenon, on which the different authors have insisted with a varying intensity. Accordingly, the decentralised agencies have been defined as "permanent bodies under EU public law established by the institutions through secondary legislation and

[984] As noted by many authors, see, *inter alia*, CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 149; VOS Ellen, "European Agencies and the Composite EU Executive" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 19; CHAMON Merijn, *op. cit.* (2016), p. 5. See also European Parliament, Resolution on financial management and control of agencies, 23.04.2009, P6 TA (2009)074, para. 6.
[985] See, *inter alia*, CRAIG Paul and DE BURCA Grainne, *op. cit.* (2011), p. 70; CHAMON Merijn, *op. cit*. (2016), p. 7. On the powers of the US agencies, see SHAPIRO Martin, "The Problems of Independent Agencies in the United States and the European Union", 4 *Journal of European Public Policy* No. 2 (1997), pp. 276-291; STRAUSS Peter, *Administrative Justice in the United States,* II° ed. (Carolina Academic Press, 2002), pp. 131-133.
[986] MAJONE Giandomenico, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005), p. 93.
[987] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 9.
[988] See Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, and annexed Common Approach.
[989] VOS Ellen, *op. cit*. (2014), p. 20.
[990] VOS Ellen, "European Administrative Reform and Agencies", *EUI Working Papers*, RSC No. 2000/51, p. 4.

endowed with their own legal personality".[991] These bodies are "institutionally separate from the EU institutions" and enjoy "a certain degree of administrative and financial autonomy".[992]

4.1.1. Permanent Bodies

Dissecting the elements in this definition, firstly, it can be acknowledged that the decentralised agencies are established with the aim of having them as permanent parts of the EU institutional landscape. They are differentiated from the executive agencies, which are generally created for the management of EU programmes for the time necessary to accomplish the related tasks.[993] However, this does not mean that the decentralised agencies cannot be disbanded or their founding regulation cannot contain sunset or review clauses.[994]

4.1.2. Established by an Act of Secondary Law

Secondly, the agencies are adopted through an act of secondary law, either by the Council and the Parliament or by the Council alone.[995] Through this act, the EU institutions exercise the powers conferred in the Treaties and delegate their power to the newly established body. Although some of the agencies are also mentioned in the Treaties,[996] this requirement implies that the establishment, empowerment and organisational structure are defined in acts of secondary law. Therefore, these bodies are distinct from other non-majoritarian institutions and bodies established directly in primary law, such as the ECB or the European Investment Bank.[997]

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[991] CHAMON Merijn, *op. cit*. (2016), p. 9. Compare this definition with the one proposed by BUSUIOC Madalina, *op. cit.* (2013), p. 21: "Agencies are specialised, non-majoritarian bodies, established by secondary legislation, which exercise public authority and institutionally separate from the EU institutions and are endowed with legal personality".

[992] VOS Ellen, *op. cit*. (2014), p. 19.

[993] See Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs, OJ L 11, 16.1.2003, pp. 1–8.

[994] Such as in the case of ENISA, see Article 25 of Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, OJ L 77, 13.3.2004, p. 1–11; and of ECHA, see Article 75 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 396, 30.12.2006, p. 1–850. See EVERSON Michelle, *op. cit.* (1995), p. 185; SCHOLTEN Miroslava, "Independent, Hence Unaccountable? The Need for a Broader Debate on Accountability of the Executive", *Review of European Administrative Law* (2011), p. 13.

[995] VOS Ellen, *op. cit*. (2014), p. 19.

[996] See Article 42 TEU mentioning the European Defence Agency; Article 12 mentioning EUROPOL and EUROJUST.

[997] See CHAMON Merijn, *op. cit*. (2016), p. 13.

4.1.3. Under EU Public Law

In addition to the requirement of establishment through secondary law, it is worth underlining the EU public law character of the agencies. In the practice of the institutions, there are cases of delegation to bodies of private law or international law,[998] created either *ad hoc* or previously existing.[999] The most evident example in recent times is the European Financial Stability Facility (EFSF), created by the Member States of the Eurozone as a public limited liability company of Luxembourgish law, which does not fall within the definition of EU agency.[1000]

4.1.4. With Separate Legal Personality

Finally, EU agencies, both the executive and the decentralised agencies, are characterised by their separate legal personality. Each founding Regulation of an EU decentralised agency[1001] contains a provision expressly conferring "legal personality" on these bodies.[1002] This legal status is also related to the autonomy that the agencies have vis-à-vis the other institutions. However, there is no consensus on the degree of autonomy or independence[1003] that each agency should enjoy, which has been described as "relatively independent",[1004] "semi-autonomous"[1005] or "quasi-

[998] See Opinion 1/76 *(Inland Waterway Vassels)*, EU:C:1977:63.
[999] As the case of the New Approach, where the European Standardisation Bodies (CEN, CENELEC and ETSI) were existing private law organisations established under Belgian and French law. See, *inter alia*, SCHEPEL Harm, "The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law", 20 *Maastricht Journal of European and Comparative Law* (2013), pp. 521-533.
[1000] CHAMON Merijn, *op. cit.* (2016), p. 13.
[1001] An example of the clause may be Article 100 of ECHA Regulation: "The Agency shall be a body of the Community and shall have legal personality. In each Member State it shall enjoy the most extensive legal capacity accorded to legal persons under their laws. In particular it may acquire and dispose of movable and immovable property and may be a party to legal proceedings. The Agency shall be represented by its Executive Director." See Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 396, 30.12.2006, pp. 1–849.
[1002] CHAMON Merijn, *op. cit*. (2016), p. 13. In this regard, Carlo TOVO observes that the founding Regulations of CEDEFOP AND EUROFOUND did not recognise legal personality (see TOVO Carlo, *op. cit*. (2016), p. 7). However, see Article 1 of CEDEFOP regulation reads as follows: "In each of the Member States, the centre shall enjoy the most extensive legal capacity accorded to legal persons.", see Regulation (EEC) No 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training, OJ L 39, 13.2.1975, p. 1–4. See also Article 4 of Regulation (EEC) No 1365/75 of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, OJ L 139, 30.5.1975, p. 1–4.
[1003] The two terms are used interchangeably in this study, although the diversity of the notions and their use is acknowledged. On the one hand, the term "autonomy" appears to describe more precisely a relative and multifaceted situation, as argued by BUSUIOC Madalina, *op. cit.* (2013), p. 27; BUSUIOC Madalina and GROENLEER Martijn, "The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives" in EVERSON Michelle, MONDA Cosimo, VOS Ellen, *European Agencies in between Institutions and Member States*, (Wolters Kluwer, 2014); SCHOLTEN Miroslava, *op. cit*. (2011), pp. 5-44. On the other hand, the term "independence" is used in the Treaties, in the founding regulations and in the practice of EU institutions, including the Court, as remarked by VOS Ellen, "EU Agencies on the Move: Challenges Ahead", SIEPS Report No. 1 (2018), available at www.sieps.se (last accessed 22.03.2018), p. 35.
[1004] GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), p. 9.
[1005] EVERSON Michelle, *op. cit.* (1995), p. 199.

autonomous"[1006] in the literature.[1007] Although the observation of their autonomy captures a relevant aspect of the agencification phenomenon, the formal legal requirement of the separate legal personality represents a clear element to identify the category of agencies in juxtaposition to other autonomous EU bodies.[1008]

4.2. The Historical Development of Decentralised Agencies

4.2.1. The Forerunners of the EU Agencies

4.2.1.1. The "Brussels agencies"

Before the establishment of the agencies as public law bodies in the sense just defined, the EU institutions have known some seminal forms of delegation of powers to separate bodies. Although not ascribed in the agencification phenomenon for the differences in the *ratio* and institutional dynamics, they are extremely relevant for this analysis, since the judicial controversy in relation to these bodies is at the origin of principles and limits which have greatly influenced the understanding and shaping of the powers delegated to the agencies. Therefore, although the relevant principles will be analysed in the following chapters, a description of these cases is necessary to understand the historical development of agencification.

In particular, the *Meroni* case,[1009] decided in 1956 under the ECSC Treaty, represents the starting point of every reflection on the limits of the delegation of powers in the EU legal system.[1010] The facts of the case originate from the system for the equalisation of imported ferrous scrap established at the EU level by ECSC Decision No. 22/54.[1011] According to this system, the High Authority of the European Coal and Steel Community, which, pursuant to Article 53 of the ECSC

[1006] CURTIN Deirdre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", 13 *European Law Journal* No. 4 (2007), p. 523.
[1007] See CHAMON Merijn, *op. cit.* (2016), p. 14.
[1008] Such as the OLAF (see Commission Decision 1999/352 of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC (1999) 802), OJ L 136, 31.5.1999, p. 20–22) and the EEAS (see Council Decision 2010/427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201, 3.8.2010, p. 30–40).
[1009] Case 9/56, *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, EU:C:1958:7 and Case 10/56, *Meroni & Co., Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, EU:C:1958:8. These identical judgments were not joined.
[1010] It has been observed that almost every author writing about EU agencies refers to the Meroni doctrine, see CHITI Edoardo, "An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies", 46 *Common Market Law Review* (2009), p. 1420; CHAMON Merijn, "EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea", 48 *Common Market Law Review* (2011), p. 1057.
[1011] ECSC Decision No 22/54 of 26 March 1954, OJ 4 of 30.3.1954, p. 286. The compulsory equalisation system was expanded by Decision No 14/55, OJ 8 of 30.3.1955, p. 685. See Case 9/56, *Meroni, cit.,* Opinion of the Advocate General Roemer, [1958] ECR 177, p. 180.

Treaty, was conferred the power to "make any financial arrangements which it recognises to be necessary for the performance of the tasks set out in Article 3",[1012] entrusted the functioning of the equalisation arrangement to two private bodies. These were the "Joint Bureau of Scrap Consumers" and the "Imported Ferrous Scrap Equalization Fund", two companies established under Belgian law by the Community producers of pig iron and steel (the "Brussels agencies").[1013] The latter, in particular, was assigned the power to adopt, on its own authority, decisions fixing the rate of contribution of the undertakings in the relevant market, which served as a basis for the individual decisions taken by the High Authority.

4.2.1.2. The Meroni Judgment

The Italian undertaking *Meroni* challenged the individual decision taken by the High Authority, arguing, *inter alia*, that the decision was based on an illegal delegation of powers to the Brussels agencies. In adjudicating the action for annulment, the Court qualified the relationship between the High Authority and the Brussels agencies as a "true delegation of powers",[1014] which transferred the full responsibility of the decision to the delegate. In this regard, the Court held that the powers conferred on the High Authority by Article 53 ECSC Treaty also entailed the power to delegate its powers, thus recognising the possibility of delegation also without an express provision in the Treaty.

However, such a delegation "could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty" and could not exempt the delegate from the conditions applicable to the delegating authority in the absence of delegation, in particular the duty to state the reasons of the decision and the judicial review of the decisions.[1015] In the particular case, the Brussels agencies should have been "subject to precise rules so as to exclude any arbitrary decisions and to render it possible to review the data used."[1016] Moreover, the delegation of powers cannot be presumed, requiring an explicit empowerment by the delegator and the exercise of the powers shall remain subject to its supervision. Finally, the Court distinguishes between the delegation of *executive* and *discretionary* powers:

> *"The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of*

[1012] Article 53(b) of ECSC Treaty.
[1013] See Opinion of Advocate General Roemer in Cases 9/56 and 10/56, *Industrie Metallurgiche, società in accomandita semplice v High Authority of the European Coal and Steel Community*, EU:C:1958:4, p. 179.
[1014] Case 9/56, *Meroni,* EU:C:1958:7, p. 149. It is noteworthy that the Advocate General qualifies it as a "delegation of administrative powers", see*,* Opinion of the Advocate General Roemer in Case 9/56, *Meroni*, *cit.*, p. 190.
[1015] Case 9 /56, *Meroni, cit.*, p. 150.
[1016] Ibidem, p. 151.

which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility."[1017]

In case of delegation of discretionary powers, the consequent transferral of responsibility from the Commission to the private entities would entail a violation of Article 53, which reflects the "balance of powers which is characteristic of the institutional structure of the Community" and which represents "a fundamental guarantee granted by the Treaty in particular to undertakings".[1018]

This judgment, which annulled the decision of the High Authority for illegitimate delegation of powers, was decided under the specific legal framework of the ECSC Treaty and it concerned the delegation of powers to private law bodies. Moreover, the structure of the delegation was remarkably different from the delegation of powers to the EU agencies of today. The delegator was the High Authority, while the agencies are generally established and empowered by the EU legislator, *i.e.* the Council and the Parliament or the Council alone.[1019]

Nevertheless, the principles enshrined in the reasoning of the Court have cast a shadow on the development of agencification, influencing the way the literature[1020] and the institutions[1021] conceived the possibility of delegating powers in the EU legal system. As we will see, the criteria identified in relation to the Brussels agencies were often indicated as the legal limits for the powers of the agencies, thus shaping the legal and political discourse on agencification.

[1017] Case 9/56, *Meroni, cit.*, p. 152.Ibidem, p. 152.
[1018] Ibidem, p. 152.
[1019] See CHAMON Merijn, *op. cit*. (2011), p. 1058-1059.
[1020] See, *inter alia*, HOFMANN Herwig and TURK Alexander, *EU Administrative Governance* (Edward Elgar, 2006), p. 89; CRAIG Paul, *op. cit.* (2012), p. 154; JACQUE Jean Paul, *op. cit*. (2012), p. 419.
[1021] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final; C-378/00, *Commission v European Parliament and Council*, EU:C:2003:42; Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, judgment of the Court (Grand Chamber), 22 January 2014, EU:C:2014:18.

4.2.1.3. The "Administrative Commission" and the Romano Case

Further guidance emerged from the *Romano* case. This case involved a body, the Administrative Commission of the European Communities on Social Security for Migrant Workers (hereafter, "Administrative Commission"), which bears more similarities to the EU agencies.[1022] In this case, Mr Romano contested the method of calculation on pension benefits adopted by INAMI (the Belgian sickness and invalidity insurance institution), based on the Administrative Commission's decision.[1023] Behind the technical details of the case, the Advocate General recognised a "point of a constitutional nature, viz. whether it was compatible with the Treaty for the Council to confer a legislative power on the Administrative Commission".[1024] In his view, the possibility to make binding decisions "incapable of judicial review" was incompatible with the Treaty, as well as with the constitutional principles accepted in all the Member States.[1025] In a more concise reasoning, the Court found that such empowerment of the Administrative Commission was contrary to Article 155 EC Treaty concerning the delegation of powers to the Commission and to the judicial system created by the Treaty.[1026] In particular, the Council could not confer the power to "adopt acts having the force of law".[1027]

This judgment has been given different interpretations in literature, either reading it as a mere confirmation of *Meroni*[1028] or emphasising its innovative implications.[1029] For the present purposes, in light of the development of agencification, it is important to underline the

[1022] Established by Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, it was composed by Member States' representatives and expert advisers, and it constituted a body of public law set up by the Council under secondary law. Being empowered to deal with the administrative and interpretation questions arising from the application of the relevant rules, it adopted decisions relating to the calculation of pension benefits by the relevant national authorities. See CHAMON Merijn, *op. cit.* (2011), p. 1061, citing also MAAS Hermann, "The Administrative Commission of the European Communities on Social Security for Migrant Workers", 4 *Common Market Law Review* (1967), pp. 51-63.

[1023] Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, EU:C:1981:104,. The applicant was an Italian national who worked in Belgium and was entitled to an invalidity pension from the Belgian authority. Since he was entitled also for a certain period also to the Italian pension, the Belgian pension had to be correspondingly reduced of the amount already received by the Italian authority. However, the method of calculation of the amount adopted by INAMI, based on the Administrative Commission's decision, was contested by Mr Romano. In the preliminary question raised before the Court of Justice, the lawfulness of a decision of the Administrative Commission was at issue.

[1024] Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, Opinion of the Advocate General Warner, EU:C:1980:267, p. 1263.

[1025] See Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, Opinion of the Advocate General Warner, EU:C:1980:267, p. 1265.

[1026] In particular, Articles 173 and 177 EC Treaty.

[1027] Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, EU:C:1981:104, para. 20. In the French version, "actes revêtant un caractère normatif"; in the Italian one, "atti di carattere normativo".

[1028] See, *inter alia*, COMTE Françoise, "Agences européennes: relance d'une réflexion interinstitutionnelle européenne ?", *Revue du Droit de l'Union Européenne* No. 3 (2008), p. 495.

[1029] GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), pp. 3-35.

controversial character of the possibility to delegate rule-making powers to bodies other than the Commission, while the implications of the judgment and its relationship to the *Meroni* doctrine will deserve further attention.

4.2.2. The First Wave of EU Decentralised Agencies

The first EU decentralised agencies *stricto sensu* were created in the 1970s. The European Centre for the Development of Vocational Training (CEDEFOP) was established in 1975 with the task of supporting the development of European vocational education and training policies and contributing to their implementation.[1030] In the same year, the Council also established the EUROFUND, a foundation which provides knowledge to assist in the development of better social, employment and work-related policies.[1031]

In this first phase, the role of the agencies was mainly operational,[1032] consisting of the collection of data and information and in the exchange of such information and best practices among stakeholders.[1033] In this sense, although being distinct in their organisation and internal procedures from the Commission,[1034] the agencies' core task was to assist this institution in the development and implementation of its policies in a merely auxiliary role.[1035] Accordingly, these agencies were not delegated decision-making powers, but their functions were limited to simply gathering, analysing and disseminating information in their specific policy area.[1036]

[1030] Council Regulation (EEC) No 337/75 of 10 February 1975 establishing the European Centre for the Development of Vocational Training (Cedefop), *OJ* L 39, 13.2.1975.

[1031] Council Regulation (EEC) No 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, *OJ* L 139, 30.5.1975. Interestingly, in this first wave of agencification the European Monetary Cooperation Fund (EMCF) - which has been now replaced by the European Central Bank - was also founded (Council Regulation (EEC) No 907/73 of 3 April 1973 establishing a European Monetary Cooperation Fund, *OJ* L 89, 5.4.1973, p. 2–5). See CHAMON Merijn, "Les Agences de l'Union Européenne: Origin, Etat de lieux et Défis", 51 *Cahiers de droit européenne No.* 1 (2015c), p. 293.

[1032] KELEMEN Daniel and MAJONE Giandomenico, "Managing Europeanisation: The European Agencies", in PETERSON John and SHACKLETON Michael (eds.), *The Institutions of the European Union,* III ed. (OUP, 2012), p. 220.

[1033] See, for instance, Article 2 of Council Regulation (EEC) No 337/75 of 10 February 1975 establishing the European Centre for the Development of Vocational Training (Cedefop), *OJ* L 39, 13.2.1975.

[1034] See Articles 7-11 of Council Regulation (EEC) No 337/75 of 10 February 1975 establishing the European Centre for the Development of Vocational Training (Cedefop), *OJ* L 39, 13.2.1975; Articles 4-15 of Council Regulation (EEC) No 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, *OJ* L 139, 30.5.1975.

[1035] This limited role of the first agencies has been related to the characteristics of the first phase in the development of EU administrative law. Indeed, the largely prevailing model was the indirect administration, where the Member States played the main role in the implementation of EU law. See TOVO Carlo, *op. cit*. (2016), pp. 5-7; HARLOW Carol, "Three phases in the Evolution of EU Administrative Law", in CRAIG Paul and DE BURCA Grainne (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), p. 444.

[1036] In this sense, they constitute "information agencies" according to the classification of EU agencies proposed by VOS Ellen, *op. cit.* (2014), p. 21. The same category has been recognized by CHITI Edoardo, *op. cit.* (2009), p. 1403; KREHER Alexandre, "Agencies in the European Community – A Step towards

4.2.3. The Second Wave of EU Decentralised Agencies

The second phase of the development of the EU agencies corresponds to the 1990s.[1037] This decade saw a significant evolution of the EU integration process through several Treaties amendments - from the Single European Act to the Amsterdam Treaty - which expanded the competences of the EU and brought significant innovation in the institutional structure and rule-making procedures.

In particular, it has been noted that the introduction of what is now Article 114 TFEU by the Single European Act has provided the EU with a legal basis which has been broadly interpreted by the Court of Justice, allowing the adoption of measures which go beyond the strict harmonisation of national measures to the establishment of institutional structures for the management of the market.[1038] Moreover, the growing competences acquired by the Union in sensitive and complex domains, such as environmental protection[1039] and certain aspects of internal market harmonisation, is considered to have paved the way resulting in the need for more technical and scientific advice in the elaboration and implementation of EU policies.[1040]

4.2.3.1. New Agencies with More Relevant Powers

In these years, important agencies were established, such as the European Environment Agency (EEA),[1041] the Office for Harmonization in the Internal Market (OHIM)[1042] and the European

Administrative Integration in Europe", 4 *Journal of European Public Policy* No. 2 (1997), p. 236; BUSUIOC Madalina, *op. cit.* (2013), p. 38.

[1037] See, *inter alia*, CHAMON Merijn, *op. cit*. (2015c), p. 293.

[1038] Reference here is to the introduction of Article 100a EC by the Single European Act (now Article 114 TFEU) which, different to previous Article 100 EC, requires the qualified majority voting for the adoption of approximating measures. As it will be seen, this article has more recently been used as the legal basis for the establishment of certain EU agencies and this use has been upheld by the Court of Justice. See TOVO Carlo, *op. cit*. (2016), p. 8; CHAMON Merijn, "The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: comment on *United Kingdom v Parliament and Council (Short Selling)* and the Proposed Single Resolution Mechanism", 39 *European Law Review* No. 3 (2014), pp. 380-403.

[1039] Article 130r of the Single European Act.

[1040] TOVO Carlo, *op. cit.* (2016), p. 8.

[1041] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126, 21.5.2009, pp. 13–22.

[1042] Council Regulation (EC) No 40/941 of 20 December 1993 on the Community trademark, OJ L 011, 14.1.1994, p. 1. The OHIM has been renamed European Union Intellectual Property Office (EUIPO) from 23 March 2016 pursuant to Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341, 24.12.2015, pp. 21–94.

Medicines Agency (EMA).[1043] Like the first agencies, some of the bodies created in this wave[1044] were charged with the mission of data gathering, analysis and dissemination of information, providing advice and/or opinions on any scientific matter concerning their field of expertise. However, some of the "second-wave" agencies were assigned new and more far-reaching tasks, involving them more actively in the development and implementation of EU policies.

Thus, while some agencies had a key role in the assistance of the Commission in the implementation of EU programmes,[1045] others were involved in decision-making activities, either assisting the Commission in the adoption of acts or adopting decisions on individual applications themselves. Therefore, for instance, the EMA was entrusted with the task of delivering independent recommendations which the Commission has to take into account before issuing marketing authorisations for a new medicine in the internal market.[1046] Although these opinions are not binding, the Commission generally has a duty to consult the agency and to state reasons for not following their opinion.[1047] As recognised by the Court, the Commission can depart from these opinions "only on grounds of safety where it can provide an alternative, equally authoritative, contradictory opinion".[1048] Therefore, considering that the Commission rarely departs from the agencies' opinion and limits itself to "rubber-stamp" its content,[1049] it has been argued that, in these cases, the agencies exercise *de facto* decision-making powers, adopting relevant decisions "under the clock of expertise".[1050]

[1043] Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, *OJ* L 214 , 24/08/1993 pp. 1-21.

[1044] Among them, the EMCDDA (Council Regulation (EEC) No 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction, *OJ* L 36, 12.2.1993, p. 1–8) and the EU-OSHA (Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, *OJ* L 216, 20.8.1994, p. 1–7).

[1045] An example is the European Training Foundation (ETF), which contributes to the development and monitoring of the vocational training systems of the countries involved in the Instrument for Pre-Accession Assistance (IPA), the European Neighbourhood Policy (ENP) and the Development Co-operation Instrument (DCI). See Council Regulation (EEC) No 1360/90 of 7 May 1990 establishing a European Training Foundation, *OJ* L 131, 23/05/1990, pp. 1-5; recast in Regulation (EC) No 1339/2008 of the European Parliament and of the Council of 16 December 2008 establishing a European Training Foundation (recast), *OJ* L 354 of 31.12.2008, pp. 82-93. See also TOVO Carlo, *op. cit.* (2016), p. 9.

[1046] See Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, *OJ* L 214 , 24/08/1993 pp. 1-21.

[1047] See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *European Union Law. Cases and Materials,* 2nd ed. (Cambridge University Press, 2010), p. 66.

[1048] Ibidem, p. 66, cited also by BUSUIOC Madalina, *op. cit.* (2013), p. 40. See T-13/99, *Pfizer Animal Health v Council*, EU:T:2002:209.

[1049] BUSUIOC Madalina, *op. cit*. (2013), p. 40. See also DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2008), pp.789–805.

[1050] CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2010), p. 66. See also HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 243; CHITI Edoardo, "The Emergence of a Community Administration: The Case of European Agencies", 37 *Common Market Law Review* (2000), p. 336.

Conversely, the OHIM and the Community Plant Variety Office (CPVO) were entrusted with the powers to decide directly on the applications for the registration of intellectual property rights on trademarks, designs (OHIM) or plant varieties (CPVO). The function of these agencies is, thus, to apply EU rules to specific cases,[1051] and to provide services - such as registration or certification services - to third parties.[1052] To perform these functions, these agencies are formally delegated powers to adopt decisions of individual application, which are binding upon third parties.[1053]

4.2.3.2. The Rationale for the Increasing Empowerment of Agencies

The involvement of agencies in the administrative action of the EU was motivated by the technical and scientific expertise which they could bring in to the shape and implementation of the policies. In this sense, the establishment of agencies is often preceded by other initiatives of coordination between Member States' administrations,[1054] such as temporary programmes[1055] or expert committees.[1056] For these reasons, the agencies were initially perceived as a replacement of the comitology system, but later they rather took the role of previously existing scientific or advisory committees composed of scientific experts often coming from national authorities.[1057] The establishment of agencies, thus, represented an "institutionalisation" of the use of technical expertise in the exercise of public power in order to enhance the quality of law-making and the implementation of EU law.[1058]

The increasing need for an effective implementation of EU law in the expanding scope of EU competences was tackled not with the empowerment of the Commission - a solution not easily acceptable by the Member States -[1059] but with the institutionalisation and reinforcement of networks including national experts and representatives.[1060] Indeed, the peculiar organisational

[1051] VAN OOIK Ronald, "The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance", in CURTIN Deirdre and WASSELS Ramses (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005), pp. 125-152.
[1052] See VOS Ellen, *op. cit.* (2014), p. 20.
[1053] In this sense, they are "genuine decision-making agencies", as defined by GRILLER Stefan and ORATOR Andreas, op. cit. (2010), p. 14. See also VOS Ellen, *op. cit.* (2014), p. 22.
[1054] CHAMON Merijn, *op. cit.* (2015c), p. 297.
[1055] For instance, the establishment of EEA followed the temporary programme "Corine" of 1985.
[1056] See, *inter alia*, the events preceding the establishment of EFSA or the ESAs.
[1057] EVERSON Michelle and VOS Ellen, "European Agencies: What about the Institutional Balance?", *Maastricht Faculty of Law Working Paper* No. 4 (2014), p. 5; VOS Ellen, "EU Agencies: Features, Framework and Future", *Maastricht Faculty of Law Working Paper* No. 3 (2013), p. 13.
[1058] TOVO Carlo, *op. cit.* (2016), p. 11, citing CARANTA Roberto, "Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection", in CARANTA Roberto and GERBRANDY Anna (eds.), *Traditions and Change in European Administrative Law* (Europa Law Publishing, 2011), pp. 42-43.
[1059] KELEMEN Daniel R., "The Politics of 'Eurocratic' Structure and the New European Agencies", 25 *West European Politics* No. 4 (2002), p. 95.
[1060] CHITI Edoardo, *op. cit.* (2002), pp. 56-57. In this regard, Majone observed that, especially when networking with other national institutions, also the function of gathering information may have an indirect, yet effective, impact on regulation, shaping the conceptual basis for the policy decisions in a new mode of

structure of the agencies, which generally envisaged the presence of Member States' representatives on the management boards, granted stronger cooperation with the national administrations.[1061] In this regard, it has been argued that the growing functions of the EU agencies were already showing the signs of the evolution of the implementation model of EU policies, which went beyond the strict dichotomy between direct and indirect administration.[1062]

The result of this evolution was a trend of "decentralised integration",[1063] which entailed a distribution of powers among different institutional actors placed "betwixt and between" the Member States and the EU institutions.[1064] In this sense, on the one hand, the agencies are part of a process of functional decentralisation within the EU executive, entrusting different bodies with various administrative tasks.[1065] On the other hand, the EU agencies provide for a component of administrative integration, contributing to the uniform implementation of EU programmes and policies through intense cooperation between the different executive levels.[1066]

4.2.4. The Third Wave of EU Decentralised Agencies

The beginning of the 21st century was marked by a number of crises and scandals which troubled the Commission and, as a reaction, accelerated the agencification process.[1067] In this regard, the outbreak of transnational crises - such as BSE, SARS and the Prestige and Erika tanker sinking - highlighted the vulnerability of European societies and the impossibility for individual States to manage and contain these crises.[1068] At the same time, they unveiled the institutional deficiencies of EU governance, especially in relation to risk prevention and regulation.[1069] The spread of the BSE disease, in particular, shed light on several failures in the management system of the

governance defined "regulation by information", see MAJONE Giandomenico, "The New European Agencies: Regulation by Information", *Journal of European Public Policy* (1997), pp. 262-275.
[1061] CHITI Edoardo, *op. cit*. (2009), p. 1398.
[1062] See, *inter alia*, TOVO Carlo, *op. cit.* (2016), p. 9.
[1063] CHITI Edoardo, *op. cit.* (2002), p. 433.
[1064] CURTIN Deirdre, *op. cit.* (2009), p. 174. See also EVERSON Michelle, MONDA Cosimo, VOS Ellen, *op. cit.* (2014).
[1065] VOS Ellen, "European Administrative Reform and Agencies", *EUI Working Papers*, RSC No. 2000/51, p. 4.
[1066] See, *inter alia*, KREHER Alexandre, *op. cit.* (1997), pp. 241-245; CHAMON Merijn, "The Influence of Regulatory Agencies on Pluralism in European Administrative Law", 5 *Review of European Administrative law No.* 2 (2012), p. 65.
[1067] VOS Ellen, *op. cit*. (2013), p. 3.
[1068] BUSUIOC Madalina, *op. cit*. (2013), p. 32.
[1069] See, *inter alia*, VOS Ellen, *Institutional Framework of Community Health and Safety Regulation* (Hart Publishing, 1999), pp. 244-246; CURTIN Deirdre, *op. cit.* (2007), p. 527.

agricultural sector, based on advisory and comitology committees[1070] politically fostering the establishment of the European Food Safety Agency (EFSA).

4.2.4.1. A Mushrooming of EU Decentralised Agencies

In this context, the establishment and empowering of independent agencies was seen as an attractive solution to the lack of credibility and legitimacy of the Commission and of the EU's work as a whole.[1071] For the first time, agencification was thought of as part of a more general strategy for the reform of the legitimacy and accountability of the EU institutional structure.[1072] Accordingly, in the context of a broader reform of the EU executive, the delegation of powers to the agencies was conceived as a way to externalise certain tasks of a technical nature carried out by the Commission, which could thus concentrate on its core activities in a more efficient and flexible way.[1073] In its White Paper on European Governance, the Commission heralded the creation of further autonomous EU agencies in clearly defined areas to improve the application and enforcement of EU law across the Union.[1074] In its view, recourse to the agencies presented the advantage of greater expertise and technical knowledge, coupled with greater efficiency and visibility in the sectors concerned.[1075]

Consequently, in the 2000s, more than 20 new agencies were created, in a wide array of sectors, ranging from food safety (the abovementioned EFSA),[1076] to aviation safety (EASA)[1077] and gender equality (EIGE).[1078] Interestingly, the legal basis employed for the establishment of these agencies

[1070] Namely, the Scientific Committee on Foodstuffs (SCF), composed of independent scientific experts; the Standing Committee on Foodstuffs (StCF), composed of national representatives, and the Advisory Committee on Foodstuffs (ACF), composed of representatives of the various interest groups.
[1071] BUSUIOC Madalina, *op. cit.* (2013), p. 26. In the same years, the resignation of the Santer Commission, following the allegations of fraud, corruption and maladministration, seriously undermined the credibility and legitimacy of the Commission to the eyes of citizens, calling for a significant reform of the current state of affairs. See TOVO Carlo, *op. cit.* (2016), p. 10.
[1072] VOS Ellen, *op. cit.* (2014), p. 13.
[1073] European Commission, Reforming the Commission - A White Paper - Part II - Action plan, COM (2000)200 final. It is noteworthy that in this communication the Commission already envisaged the possibility to confer powers which "may go beyond purely technical activities." See also MAJONE Giandomenico, *op. cit.* (1997), pp. 262-275.
[1074] European Commission, European Governance: A White Paper, COM(2001) 428 final.
[1075] Ibidem. This reasoning echoes the "rational-choice approach" of political scientists, see EGEBERG Morten and TRONDAL Jarle, "Agencification of the European Union Administration", *TARN Working Paper 1/2016,* p. 4.
[1076] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, *OJ* L 31, 1.2.2002, p. 1–24.
[1077] Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, *OJ* L 240, 7.9.2002, p. 1–21.
[1078] Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, *OJ* L 403, 30.12.2006, p. 9–17.

was no longer the flexibility clause,[1079] but the legal bases for the specific policies, especially Article 114 TFEU.[1080] Such a shift in the practice was not uncontroversial from a legal perspective,[1081] but it represented a relevant change as the Member States somehow gave up their full control on agencification, granted by the unanimity requirement of Article 352 TFEU, accepting to adopt such institutional arrangements also by qualified majority voting.[1082] In addition, this implied a more relevant involvement of the Parliament in setting up the agencies, in parallel with its increasing legislative and budgetary capacity as co-legislator.[1083]

4.2.4.2. The "Council agencies"

In those years, the agencification process not only concerned the traditional sectors of the so-called first pillar, but it also reached out to the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs cooperation (JHA).[1084] In the area of the so-called second pillar, the EUISS[1085] and SatCen[1086] were created in 2001, while the EDA was established 2004 as an intergovernmental agency of the Council of the European Union. In the area of the third-pillar, the need to improve the coordination and the collaboration among national authorities to tackle common challenges[1087] in criminal and judicial matters led to the establishment of the CEPOL,[1088] the EUROJUST[1089] and the EUROPOL. Interestingly, EUROPOL was established pursuant to a Convention between Member States and it was brought within the EU framework only in 2010.[1090] These agencies, created by Council initiatives, are often referred to as the "Council agencies".[1091]

[1079] Now Article 352 TFEU. In particular, the Council's Legal Service considered that this was the only appropriate legal basis, see VOS Ellen, *op. cit.* (2014), p. 21.
[1080] CHAMON Merijn, *op. cit.* (2016), p. 140.
[1081] The issues raised by the delegation on the basis of policy-specific provisions will be analysed in detail in Chapter 4, para. 2.2.
[1082] CHAMON Merijn, *op. cit.* (2016), p. 152.
[1083] On the increasing involvement of the Parliament with decentralised agencies, see JACOBS Francis, "EU Agencies and the European Parliament" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 201-228.
[1084] TOVO Carlo, *op. cit.* (2016), p. 13.
[1085] Council Joint Action of 20 July 2001 on the establishment of a European Union Institute for Security Studies, *OJ* L 200, 25.7.2001, pp. 1–4.
[1086] Council Joint Action of 20 July 2001 on the establishment of a European Union Satellite Centre, *OJ* L 200, 25.7.2001, pp. 5–11.
[1087] BUSUIOC Madalina, *op. cit.* (2013), p. 29.
[1088] Council Decision of 22 December 2000 establishing a European Police College (CEPOL), *OJ* L 336, 30.12.2000, pp. 1–3. Since 1 July 2016, CEPOL's official name is "The European Union Agency for Law Enforcement Training", see Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA, *OJ* L 319, 4.12.2015, p. 1–20.
[1089] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), *OJ* L 063 , 06.03.2002 pp. 1-13.
[1090] See Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316, 27.11.1995, p. 1; Council Decision of 6 April 2009 establishing the European Police Office (Europol)(2009/371/JHA), *OJ* L 121, 15.5.2009, pp. 37-66.
[1091] See CRAIG Paul, *op. cit.* (2012), p. 147.

4.2.4.3. The Institutional Reactions

While the mushrooming of EU agencies was generally welcomed in the light of their advantages in terms of technical expertise and flexibility, some doubts on the legitimacy of these non-majoritarian bodies were raised.[1092] The lack of an express legal basis for agencification in the Treaties,[1093] the difficult distinction between technical contribution and policy choices,[1094] as well as the issues of independence,[1095] transparency and accountability[1096] of such entities were seen as problematic, raising severe concerns on the place of agencies within the EU institutional framework.[1097] These concerns were reflected in the emerging awareness of the need for a clear legal framework regulating the delegation of powers to these bodies, which had become an integral part of the EU's institutional structure.

In this respect, already in the White Paper on European Governance the Commission spelled out some conditions for the delegation to EU agencies in order to "respect [...] the balance of powers between the Institutions and do [...] not impinge on their respective roles and powers".[1098] According to the Commission, it would be an inadmissible choice entrusting the agencies with powers "to adopt general regulatory measures" or "to arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments".[1099] Moreover, it expressed the need that, in exercising their powers, the agencies should be effectively supervised and controlled.[1100]

4.2.4.4. Communication on the Operating Framework for the European Agencies

The legal framework applicable to the EU agencies was further clarified in the Commission's Communication on the operating framework for the European Agencies in 2002.[1101] In this

[1092] See, *inter alia*, EVERSON Michelle, *op. cit.* (1995), pp. 180-204; GRILLER Stephan and ORATOR Andreas, "Empowering European Agencies – or How to Tame the Sorcerer's Apprentice", *NewGov policy brief No.* 22 (2008), available at < http://www.eu-newgov.org/database> (last accessed 02.06.2017).
[1093] LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), pp. 23-49.
[1094] SHAPIRO Martin, *op. cit*. (1997), pp. 276-291.
[1095] EVERSON Michelle, *op. cit. (*1995), pp. 180-204.
[1096] BUSUIOC Madalina, *op. cit.* (2013).
[1097] See VOS Ellen, *op. cit.* (2014), p. 16.
[1098] European Commission, European Governance: A White Paper, COM(2001) 428 final, p. 23.
[1099] Ibidem.
[1100] Ibidem.
[1101] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final. This communication is recognised by the Parliament to start finally shaping "a legislative regulatory framework for the externalisation of tasks incumbent upon the Commission in the form of agencies", see European Parliament resolution on the communication from the Commission: The operating framework for the European regulatory agencies (COM(2002) 718 - 2003/2089(INI)), *OJ* C 92E , 16.4.2004, p. 119–124. However, the limits to the delegation of powers to the Agencies, mainly recalling the conditions set forth in *Meroni*, were also mentioned in Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget

document, the Commission outlined its vision on the creation and functioning of the agencies, proposing a model for the future development of agencies in line with the limitations of the *Meroni* doctrine. For the purpose of this study, it is particularly noteworthy that the Commission stressed the centrality of the legislator's choice to create a new agency, considering the establishment and empowerment of the agency as a delegation of powers from the legislator to this new public entity.[1102] At the same time, although recognising the role of the delegator in the Parliament and the Council, it gave great importance to the control exercised by the Commission over the agencies in pursuit of the preservation of "the unity and integrity of the executive function at European level".[1103] From its perspective, the Commission, being the "institution normally responsible for the executive function", bears the responsibility for the general exercise of that function, thus necessarily assuming an oversight role in relation to these executive bodies.[1104] In other words, institutional balance and other political considerations motivated the introduction of control mechanisms by the Commission, despite the fact that it was not seen as the formal delegator of the powers assigned to the agencies.

Overall, albeit praising the independence and technical expertise of agencies' work, the Commission appeared eager to reaffirm its leading role within the executive activities of the EU against the risk of being overshadowed by the increasing success of these new bodies. While the Commission appeared more in favour of the creation of agencies during the second wave of agencification - when it would have been difficult for the Commission to receive further powers[1105] - during the third wave it started to see the agencies as potential competitors in the leading executive role.[1106]

This emphasis placed by the Commission on the "unity and integrity of the executive function" has also been related to the debate which was ongoing within the Convention on the Future of Europe.[1107] The Commission was struggling to obtain to be the sole responsibility for the

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of the European Communities, *OJ* L 248, 16.9.2002, p. 1–48; and Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ* L 357, 31.12.2002, p. 72–90

[1102] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 5. This view was shared by the Parliament, see European Parliament, Resolution on the typology of acts and the hierarchy of legislation in the European Union (2002/2140(INI)), *OJ* C 31E of 17.12.2002 pp. 126-134.

[1103] European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final, p. 5.

[1104] Ibidem, p. 6.

[1105] See DEHOUSSE Renaud, "The Politics of Delegation in the European Union", *Les Cahiers européens de Sciences Po*, No. 4 (2013), p. 12.

[1106] DUTHEIL DE LA ROCHERE Jacqueline, "EU Regulatory Agencies: What Future Do They Have?", in BULTERMAN M. *et al.* (ed.)*, Views of European Law from the Mountain* (Wolters Kluwer, 2009), p. 357.

[1107] See CRAIG Paul, *op. cit.* (2012), p. 156.

implementation of EU law at the EU level, divesting the Council of its executive powers in the Constitution.[1108] Therefore, while maintaining its positive approach in the agencification process,[1109] the 2002 Communication can be seen as an attempt to strongly emphasise the location of the executive power as being in the hands of the Commission, to ensure continued unity and integrity that had become increasingly fragmented due to the sharing of the implementing powers with the Council and the agencification process.[1110]

4.2.4.5. The Proposal for an Interinstitutional Agreement of 2005

The reflection on the establishment of a common legal framework for the agencies was further elaborated on in a proposal by the European Commission for an Interinstitutional Agreement.[1111] Taking stock of the diversity of the existing agencies, set up on a case-by-case basis to meet specific needs, in the 2005 draft text the Commission proposed "to establish a horizontal framework for the creation, structure, operation, evaluation and control of European regulatory agencies".[1112] In this framework, in the case of agencies adopting individual decisions that are legally binding on third parties, direct executive responsibility was recognised for the agencies, whose powers, in any case, could not extend to the adoption of general regulatory measures, to the exercise of political discretion or to the exercise of powers conferred directly on the Commission by the Treaties.[1113]

The proposal was received positively by the Parliament,[1114] but the opposition of the Council resulted in the failure to reach an agreement between the institutions.[1115] In particular, the Council opposed the use of an interinstitutional agreement, considering that it was an unsuitable legal instrument for establishing an operating framework for the agencies.[1116] In its view, a modification of primary law was necessary.[1117] However, it is clear that such a position was also

[1108] See *supra* Chapter 2, para. 2.7.
[1109] *Contra* TOVO Carlo, *op. cit*. (2016), p. 16.
[1110] CRAIG Paul, *op. cit*. (2012), p. 156. On the fragmentation of the EU executive power, see CURTIN Deirdre, *op. cit.* (2009).
[1111] Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM/2005/0059 final.
[1112] Articles 1 and 2 of the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM/2005/0059 final.
[1113] Articles 4 and 5 of the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM/2005/0059 final.
[1114] See European Parliament, Resolution on the Draft Interinstitutional Agreement presented by the Commission on the operating framework for the European regulatory agencies, OJ C 285E of 22.11.2006, p. 126-126.
[1115] See TOVO Carlo, *op. cit*. (2016), p. 16.
[1116] Communication from the Commission to the European Parliament and the Council - European agencies – The way forward, COM/2008/0135 final, p. 6.
[1117] See Council Opinion 7861/05 of the Legal Service on the Draft Inter-Institutional Agreement on the operating framework for the European Regulatory Agencies, paras. 5-10. Other difficulties highlighted by the Council concerned the question of the localisation of new regulatory agencies without the agreement of

motivated by political considerations, aiming at avoiding binding constraints in establishing and shaping new agencies and their organisation.[1118]

In the aftermath of the failed agreement with the Council, the Commission decided to re-launch the debate on the role of agencies and their place in the governance of the EU. Therefore, in its Communication of 2008 it proposed to withdraw the initial proposal and to start an inter-institutional discussion which should possibly lead to a common approach.[1119] Considering the agencification as an "established part [...] of the institutional landscape of the Union", the Commission insisted on the need for an "overall vision of the place of agencies in the Union" shared between the EU institutions.[1120] For this purpose, in particular, an interinstitutional working group was established with the objective of creating political understanding in relation to the agencies in order to define a common framework for their operation. Moreover, the Commission committed to refrain from proposing new regulatory agencies until a horizontal evaluation of existing regulatory agencies had taken place, thus putting an end to the agencification escalation.[1121]

4.2.5. The Lisbon Treaty

4.2.5.1. The Recognition of EU Agencies in Primary Law

The entering into force of the Lisbon Treaty represented a significant step in the institutionalisation of EU agencies.[1122] In an overall reorganisation of the institutional framework of the Union, the term "agencies" was inserted into the text of the Treaties next to the "institutions, bodies, offices" of the Union.[1123] In particular, the agencies are mentioned in primary law in two groups of provisions.[1124]

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all Member States and the question of the composition of the administrative board and designation of the director, see DUTHEIL DE LA ROCHERE Jacqueline, *op. cit*. (2009), p. 361.

[1118] See TOVO Carlo, *op. cit.* (2016), p. 18.

[1119] Communication from the Commission to the European Parliament and the Council - European agencies – The way forward, COM/2008/0135 final, p. 6. See COMTE Françoise, "Agences européennes: relance d'une réflexion interinstitutionnelle européenne?", *Revue du Droit de l'Union Européenne* No. 3 (2008), pp. 461-506.

[1120] Communication from the Commission to the European Parliament and the Council - European agencies – The way forward, COM/2008/0135 final, p. 2.

[1121] Ibidem, p. 10. See also EVERSON Michelle and VOS Ellen, *op. cit*. (2014), p. 8.

[1122] *Sic* CURTIN Deirdre, *op. cit*. (2009), p. 146. The extent and meaning of this recognition in the Lisbon Treaty will be analysed *infra*.

[1123] In other language versions of the Treaties the reference to the agencies is less apparent (for instance in Italian, "istituzioni, organi e organismi"; in French, "institutions, organes et organismes"; in German, "Organe, Einrichtungen und sonstigen Stellen"; the Spanish, "instituciones, órganos y organismos de la Unión"), but neverthless undisputed.

[1124] As divided by TOVO Carlo, *op. cit*. (2016), p. 24.

Firstly, the provisions on transparency and participation are now expressly applicable to the agencies. Thus, pursuant to Article 15 TFUE "the Union institutions, bodies, offices and *agencies* shall conduct their work as openly as possible", granting a right of access to their documents.[1125] In all their activities, the agencies shall observe the principle of the equality, paying equal attention to the citizens.[1126] More in general, the agencies are granted the support of "an open, efficient and independent European administration".[1127] In this sense, being part of the institutional architecture of the EU, the agencies shall comply with the same requirements of transparency and good administration which inform the activities of the institutions.

Secondly, the agencies are subject to a certain number of provisions relating to the administrative, financial and judicial control of their acts. Therefore, with reference to the administrative and financial controls, the European Ombudsman is entitled to receive complaints concerning instances of maladministration in the activities of the agencies,[1128] whereas the Court of Auditors has the power to examine the accounts of all the revenue and expenditure of the agencies, thus exercising financial oversight in relation to their activities.[1129] The financial interests of the Union are also safeguarded by the provisions to counter fraud and any other illegal activities, which applies to the activities carried out by the agencies.[1130] Moreover, as will be seen in detail,[1131] it is expressly mentioned that the Court of Justice has jurisdiction over EU agencies in relation to their acts intended to produce legal effects *vis-à-vis* third parties,[1132] also in relation to the preliminary ruling procedure for the interpretation of EU acts,[1133] for plea of illegality[1134] and failure to act.[1135]

4.2.5.2. An Unfinished Constitutionalisation

The insertion of the express mention in the text of the Treaties, although only in the described provisions, has been read as an indirect "constitutionalisation" of the powers exercised by the agencies.[1136] Indeed, in recognising that the EU agencies are subject to the jurisdiction of the Court and to the principles of good governance in the same way as the institutions, the Lisbon Treaty

[1125] Article 15 TFEU, emphasis added. See also Article 16 TFEU on data protection.
[1126] Article 9 TEU
[1127] Article 298 TFEU.
[1128] Article 228 TFEU.
[1129] Article 287 TFEU.
[1130] Article 325 TFEU.
[1131] Chapter 6, para. 4.5.
[1132] Article 263(1) TFEU.
[1133] Article 267 TFEU.
[1134] Article 277 TFEU.
[1135] Article 265 TFEU.
[1136] EVERSON Michelle and VOS Ellen, *op. cit.* (2014), p. 15; CLEMENT-WILZ Laure, "Les agences de l'Union européenne dans l'entre-duex constitutionnel", *Revue trimestrielle de droit européen* (2015), p. 343. See Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18.

has strengthened the position of EU agencies as part of the EU executive.[1137] However, as we will discuss in detail in this study, this constitutionalisation appears incomplete.

In this regard, it is important to recall that the attempts to introduce a specific provision on the delegation of powers to EU agencies date back to the 1990s.[1138] However, already in the Nice Intergovernmental Conference it was not possible to obtain sufficient consensus. The controversial Penelope project had the same fate during the discussions for the Constitution for Europe.[1139] Hence, also in the negotiations leading up to the Lisbon Treaty, did not result in any general provision on agencies being inserted into primary law. Therefore, the delegation of powers to EU agencies still does not have a specific legal basis in the Treaties, as the Treaties do not regulate the establishment, the mandate nor the role of these bodies in the institutional structure.[1140] The EU agencies are not even mentioned among the institutions in Title III TEU.

More remarkably, the agencies are not mentioned in the articles most related to delegation and to the composite EU executive of which the agencies nowadays constitute an essential part. This omission appears even more extraordinary considering that, during the Convention on the Future of Europe, the Parliament adopted a Resolution on the hierarchy of norms in EU acts where it specifically recommended the addition of agencies in what is now Article 291 TFEU as bodies also exercising implementing powers.[1141] This, however, was not taken into account by the drafters of the Treaty, probably more influenced in the reform by the unitary concept of the EU executive power brought forward by the Commission, for instance, in its White Paper on European Governance.[1142] Therefore, the acts adopted by the agencies do not appear in the categorisation of

[1137] VOS Ellen, *op. cit.* (2014), p. 41.
[1138] See the proposed Article 256a: "[w]here this appears necessary in order to carry out any of the activities provided for in Article 3, the Council, acting in accordance with the procedure laid down in Article 251, shall establish an agency having legal personality and confer on it powers to implement the rules which the Council lays down, without prejudice to Article 202.", as reported in VOS Ellen, *op. cit*. (2014), p. 42.
[1139] The text of the Penelope project, promoted by the President of the Commission but never adopted by the College, contained a chapter on agencies. Article 71 read as follows: "1. Dans l'exercice de la fonction exécutive, la Commission peut être assistée par des agences. Ces agences peuvent être chargées d'exécuter des tâches de gestion des programmes de l'Union ou de fournir une expertise scientifique. Ces agences peuvent également être chargées de prendre des décisions pour l'application des lois. 2. Les agences sont instituées conformément aux principes établis par une loi organique qui en détermine les structures, les règles de fonctionnement, les pouvoirs, les responsabilités et les contrôles auxquels elles sont soumis *(sic)*.", DUTHEIL DE LA ROCHERE Jacqueline, *op. cit.* (2009), p. 359. See also VOS Ellen, "Agencies and the European Union", in ZWART Tom and VERHEY Luc (eds.), *Agencies in European and Comparative Law,* (Intersentia, 2003), p. 128.
[1140] TOVO Carlo, *op. cit*. (2016), p. 24.
[1141] European Parliament, Resolution on the typology of acts and the hierarchy of legislation in the European Union (2002/2140(INI)), OJ C 31E of 17.12.2004 pp. 126-134. See also CHAMON Merijn, *op. cit.* (2016), p. 130.
[1142] VOS Ellen, *op. cit.* (2014), p. 43; EVERSON Michelle and VOS Ellen, "Unfinished Constitutionalisation: The Politicised Agency Administration and Its Consequences", *Paper presented at the TARN Conference* (Florence, 10-11/11/2016), p. 14.

non-legislative secondary acts contained in Articles 290 and 291 TFEU.[1143] The implications of this "constitutional neglect"[1144] of the position of the agencies within the reality of the EU institutional structure deserves further reflection, especially with regard to the position of these acts within the hierarchy of norms and the legality of the delegation of powers to these entities.[1145]

4.2.6. The Fourth Wave

Despite the moratorium of the Commission, new EU agencies were established after the publication of the Communication of 2008.[1146] These agencies, established in the legal and political context innovated by the Lisbon Treaty, constitute a fourth wave of agencification, characterised by a significant strengthening of the delegated powers.[1147]

Among the new agencies created, are the ACER[1148] and the BEREC,[1149] operating in the energy and communication markets. The structure of these agencies, originating from the cooperation between national authorities and maintaining some aspects of the preceding network model, presents some peculiarities which have led some authors to describe them as "network agencies".[1150] Moreover, it is remarkable that, while the third wave agencies were established mainly in fields of risk regulation or in connection with social aspects of market regulation (so-called "social regulation"), the fourth wave agencies seem to be linked to the regulation of sensitive economic areas (so-called "economic regulation").[1151]

4.2.7. The Establishment of the ESAs

The financial sector certainly also represents one of these sensitive economic areas, which has seen the creation of the most powerful agencies in recent times. In the aftermath of the financial

[1143] EVERSON Michelle and VOS Ellen, *op. cit.* (2014), p. 17.
[1144] EVERSON Michelle and VOS Ellen, *op. cit.* (2014), p. 18.
[1145] See Chapter 6, para. 3.5.
[1146] See TOVO Carlo, *op. cit.* (2016), p. 20.
[1147] CHAMON Merijn, *op. cit.* (2015c), p. 295.
[1148] See Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1–14.
[1149] Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, p. 1–10. See also KOENIG Christian, LOETZ Sascha and FECHTNER Sonja, "Do We Really Need a European Agency for Market Regulation?", *Intereconomics* (2008), pp. 226-235.
[1150] See, *inter alia*, ZINZANI Marco, *Market integration through 'network governance': the role of European agencies and networks of regulators*, (Intersentia, 2012), pp. 41-42; ZINZANI Marco, "Towards a new Agency Model? The Example of Telecommunications" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 145-172; TOVO Carlo, *op. cit.* (2016), p. 22.
[1151] See TOVO Carlo, *op. cit*. (2016), pp. 20-21; CHAMON Merijn, *op. cit.* (2011), p. 1056; CHAMON Merijn, *op. cit.* (2014), p. 380.

crisis which began in the US in 2007,[1152] the existing and supervisory framework was found to be insufficient to manage the problems created by the increasing transnational dimension of the European financial sector.[1153] Indeed, the Lamfalussy system of committees[1154] proved to be inadequate to tackle the risks of the financial crisis and its spillover effects, calling for an institutional reform of financial supervision and regulation in the EU.[1155]

Following the Larosière report, the Commission proposed a legislative package aiming at the creation of a European system of financial supervisors (ESFS), institutionally composed of a European Systemic Risk Board (ESRB)[1156] and three European Supervisory Authorities (ESAs) responsible for micro-prudential supervision.[1157] These Regulations entered into force in 2011 and thus established three new agencies, namely the European Banking Authority (EBA),[1158] the

[1152] On the political and economic background, see, *inter alia*, WOLFERS Benedikt and VOLAND Thomas, "Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank", 51 *Common Market Law Review* (2014), pp. 1463-1464.

[1153] See Report of the High level group on financial supervision in the EU, chaired by Jacques de Larosière, of 25 February 2009, available at <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf> (last accessed 10.06.2017).

[1154] As described in Chapter 2, para. 2.7.1, the so-called Lamfalussy system is a specific EU regulatory process in financial services first introduced in 2001, which includes a four-level institutional architecture: (i) Level 1 consists of the adoption of basic laws through the co-decision procedure; (ii) Level 2 consists of the adoption of implementing measures by the Commission; (iii) Level 3 foresees the assistance of committees of national supervisors; and (iv) Level 4 entails a stronger role for the Commission in ensuring the correct enforcement of EU rules. The financial crisis highlighted the shortcomings of the Level 3 committees (devoid of binding powers and lacking accountability, transparency and independence) which were used until that date. See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Alexandre Lamfalussy, of 15 February 2001, available at <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> (last accessed 10.06.2017).

[1155] LO SCHIAVO Gianni, "The European Supervisory Authorities: A True Evolutionary Step along the Process on European Financial Integration?", *Paper presented at the Conference at Vilnius University Faculty of Law*, 25-26 of April 2013 < http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Schiavo.pdf > (last accessed 08.08.2016), p. 295.

[1156] See Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ L 331, 15.12.2010, p. 1–11; Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331, 15.12.2010, p. 162–164.

[1157] LO SCHIAVO Gianni, *op. cit.* (2013), p. 294.

[1158] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12–47.

European Securities and Markets Authority (ESMA)[1159] and the European Insurance and Occupational Pensions Authority (EIOPA).[1160]

These agencies are conceived of as an "integrated network of national and EU supervisory authorities"[1161] and their rules of governance do not differ from the traditional agency structure.[1162] However, they enjoy powers of an unprecedentedly far-reaching character.[1163] To give an overview of their powers, firstly, their role in the preparation of technical standards can be mentioned. They may propose regulatory or implementing technical standards, which the Commission will adopt in the form of delegated or implementing acts.[1164] The Commission can reject or amend the proposed standards only "in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets",[1165] relying as a rule on the preparatory work of the agency. Secondly, the ESAs can adopt guidelines and recommendations, addressed to competent authorities or market actors.[1166] Although they are soft law measures, the addressees "shall make every effort to comply" and must give reasons for their failure to comply.[1167] Thirdly, significant direct intervention powers are attributed to these agencies in their supervisory role both in emergency circumstances[1168] and in the day-to-day supervision of the market.[1169]

[1159] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

[1160] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48–83.

[1161] Recital 9 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12–47.

[1162] LO SCHIAVO Gianni, *op. cit*. (2013), p. 296.

[1163] See, *inter alia*, SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The ESMA-Short Selling Case. Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants", 41 *Legal Issues of Economic Integration* No. 4 (2014), p. 392. For a detailed analysis of the powers with reference to ESMA, see SCHAMMO Pierre, "The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers", 48 *Common Market Law Review* (2011), pp. 1879-1913; with reference to EBA, see LO SCHIAVO Gianni, *op. cit.* (2013), p. 294.

[1164] See, for instance, Articles 8-15 of ESMA Regulation.

[1165] Recital 23 of EBA Regulation. See also Recitals 23 and 24 of ESMA Regulation. Criticism on the compatibility of these provisions with Articles 290 and 291 TFEU have been expressed by CHAMON Merijn, *op. cit.* (2011), pp. 1068-1070; SCHAMMO Pierre, *op. cit.* (2011), p. 1883.

[1166] See, for instance, Article 16 of ESMA Regulation.

[1167] Article 16(3) of ESMA Regulation.

[1168] See, for instance, Article 18 of ESMA Regulation.

[1169] The day-to-day supervision is in principle of Member States' competence according to the principle of home country control, but in relation to credit rating agencies (CRA) Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies (OJ L 145, 31.5.2011, p. 30–56) has conferred the task on ESMA to register EU-based CRAs

Successive Regulations have strengthened the supervisory role of ESMA in the securities and financial sector, conferring further powers on it to intervene in the market.[1170] In particular, Article 28 of Regulation No. 236/2012 gave ESMA the power to adopt a legally binding decision addressed to a specific financial market participant or "prohibit[ing,] or impos[ing] conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument".[1171] Therefore, the agency potentially can takes measures of general application where it considers that the particular circumstances justify the intervention.[1172]

This specific empowerment triggered the controversy in Case C-270/12 (*Short Selling*) in which the UK contested the legality of the Short Selling Regulation.[1173] The UK government, after having lost the political game in the adoption of the Short Selling Regulation, challenged its compliance with the *Meroni* and *Romano* doctrine, as well as with Articles 290 and 291 TFEU.[1174] The outcome of the case, and especially the reasoning of the Court, marks a fundamental step in the judicial approach to the limits of the delegation of powers, allowing greater room for manoeuvre to the agencies.[1175]

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and to ensure their compliance to the Regulation, with powers to investigate and sanction. See SCHAMMO Pierre, *op. cit*. (2011), p. 188.

[1170] See, *inter alia*, Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30–56; Regulation EU No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27/7/2012, p. 1; Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24. For an assessment of ESMA powers, see, *inter alia*, TRIDIMAS Takis, "Financial Supervision and Agency Power: Reflections on ESMA", N. Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union*, (Oxford University Press, 2012) pp. 55-83.

[1171] Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

[1172] SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), p. 393; BONICHOT Jean-Claude, "A propos de l'attribution du pouvoir réglementaire à l'Autorité européenne des marches financiers", 30 *Revue français de droit administratif No.* 2 (2014), pp. 325-330.

[1173] Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18.

[1174] Ibidem. A fifth argument of applicant concerned the legal basis on which the Regulation was adopted, *i.e*. Article 114 TFEU.

[1175] The comments on the case are abundant. See, *inter alia*, BERGSTROM Carl Fredrik, "Shaping the New System for Delegation of Powers to EU Agencies: *United Kingdom v European Parliament and Council (Short Selling)*", 52 *Common Market Law Review* (2015), pp. 219-242; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), pp. 389-406; PELKMANS Jacques and SIMONCINI Marta, "Mellowing Meroni: How ESMA Can Help Build the Single Market", *CEPS Commentary*, 18 February 2014; CHAMON Merijn, *op. cit.* (2014), pp. 380-403; ADAMSKI Dariusz, "The ESMA Doctrine: A Constitutional Revolution and the Economies of Delegation", 39 *European Law Review* (2014), pp. 812-834; ALBERTI Jacopo, "Delegation of Powers to EU Agencies after the Short Selling Ruling", *Il Diritto dell'Unione Europea No.* 2 (2015), pp. 451-492; SZEGEDI Laszlo, "EU-Level Market Surveillance and Regulation by EU Agencies in Light of the Reshaped Meroni Docrine", *European Networks Law and Regulation Quarterly* No. 4 (2014), pp. 298-304. For the relevance of the principles enunciated in the constitutional debate on the delegation of powers, the limits identified in the judgment will be analysed in detail in the following chapters.

4.2.8. The Common Approach on Decentralised Agencies

As announced in the 2008 Communication of the Commission, the Parliament, the Council and the Commission entered into an inter-institutional dialogue on a common vision for EU agencies that led to the establishment of a Common Approach of a non-legally binding character, which represents the first political agreement on EU decentralised agencies between the three institutions. The agreement, however, excludes from its scope the agencies operating in the CFSP field and the executive agencies.[1176]

Recognising the role of decentralised agencies in implementing the policies of the EU and their position as "an established part of the way the EU operates",[1177] the Common Approach presents a harmonised framework for the creation, structure and operation of these agencies.[1178] On the whole, with the exception of the introduction of the alarm/warning system[1179] and the recommendation to insert "a sunset or a review clause" in the agencies' founding regulations,[1180] the framework emerging from the Common Approach does not seem to be particularly innovative, failing to address the most problematic aspects of the delegation of powers to EU agencies.[1181] As remarked by the Parliament: "the lengthy work of the Interinstitutional Working Group has led to a rather modest outcome",[1182] disappointing the expectations of a more ambitious vision on the future role of the agencies in the EU institutional structure. Indeed, it represents "a half-hearted

[1176] Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, p. 1.
[1177] Ibidem.
[1178] It includes requirements on funding, budgetary, supervision, and management aspects. See Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, p. 1.
[1179] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, point 59.
[1180] An example what constitutes a "review clause" is provided in the ENISA founding regulation, Article 25 of Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, OJ L 77, 13.3.2004, p. 1–11: "1. By 17 March 2007, the Commission, taking into account the views of all relevant stakeholders, shall carry out an evaluation on the basis of the terms of reference agreed with the Management Board. The Commission shall undertake the evaluation, notably with the aim to determine whether the duration of the Agency should be extended beyond the period specified in Article 27. 2. The evaluation shall assess the impact of the Agency on achieving its objectives and tasks, as well as its working practices and envisage, if necessary, the appropriate proposals. 3. The Management Board shall receive a report on the evaluation and issue recommendations regarding eventual appropriate changes to this Regulation to the Commission. Both the evaluation findings and recommendations shall be forwarded by the Commission to the European Parliament and the Council and shall be made public." See Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, p. 3.
[1181] See TOVO Carlo, *op. cit*. (2016), p. 27; BERNARD Elsa, *op. cit.* (2012), p. 430.
[1182] Resolution of the European Parliament of 17 April 2013 on discharge in respect of the implementation of the budget of the European Union Agencies for the financial year 2011: performance, financial management and control, OJ L 308, 16.11.2013, p. 374–384, para. 49.

codification of existing practice",[1183] partially restating the arrangements developed in these years of agencification[1184] and leaving unanswered certain challenging questions, such as the democratic accountability of self-financing agencies.[1185]

In particular, it is remarkable that the role and the position of decentralised agencies in the EU's institutional architecture remains unclear. Firstly, while the agencies are seen as independent bodies, strong emphasis is put on their auxiliary role in relation to the other institutions[1186] and the provision of the oversight institutional arrangements, *in primis* the alert/warning system, appears at odds with their institutional autonomy.[1187] Secondly, although the 2008 Communication listed the regulatory tasks of the agencies among the issues to be tackled in the interinstitutional dialogue,[1188] in the Common Approach there is no mention of the delegation of powers nor of its limits.[1189] This arguably illustrates the disagreement of the other institutions with the Commission's vision of a unitary executive, whereby the Commission itself is in the driving seat with regard to implementation. At the same time, it reveals the unwillingness of the legislator to see its discretion on these matters as being limited, even by a non-binding act.

4.2.9. The Recent Developments in the Delegation to Decentralised Agencies

In recent years, the creation of EU agencies has been significantly influenced by the described judicial and political developments. The Commission has followed up on its commitments in the Common Approach,[1190] by issuing proposals for the revision of existing regulations or for the

[1183] CHAMON Merijn, *op. cit.* (2016), p. 53. See also CHAMON Merijn, *op. cit*. (2014), p. 382; TOVO Carlo, *op. cit*. (2016), p. 27.
[1184] Such as the composition of the Management Boards (point 10), the international relations of EU agencies (point 8) and the rationalisation of their resources (point 2). See Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012.
[1185] See, *inter alia*, SCHOLTEN Miroslava, "The Newly Released 'Common Approach' on EU Agencies: Going Forward or Standing Still?", 19 *Columbia Journal of European Law* No. 1 (2012), pp. 3-4; CHAMON Merijn, *op. cit.* (2016), p. 53
[1186] Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, p. 1.
[1187] SCHOLTEN Miroslava, *op. cit.* (2012), p. 4; VOS Ellen, *op. cit*. (2018), p. 43.
[1188] Communication from the Commission to the European Parliament and the Council - European agencies – The way forward, COM/2008/0135 final, p. 7.
[1189] Which conversely constituted a relevant part of the preceding Commission's Communications, see European Commission, Communication of 11 December 2002 - The operating framework for the European Regulatory Agencies, COM/2002/0718 final; Communication from the Commission to the European Parliament and the Council - European agencies – The way forward, COM/2008/0135 final.
[1190] See European Commission, Roadmap on the follow-up to the Common Approach on EU decentralised agencies, of 19 December 2012. The Commission has also adopted Guidelines on standard provisions for headquarters agreements in 2013, Guidelines for agencies' programming document (applicable as from 2016), Guidelines for the prevention and management of conflicts of interest (2013), Guidelines on performance budgeting and a Communication Handbook for the EU decentralised agencies and a Start-up Toolkit on the procedures to be followed when an agency is being set up. See European Commission,

establishment of new agencies in line with this political understanding. Therefore, the amended Regulations of ERA,[1191] OHIM,[1192] EUROJUST, EUROPOL[1193] and CEPOL[1194] reflect now the institutional arrangements stemming from the Common Approach, as well as the Regulations newly establishing the GSA[1195] and the ENISA.[1196]

4.2.9.1. The Delegation of More Far-Reaching Powers to EU Agencies

Arguably freed from the strict limits of the original *Meroni* doctrine, the legislator has thus reinforced the powers of ERA, conferring on it a greater role in the implementation and management of the single European railway area.[1197] Moreover, in the aftermath of the financial crisis, Regulation No. 806/2014 has established the Single Resolution Board, an agency with a specific structure and entrusted with a centralised power of resolution for failing banks in the Member States participating in the Banking Union, as well as for management of the relevant

Progress report on the implementation of the Common Approach on EU decentralised agencies, COM(2015) 179 final.

[1191] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, COM/2013/027 final, then adopted as Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, OJ L 138, 26.5.2016, p. 1–43

[1192] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trademark, COM/2013/0161 final. The proposal was adopted as Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341, 24.12.2015, p. 21–94. In particular the OHIM Regulation appears to go beyond the minimum requirements agreed, see CHAMON Merijn, *op. cit*. (2016), p. 100.

[1193] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM/2013/0173 final. The proposal was adopted as Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

[1194] Regulation (EU) No 543/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Decision 2005/681/JHA establishing the European Police College (CEPOL), OJ L 163, 29.5.2014, p. 5–6.

[1195] Regulation (EU) No 512/2014 of the European Parliament and of the Council of 16 April 2014 amending Regulation (EU) No 912/2010 setting up the European GNSS Agency, OJ L 150, 20.05.2014, p. 72

[1196] Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004, OJ L 165, 18.6.2013, p. 41–58.

[1197] Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, OJ L 138, 26.5.2016, p. 1–43.

Fund.[1198] Overall, the powers delegated appear rather far-reaching, while the legal framework embedding those powers may raise doubts on its compatibility with the institutional balance.[1199]

Furthermore, in the context of the escalating migration crisis, the tasks of Frontex, now renamed European Border and Coast Guard Agency, were expanded in order to ensure the effective implementation of the European integrated border management.[1200] In the same context, a proposal to strengthen the role of EASO and enhance its mandate was issued by the Commission in 2016 and it is currently under discussion at the Council.[1201] Therefore, a certain tendency to delegate powers that are more far-reaching can be arguably recognised, putting to the test the assumption that the EU agencies only provide for technical assessments.

Since agencies are called to act in reaction to emergency and highly contentious situations, their powers involve more and more political, economic and social choices, as was recently recognised also by the Court.[1202] The fact that the EU agencies are now "asked to engage in political processes and need to operate within complex and conflicting interests to pursue rather open-ended mandates"[1203] marks a fundamental evolution in the role of these bodies in the EU institutional context, moving from a vision of mere technical bodies to a model of "politicised depoliticisation" which is becoming increasingly important.[1204] However, this is extremely problematic from a constitutional perspective, calling into question the limits identified for the delegation of powers to EU agencies and, more in general, the legitimacy of the agencification process.

4.2.9.2. An Unending Appetite for EU Agencies

Despite the issues raised by the recent trends in agencification, the appetite for EU agencies still appears to be unending. This is also illustrated by the establishment – thought a procedure for

[1198] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90.
[1199] See CHAMON Merijn, *op. cit.* (2014), pp. 399-402.
[1200] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, p. 1-76.
[1201] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM/2016/0271 final.
[1202] Case T-187/06, *Schräder v CPVO*, EU:T:2008:511; Case T-96/10, *Rütgers Germany v ECHA*, EU:T:2013:109.
[1203] VOS Ellen, *op. cit*. (2018), p. 45.
[1204] EVERSON Michelle, MONDA Cosimo and VOS Ellen, "What Is the Future of European Agencies?" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 246.

enhanced cooperation[1205] - of the European Public Prosecutor (EPPO), as an independent body created to investigate and prosecute fraud against the EU budget and other crimes against the EU's financial interests.[1206] Likewise, the creation and empowerment of EU agencies remains one of the key elements in the Commission's proposals for enhancing or developing new legislative packages in sensitive and current policies, as demonstrated by the proposed establishment of an EU Cybersecurity Agency,[1207] a European Labour Authority[1208] and a European Monetary Fund.[1209].

As a result of this ongoing proliferation of agencies, today there are 34 EU agencies in the EU institutional panorama, carrying out a variety of tasks related to the development of legislation and implementation of EU policies. These bodies are allocated an overall budget of more than one billion euros per year and they are composed by more than 5,000 staff members.[1210] Therefore, they are uncontestedly a relevant part of the EU institutional structure, which could simply not function without them. However, not every newly created agency amounts to a delegation of powers in the sense addressed in this study. Indeed, in line with the definition provided, a systematic analysis of the powers conferred on the different agencies is necessary to identify the cases where a true delegation of powers actually takes place.

4.3. The Powers Delegated to Decentralised Agencies

The description of the historical development of agencification has highlighted that the evolution of this phenomenon has been far from linear, resulting in a variety of EU decentralised agencies and of different powers delegated therein. In the light of this composite character of agencification, it appears to be difficult to provide a general picture on the delegation of powers to EU agencies, each of them requiring a separate and detailed analysis to establish the precise extent and content of the powers delegated.

[1205] Article 20 TEU and Articles 326-334 TFEU.
[1206] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283, 31.10.2017, p. 1–71.
[1207] See, within the cybersecurity package, the Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification (''Cybersecurity Act''), COM/2017/0477.
[1208] Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM/2018/0131 final.
[1209] Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM/2017/0827.
[1210] VOS Ellen, *op. cit.* (2018), p. 16.

4.3.1. Different Taxonomies of EU Agencies

It seems particularly helpful to resort to the classification of EU agencies which the abundant literature on the topic has elaborated. Scholars have proposed several taxonomies, classifying these bodies into groups according to historical,[1211] numerical,[1212] structural,[1213] functional,[1214] legal,[1215] or instrumental[1216] criteria. Although all these taxonomies represent valuable instruments for the analytical understanding of the phenomenon, for the purposes of this study it appears particularly suitable to distinguish EU agencies according to the powers their founding regulations stipulate.

4.3.2. Classifying EU Agencies According to Their Powers

The classification of EU agencies according to the delegated powers, often referred to as "instrumental taxonomy",[1217] adopts as fundamental distinguishing criterion whether the given agency has been delegated the power to adopt binding legal instruments vis-à-vis third parties, or not.[1218] Accordingly, we can distinguish between "non-decision-making agencies" which constitute the majority of agencies and represent the ordinary case and "decision-making agencies" with the ability to enact legal instruments affecting third parties.[1219] Within these two fundamental groups, further differentiations are possible in relation to the nature of the powers conferred.

4.3.2.1 Agencies Adopting Binding Legal Instruments

A limited number of decentralised agencies, defined as "genuine decision-making agencies",[1220] are delegated the power to adopt formal and binding legal instruments.[1221] Considering the definition of delegation of powers adopted, it is arguable that, in these cases, a true delegation of powers can be recognised, since the agencies are formally transferred powers capable of affecting

[1211] Classifying the agencies according to the historical "waves" of their creation, as was attempted in the preceding paragraph. See GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), p. 12.
[1212] Based on the size, which varies significantly (from the 30 employees of EIGE to the 730 persons of OHIM). See VOS Ellen, *op. cit.* (2014), p. 21.
[1213] Based on the Treaty or former pillar under which the agency is created. See GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), p. 11.
[1214] KREHER Alexandre, *op. cit*. (1997), pp. 236-338; VOS Ellen, op.cit. (2014), p. 20; CHITI Edoardo, *op. cit.* (2009), p. 1403; BUSUIOC Madalina, *op. cit.* (2013), p. 38. See also the comparison between the different classifications from a functional perspective in CHAMON Merijn, *op. cit*. (2016), pp. 19-24.
[1215] See VOS Ellen, *op. cit.* (2014), p. 21.
[1216] As the one proposed by GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), p. 12.
[1217] The first instrumental classification was proposed by GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), pp. 13-15.
[1218] See CHAMON Merijn, *op. cit*. (2016), p. 25.
[1219] GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), pp. 13-15.
[1220] Ibidem, p. 14.
[1221] VOS Ellen, *op. cit*. (2014), p. 22.

the legal position of third parties, thus constituting a manifestation of the public power conferred on the EU pursuant to primary law. In this category, agencies adopting measures of individual application and agencies which, although more controversially, may adopt measures of general application can be distinguished.

(i) Agencies Adopting Measures of Individual Application

Since the second wave of agencification, agencies have been empowered to issue decisions which are binding on legal or natural persons. These persons have generally applied for authorisation or protection of their rights to these bodies, which often have the specific function to provide those services to third parties.[1222] However, some agencies may also adopt individual decisions on their own initiative.[1223] Currently, included in this category are the EUIPO (former OHIM), the CPVO, the EASA, the ECHA, the EMA, the ESMA, the EBA and the EIOPA.[1224]

They have the power to adopt decisions of individual application which are amenable to judicial review before the Court of Justice.[1225] Considering the nature of the powers,[1226] it appears that, since they apply the general rule to the particular case, they act within the realm of implementation.[1227]

(ii) Agencies Adopting Measures of General Application

As a consequence of the described trends in agencification, an even more limited number of EU agencies have been conferred the power to adopt measures of general application. In this regard, in EU law literature, such "rule-making agencies" were long considered a hypothetical category, whose actual establishment was impeded by the strict interpretation given to the *Meroni* and especially the *Romano* judgments,[1228] and by the lack of a *Delegationsnorm* in the Treaties.[1229] However, as we have seen, the evolution of EU governance and of the case law has increasingly corroded such limits.

[1222] See VOS Ellen, *op. cit*. (2014), p. 20.
[1223] This is the case of ACER and the ESAs. See CHAMON Merijn, *op. cit.* (2016), p. 37.
[1224] VOS Ellen, *op. cit.* (2014), p. 22.
[1225] See Chapter 6, para. 4.5.
[1226] See the considerations exposed in Chapter 1, para. 7.5.
[1227] See VOS Ellen, *op. cit*. (2014), p. 44; CHAMON Merijn, *op. cit*. (2014), p. 397; TOVO Carlo, *op. cit.* (2016), p. 73; RITLENG Dominique, "La nouvelle typologie des actes de l'Union. Un premier bilan critique de son application", 51 *Revue trimestrielle de droit européen* No. 1 (2015), p. 28. See also Case C-16/88, *Commission v Parliament,* EU:C:1989:397, para. 11; Case C-42/97, *Commission v Parliament and Council*, EU:C:1999:81, para. 37.
[1228] GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), p. 15.
[1229] CHAMON Merijn, *op. cit.* (2016), p. 39.

Recently, the Court of Justice has recognised that, when classifying substances according to the risk they may pose, ECHA exercises a power resulting in acts of general application.[1230] Moreover, the powers conferred on the ESAs, and in particular the further empowerment of ESMA in relation to short sales,[1231] allow these bodies to take measures of general application in emergency situations.[1232] Therefore, the exercise of rule-making powers by EU decentralised agencies no longer appears a chimera.[1233]

In the light of this, and considering the described approach of the Court in *Biocides*, it has been noted that the powers conferred on these agencies cannot be defined *a priori* as implementing powers.[1234] Indeed, since the acts of these agencies may even supplement the relevant legislative acts, their powers may be considered more properly of the same nature of the delegated powers within the meaning of Article 290 TFEU, especially after the *Short Selling* judgment.[1235] Although one must be particularly careful to apply the terminology of Articles 290 and 291 TFEU to EU agencies,[1236] this remark underlines that the difficulty of distinguishing the powers according to their nature emerges also in relation to the acts of EU agencies.

(iii) Agencies Adopting International Law Measures

An interesting phenomenon that recently emerged in the agencification process is the adoption of EU agencies' acts in the international sphere. [1237] Some agencies are particularly active in the global scene and may conclude different forms of international agreements with third States' authorities, such as memoranda of understanding or working arrangements.[1238] Therefore, depending on their nature and content, these acts may have binding effects in international law.

[1230] The resulting acts are, thus, "regulatory acts" within the meaning of Article 263(4) TFEU. See Case T-96/10, *Rütgers Germany v ECHA*, EU:T:2013:109, para. 58.

[1231] Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

[1232] SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), p. 393; BONICHOT Jean-Claude, *op. cit.* (2014), pp. 325-330.

[1233] See, *inter alia*, BUSUIOC Madalina, "Rule-Making by the European Financial Supervisory Authorities: Walking on a Tight Rope", 19 *European Law Journal* No. 1 (2013), pp. 111-125; CHITI Edoardo, *op. cit*. (2013), pp. 93-110.

[1234] TOVO Carlo, *op. cit.* (2016), p. 75.

[1235] BERGSTROM Carl Fredrik, *op. cit.* (2015), p. 238; ALBERTI Jacopo, *op. cit.* (2015), p. 480.

[1236] In this regard, it is important to underline that, although the Meroni judgment uses the notion of "executive powers", they cannot be automatically assimilated to the concept of implementing acts, see BERGSTROM Carl Fredrik, op. cit. (2015), pp. 238-239.

[1237] This theme must be considered strictly linked with the problematic issue of the admissibility of administrative agreements under EU law. See, *inter alia*, Case C-327/91, *France v Commission*, EU:C:1994:305, and Opinion of Advocate General Tesauro in this case, EU:C:1993:941; EECKHOUT Piet, *EU External Relations Law,* (Oxford University Press, 2011), p. 206.

[1238] See, *inter alia*, OTT Andrea, "EU Regulatory Agencies in the EU External Relations: Trapped in a Legal Minefield Between European and International Law", 13 *European Foreign Affairs Review* No. 4 (2008), p. 515; COMAN-KUND Florin, "Assessing the Role of EU Agencies in the Enlargement Process: The Case of the European Aviation Safety Agency", 8 *Croatian Yearbook of European Law and Policy* (2012), p. 338.

The autonomy and the powers delegated to the agencies in this context vary in intensity, having different implications according to the effects and the discretion exercised by these bodies. In this context, in a few cases this can be considered as a true delegation of powers.[1239] On the one hand, in most cases the agencies' external action does not result in the adoption of binding agreements, and thus does not create international obligations for the EU.[1240] On the other hand, the conclusion of international measures is often made conditional upon the prior approval by the Commission or the Council, such as in the case of EASA, EUROJUST, EUROPOL and CEPOL.[1241] In these cases, the absence of autonomy of the agencies suggests to exclude that this is a true delegation of powers since no real power is transferred to the agency.[1242] In fact, these situations are generally perceived as not being problematic from an institutional balance perspective.[1243]

4.3.2.2 Agencies not Adopting Binding Legal Instruments

The "ordinary" or "non-decision-making" agencies constitute the majority of these bodies. They can issue a wide array of non-binding acts, such as opinions, recommendations, standards, guidelines, scientific or annual reports, codes of conduct, guidance documents, work or strategic plans.[1244] The effect of these acts may vary considerably, ranging from advisory, non-committal opinions to quasi-binding rules.

(i) The "Pre-Decision-Making" Agencies

Albeit deprived of formally binding effects, the scientific opinions of certain specialised agencies *de facto* have a considerable influence on the decision-making activities of the EU institutions, being so authoritative that the Commission cannot depart from them without properly motivating its decision.[1245] In this sense, agencies like the EMEA, the EFSA, the EMSA[1246] and the ERA have

[1239] See OTT Andrea, VOS Ellen and COMAN-KUND Florin, "European Agencies on the Global Scene: EU and International Law Perspectives" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 87-122.
[1240] Such as in the working arrangements established by FRONTEX with third countries, see for instance Working arrangement establishing operational cooperation between Frontex and the National Security Council of Armenia done on 22 February 2012, point 6. Remarkably, the absence of binding effects is now expressly recommended in the Common Approach on decentralised agencies. In this first attempt to streamline the agencies' international relations, it requires a clear strategy to ensure that they operate within their mandate and do not appear to commit the EU to international obligations. See Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, and annexed Common Approach, para. 25.
[1241] See OTT Andrea, VOS Ellen and COMAN-KUND Florin, *op. cit.* (2014), p. 99.
[1242] Ibidem, p. 118.
[1243] Ibidem.
[1244] VOS Ellen, *op. cit*. (2014), p. 21. These documents may be adopted on the agencies' own initiative or upon the request of EU institutions or Member States. CHAMON Merijn, *op. cit*. (2016), p. 25.
[1245] CHAMON Merijn, *op. cit*. (2016), p. 31.
[1246] For instance, the EMSA assists the Commission "in the preparatory work for updating and developing relevant legal acts of the Union". See Article 2 (2) (b) of Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, p. 1–9.

been defined as "pre-decision-making" agencies, standing out among the ordinary agencies for the authority of their acts on the decision-making activities of the Commission.[1247] These authoritative opinions may be issued in relation to individual decisions or in the decision-making process resulting in general decisions.[1248] Such an involvement of the agencies in the preparatory work can reach the level of drafting the general decision to be later endorsed by the Commission.[1249]

In line with the definition of delegation adopted, it is argued here that, in substantive terms, some of these cases can be considered to be a delegation of powers. In particular, this is the case when the influence of the agencies in the decision making results in encroaching upon the other institution's prerogatives, such as modifying the procedure for the adoption of the act or adding further requirements. In this regard, one of the most remarkable examples is EASA, which is empowered to prepare technical rules the content of which the Commission may not change "without prior coordination with the Agency".[1250]

Likewise, the ESAs are entrusted with the power to draft regulatory technical standards to be endorsed by the Commission in the form of delegated acts. Where, as an exception, the Commission does not endorse the agency's draft measure, it must state its reasons and it may be forced to present its position in a meeting with representatives of the Council, the Parliament and the agency.[1251] As it will be seen, these powers of the ESAs have relevant implications for the autonomy of the Commission and, eventually, for the institutional balance.[1252]

(ii) Other Non-Decision-Making Agencies

In all other cases, the EU agencies are entrusted with functions and tasks which do not result in the adoption of legally binding acts. Accordingly, they issue opinions or recommendations which do not bind other institutions or third parties. Thus, for instance, the ACER can provide opinions

[1247] GRILLER Stefan and ORATOR Andreas, *op. cit*. (2010), p. 13. The judicial review of the Commission's act may reach the legality of the scientific opinions of the agencies, see Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 e T-141/00, *Artegodan and others v Commission*, EU:T:2002:283, paras. 197-199.

[1248] See CHAMON Merijn, *op. cit.* (2016), p. 33.

[1249] See CHAMON Merijn, *op. cit.* (2016), p. 35. The author distinguishes this case from the other cases of opinion on general decisions, making it a separate category.

[1250] Article 17 (2) (b) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19.3.2008, p. 1–49. See VOS Ellen, *op.cit*. (2014), p. 22.

[1251] Article 14 of EBA Regulation.

[1252] See Chapter 5, para. 6.3.6.

or recommendations to EU institutions,[1253] while the EEA can give advice on the monitoring of environmental measures to Member States upon their request.[1254]

Arguably, in certain cases these acts may constitute forms of soft law, with all the legal implications the use of such instruments generally entails.[1255] For instance, agencies can intervene at the subsequent level of interpretation and application of regulations, adopting "guidelines".[1256] Albeit non-binding, these guidelines represent authoritative acts of general scope, which influence the behaviour of economic operators in the market, such as in the case of EFSA[1257] or EMA.[1258] However, although in the latter case "alternative approaches" must be "appropriately justified",[1259] they remain expressly non-binding. Therefore, without entering the debate on the legal effects of soft law measures,[1260] these cases do not appear to constitute a delegation of powers in the sense addressed in this study.

4.4. The Chain of the Delegation to Decentralised Agencies

The description of the evolution of agencification, together with the analysis of the powers exercised by the decentralised agencies, has shed light on some salient features of the delegation

[1253] See Article 5 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1–14.
[1254] Article 2(d) of Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126, 21.5.2009, p. 13–22.
[1255] See CHAMON Merijn, "Le recours à la *soft law* comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE", *Revue de l'Union européenne,* no. 576 (2014a), pp. 152-160. On this point, see also MÖLLERS Thomas M.J., "Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosière", 11 *European Business Organization Law Review* (2010), p. 400; VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* no. 1 (2014), p. 49.
[1256] See CHAMON Merijn, *op. cit.* (2016), p. 34.
[1257] The EFSA is empowered, for instance to adopt guidelines on the submission of applications in relation to certain substances or products causing allergies or intolerances. See EFSA Panel on Dietetic Products, Nutrition and Allergies, "Guidance on the preparation and presentation of applications pursuant to Article 21 Paragraph 2 of Regulation (EU) No 1169/2011", *EFSA Journal* (2013), available at http://onlinelibrary.wiley.com/doi/10.2903/j.efsa.2013.3417/epdf (last accessed 27.06.2017). For the legal basis for the adoption of guidelines, see Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L 109, 6.5.2000, p. 29, as amended by Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003, OJ L 308, 25.11.2003, p. 15.
[1258] The EMA can adopt scientific guidelines in consultation with regulatory authorities in the States, to help applicants prepare marketing authorisation applications for human medicines. They are described, in particular, as "a harmonised Community position" which, if followed, "will facilitate assessment, approval and control of medicinal products". See EMA, *Procedure For European Union Guidelines And Related Documents Within The Pharmaceutical Legislative Framework,* (London, 18 March 2009), available at http://www.ema.europa.eu (last accessed 27.06.2017).
[1259] EMA, *Procedure For European Union Guidelines And Related Documents Within The Pharmaceutical Legislative Framework,* (London, 18 March 2009), p. 4.
[1260] See SENDEN Linda, *Soft Law in European Community Law,* (Hart Publishing, 2004); CHAMON Merijn, *op. cit.* (2014a), pp. 152-160.

of powers to these bodies. Reflecting on this delegation, it is now appropriate to approach some characterisations which have emerged in the literature in order to clarify how the relationships among the institutional actors involved are articulated.

4.4.1. A Delegation of Powers from the Member States?

From the analysis above, it has emerged that EU agencies are often entrusted with powers previously exercised by the national authorities in charge of the regulation of a specific policy sector. In some cases, the establishment of an agency resulted from a sort of "institutionalisation" of existing networks between institutional actors, especially at the Member States' level.[1261] These observations, which have an undoubtable value for a holistic understanding of the phenomenon, have brought some authors to draw some original conclusions with regard to the chain of delegation established in these cases.

In particular, it has been argued that "what seems to be involved in the construction of such control agencies is the 'Europeanisation' of the functions of the administrations of the Member States rather than the delegation of powers".[1262] In view of other authors, the empowerment of decentralised agencies has been understood as a model of "direct delegation of Member States' implementing power to the agencies", thus providing an explanation for the conferral of far-reaching powers in the absence of enabling provisions in primary law.[1263] This argument was apparently corroborated by the observation that, under Article 291 TFEU, the implementation of EU law is primarily the competence of the Member States, which thus are in principle the holders of the implementing powers delegated to the agencies.[1264] In other words, the decentralised agencies would constitute a way to "pool" the implementing powers of the Member States which, if according to Article 291 TFEU can retain the implementation of EU legislation, *a fortiori* can exercise them in a coordinated way.[1265] Therefore, the establishment of a decentralised agency would constitute a "coordinated Member States' implementation within a supranational constitutional framework".[1266]

However, from a legal perspective, this position cannot be shared. Although the concept of "Europeanisation of powers" interestingly describes the agencification phenomenon from an historical or socio-political perspective, the vertical and the horizontal dimensions of the

[1261] CHITI Edoardo, *op. cit.* (2002), pp. 56-57; VOS Ellen, *op. cit*. (2018), p. 19 and literature cited therein.
[1262] CURTIN Deirdre, *op. cit*. (2009), p. 165. See also CHAMON Merijn, *op. cit.* (2016), p. 195.
[1263] See HOFMANN Herwig C. H. and MORINI Alessandro, *op. cit.* (2012), p. 431.
[1264] CLEMENT-WILZ Laure, *op. cit.* (2015), pp. 340 and 348.
[1265] See HOFMANN Herwig C. H. and MORINI Alessandro, *op. cit.* (2012), p. 431.
[1266] VAN CLEYNENBRUEGEL Pieter, "Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014), p. 85.

phenomenon must not be confused. A legal analysis cannot disregard the fact that, in the enactment of the founding Regulation, an EU competence is exercised according to the principle of conferral.[1267] Therefore, if we need to find a vertical element of the phenomenon, from a legal perspective it can be identified only with the original conferral of the competence to the EU in the Treaties. Adopting the founding Regulation of the agency, the EU institutions entrusted with the powers according to the relevant legislative procedure (thus, the Parliament and the Council, or the sole Council) exercise this competence and, in the case of shared competence, "occupy the field" previously left to the Member States to the extent that the Union had not exercised its competence.[1268] In accordance with the principles of proportionality and subsidiarity, these powers can be exercised by the legislator at its discretion either by regulating in detail the matter, or by delegating them to another institutional actor,[1269] in this case the agency. Therefore, in this subsequent "horizontal" transferral of powers at the EU level a delegation of powers can certainly be recognised.[1270] Thus, a legal reading of the phenomenon identifies the delegator as the Parliament and the Council, or the sole Council, in their role as EU legislator.[1271]

This reasoning holds true not only in the case of the creation of agencies pursuant to a sector-specific legal basis, but also pursuant to what is now Article 352 TFEU. Indeed, the flexibility clause enables to the adoption of the appropriate measures "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers",[1272] with an unanimous vote in the Council. Although the Treaties have not provided the necessary powers, the triggering of Article 352 TFEU serves exactly to fill this lacuna, empowering the EU institutions to attain the objective.[1273]

[1267] See VOS Ellen, *op. cit.* (2014), p. 41.

[1268] See, *inter alia*, in general on shared competences and pre-emption, CRAIG Paul and DE BURCA Grainne, op. cit. (2011), pp. 83-85.

[1269] JACQUE Jean-Paul, "Pouvoir législatif et pouvoirs exécutif dans l'Union européenne", in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen,* II ed. (Bruylant, 2014), p. 47. See also Case C-270/12, *UK v Parliament and Council (Short Selling)*, EU:C:2014:18, para. 105: "Accordingly, the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to Union body, office or agency powers for the implementation of the harmonisation sought".

[1270] CHAMON Merijn, *op. cit.* (2016), p. 39.

[1271] See, *inter alia*, VOS Ellen, *op. cit*. (2014), p. 41; GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), p. 19; DUTHEIL DE LA ROCHERE Jacqueline, *op. cit.* (2009), p. 364; BONICHOT Jean-Claude, *op. cit*. (2014), p. 328.

[1272] Article 352 (1) TFEU.

[1273] See, *inter alia*, CRAIG Paul and DE BURCA Grainne, *op. cit.* (2011), pp. 89-92. Furthermore, the unanimity requirement in the Council's vote should not be confused with a joint action of the Member States. Embedded in the procedure which involves the Commission and the Parliament, the act based on Article 352 TFEU is an EU act adopted by the Council in its role of EU institution. See, *inter alia*, Opinion 1/94, EU:C:1994:384.

With reference to the argument that, pursuant to Article 291 (1) TFEU, the Member States are the ultimate holders of the implementing powers delegated to the agencies, it is important to remark that the empowerment of an agency constitutes a different model of implementation in respect of the indirect administration to which the abovementioned paragraph is dedicated. As argued convincingly, the agencification represents a "decentralised *integration*".[1274] Although maintaining a strong Member States' component in their organisation, the implementation of EU law through an agency represents an integrated model converging at the EU level.[1275] The creation of an agency responds to the need for uniform conditions of implementation of certain policies or programmes, thus coming closer to the *ratio* of the second paragraph of Article 291 TFEU rather than the first one.[1276] In this regard, where "uniform conditions for implementing legally binding Union acts are needed",[1277] the choice to empower an agency instead of the Commission or the Council shall be considered carefully from an institutional balance perspective, in light of its implications for the prerogatives of the Commission.

4.4.2. One, Two, Many Delegators?

Drawing from economics, the delegation of powers to decentralised agencies is often described in political science by using the principal-agent theory.[1278] Accordingly, the principal entrusts the agent to perform tasks for which it does not have the expertise or the possibility to perform itself, while maintaining a certain control over the agent's behaviour.[1279] In a context of asymmetrical information, the accountability of the agent is guaranteed through incentives and information obligations to the benefit of the principal.[1280] Moreover, the agent can sub-delegate his/her powers, thus creating a chain of delegations ultimately attributable to the initial principal.

[1274] CHITI Edoardo, *op. cit*. (2002), p. 433.
[1275] See, *inter alia*, KREHER Alexandre, *op. cit*. (1997), pp. 241-245; CHAMON Merijn, *op. cit.* (2012), p. 65.
[1276] In this sense, they contribute to a supranationalisation of EU executive power and a centralisation of EU administration. See EGEBERG Morten and TRONDAL Jarle, *op. cit.* (2016), p. 9; KEADING Michael and VERSLUIS Esther, "EU Agencies as a Solution to Pan-European Implementation Problems", in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 73-86.
[1277] Article 291 (2) TFEU.
[1278] The origin of the theory shall be found in the economic theories on contracts and management, ALCHIAN Armen A. and DEMSETZ Harold, "Production, Information Costs, and Economic Organization", 65 *American Economic Review* nº 5 (1972), pp. 777-795; JENSEN Michael and MECKLING William H., "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure", 3 *Journal of Financial Economics* nº 4 (1976), pp. 305-360; MILGROM Paul and ROBERTS John, *Economics, Organization and Management*, (Prentice Hall, 1992); BOLTON Patrick, DEWATRIPONT Mathias, *Contract Theory*, (MIT Press, 2005).
[1279] See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 222.
[1280] STROM Kaare, "Delegation and Accountability in Parliamentary Democracies", 37 *European Journal of Political Research* (2000), pp. 261-289.

Although the use of this theory in the EU context has been criticised for its failure to take into account the complexity of the EU institutional architecture,[1281] this model has been used both to explain the empowerment of the agencies as a delegation from the Member States[1282] and as a delegation from the EU institutions. Therefore, the "principal" has been identified in the Council and, in the case of co-decision, in the Parliament.[1283] Conversely, focusing on the control and auxiliary role of the agencies, the agencies also have been described as "agents" of the Commission, which oversees their activities.[1284] In this sense, considering the Commission's DGs as the ultimate beneficiaries of the agencies' assistance, EU agencies were considered to "relate more closely to the European Commission than to any other institution or actor".[1285]

Building from these reflections, the legal literature has elaborated a vision of delegation where the agency is considered the agent of multiple principals.[1286] Indeed, the creation of an agency is the result of the cooperation of a variety of institutional actors, each acting in its own interest. Therefore, on the one hand, in the EU constitutional architecture, characterised by the balance among different institutional actors,[1287] one single "principal" cannot be identified that enjoys the prominence accorded, for instance, to the Parliament in State legal systems.[1288] On the other hand, the influence of many actors in the establishment and management of an agency should not be underestimated. From the proposal of the Commission, to the adoption by the Council and, eventually, the Parliament, the system appears characterised by a plurality of principals.[1289] This "multi-principal" perspective represents a valuable model to understand the polycentricity of the control mechanisms and accountability channels whereby the agency is held accountable to different EU institutional actors. Moreover, it offers a solid ground for the need for an

[1281] See, *inter alia*, DEHOUSSE Renaud, *op. cit.* (2008), p. 790.
[1282] See *supra*. See also POLLACK Mark A., *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, (Oxford University Press, 2003); BAUER Michael, "Limitations to Agency Control in European Union Policy-Making: The Commission and the Poverty Programmes", *Journal of Common Market Studies* (2002), pp. 381-400.
[1283] KELEMEN Daniel R., *op. cit.* (2002), pp. 93-118.
[1284] See CHITI Edoardo, *op. cit.* (2013), pp. 93-110; GERARDIN Damien, MUNOZ Rodolphe and PETIT Nicolas, *Regulation through Agencies in the EU. A New Paradigm for European Governance,* (Edward Elgar, 2005); LENAERTS Koen, *op. cit.* (1993), pp. 23-49; YATAGANAS Xénophon A., "Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies", 2000-2001 <www.jeanmonnetprogram.org/archive/papers/01/010301.html> (last accessed 08.08.2016).
[1285] EGEBERG Morten and TRONDAL Jarle, *op. cit.* (2016), p. 1. In this study, the authors interestingly encapsulate the existing literature on agencification in three coexisting "images": (i) An intergovernmental image, according to which EU agencies are established by Member States for the implementation and monitoring of EU policies, and their powers are delegated from national governments rather than from the Commission; (ii) A transnational image, according to which EU agencies are "loosely coupled" to both national and EU institutions, "floating in between" levels of governance as regulator networks; (iii) A supranational image, according to which EU agencies are part of the EU administrative apparatus, under the umbrella of the Commission.
[1286] See DEHOUSSE Renaud, *op. cit.* (2008), pp.789–805.
[1287] See Chapter 1, para. 14.
[1288] DEHOUSSE Renaud, *op. cit.* (2008), p. 794.
[1289] Ibidem, p. 799.

interinstitutional agreement on decentralised agencies as proposed by the Commission in 2005.[1290]

These observations have the undoubtable merit of raising awareness on the complexity of the institutional environment in which the agencies are created and flourish, and they highlight the influence of the three "political" EU institutions in their governance.[1291] However, while the value of this theory (as well as of the principal-agent theory in general) for political science is uncontested, from a legal perspective it offers little help for the systematisation and analysis of the transferral of powers.[1292] As we have seen, the notion of this legal institution is primarily characterised by the initial allocation of competences, which is transformed by the effect of the transferral of powers.[1293] Thus, while it is certainly correct that in the EU institutional system the legislator is "plural", meaning composed of the Council and the Parliament sharing the legislative powers in the cases set forth by the Treaties, the role of delegator arguably cannot be extended to the Commission. Indeed, its role in the legislative procedures is not to exercise the powers conferred on it, but to initiate the procedure which allows the enactment of an act by the Council and the Parliament.[1294] In other words, arguably the chain of delegation must be understood according to the specific constitutional allocation of powers[1295] rather than from the political interplay among institutions in the establishment of a new agency or from the control mechanisms provided. Building from the insight of legal theory and the State constitutional law tradition, what is argued here is that, in legal terms, the provisions on the oversight and accountability of the delegate do not derive from the intrinsic notion or chain of delegation, but they are the result of the fundamental principles which characterise a certain legal system, such as the institutional balance in the EU context.

4.4.3. Not a Delegation of Powers at All?

On a final note, it is important to approach a more radical opinion which denies that the empowerment of agencies represents a form of delegation of powers at all.[1296] In this regard, the application of the delegation notion to agencification has been contested, firstly, noting that the powers conferred on the agencies do not pertain originally to the Council (or to the Parliament

[1290] Ibidem, p. 802.
[1291] See DEHOUSSE Renaud, *op. cit.* (2008), p. 803.
[1292] See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 223.
[1293] See Chapter 1, para. 2.
[1294] Strictly formally speaking, the signature of the acts by the President of the Parliament and the President of the Council pursuant to Article 297 TFEU leaves no doubt on the authorship of the act. This situation is fundamentally different when the Commission exercises its own rule-making powers or it sub-delegates the powers received as in the case of the executive agencies. See *supra* para. 3.3.
[1295] See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 223.
[1296] For a discussion, see CHAMON Merijn, *op. cit.* (2016), pp. 239-241.

and Council).[1297] Since the agencies are often entrusted with operational and expertise-related tasks, they cannot be described as exercising powers previously conferred on the EU institutions.[1298] In this sense, the argument may be linked to the "Europeanisation" position outlined above.[1299] Advocate General Jääskinen arrives at the same conclusion, rejecting the notion of delegation in the context of agencification and, therefore, the application of the *Meroni* doctrine, arguing from the distinction between the implementing acts and the delegated acts.[1300] In his opinion, "the EU legislature is not acting as a 'delegating authority' in the sense of the Meroni judgment when it confers implementing powers on institutions, agents, or other bodies of the Union, but a constitutional actor exercising its own legislative competence, as conferred on it by the higher constitutional charter, i.e. the Lisbon Treaty. The executive and judicial powers that the EU legislature can confer on institutions or bodies are qualitatively different from its own powers."[1301] However, in its judgment, the Court does not follow the reasoning of the Advocate General.[1302]

Focusing on the nature of the powers conferred on the agencies, these arguments share the idea that the Council (and the Parliament) cannot be considered the "holder" of implementing powers but only of legislative powers – and, therefore, only these powers can be delegated. According to this view,[1303] the Lisbon reform has established a clear distinction between legislative and implementing powers, whereby the latter is attributed directly to the Commission upon the existence of an "objective cause" justifying their exercise at the EU level.[1304] Therefore, the competence to implement (and thus to delegate implementing powers) is a competence of the Commission. Accordingly, the notion of delegation would be unsuitable to describe the empowerment of EU agencies, which could be rather qualified as a "conferral".[1305]

[1297] GAUTIER Yves, *La délégation en droit communautaire,* PhD thesis (Université de Strasbourg, 1995), p. 402: "Pour que la délégation soit une explication satisfaisante, il faudrait que le Conseil lui ait confié des tâches qui relèvent directement de lui." See also VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* No. 1 (2014), p. 35.

[1298] GAUTIER Yves, *op. cit.* (1995), p. 402; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The Limits of Agencification in the European Union", 15 *German Law Journal* No. 7 (2014), p. 1250.

[1299] See CHAMON Merijn, *op. cit.* (2016), p. 240.

[1300] See Case C-270/12, *UK v. Council of the European Union and European Parliament* (*Short Selling*), Opinion of the Advocate General Jääskinen, EU:C:2013:562.

[1301] Ibidem, para. 91.

[1302] Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18.

[1303] See the discussion in Chapter 2, para. 2.10.

[1304] See CHAMON Merijn, *op. cit.* (2016), p. 237; TOVO Carlo, *op. cit*. (2016), p. 99.

[1305] Opinion of the Advocate General Jääskinen in Case C-270/12, *UK v. Council of the European Union and European Parliament* (*Short Selling*), EU:C:2013:562, para. 6. See CHAMON Merijn, op. cit. (2014), p. 383; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), p. 1250; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, *op. cit.* (2014), p. 402; TOVO Carlo, "Delegation of legislative powers in the EU: how EU institutions have eluded the Lisbon reform", 42 *European Law Review* No. 5 (2017), p. 703.

However, as we have seen, although this view is interesting, it was not upheld in the post-Lisbon reality.[1306] Despite the described innovations of the Lisbon Treaty, the separation of powers is not fully achieved in the current institutional structure, leaving a blurred line between the executive and the legislative powers. As argued *supra*, the Commission still exercises implementing powers which are delegated from the legislator, not autonomously held.[1307] Therefore, the Council and the Parliament also have the competence to delegate implementing powers. More in general, the notion of delegation cannot be limited to the case of the delegation of legislative powers.[1308] Indeed, the analysis of the notion of delegation has shown how this legal institution has a broader meaning in public law, which includes - but is not limited to - the delegation of legislative powers.[1309] Therefore, considering its function and structure, the empowerment of agencies also represents a delegation of powers.

Finally, difficulties in recognising the empowerment of agencies as a form of delegation arises from the observation that in EU primary law there is no provision on the delegation of powers to these bodies.[1310] The absence of a *Delegationsnorm* in the Treaties is considered at odds with the structure of delegation as identified in classic Italian and German literature.[1311] It is worth recalling, however, that the tripartite structure of the delegation is one of the different theories advanced in relation to the issues concerning the principle of legality and the hierarchy of norms, as articulated in a State legal system.[1312] Albeit relevant for the constitutional analysis of the phenomenon, this observation arguably is not decisive for the qualification of the empowerment of EU agencies as a delegation of powers.

5. The Delegation of Powers to the European Central Bank

The analysis of the different forms of delegation established in the EU institutional panorama brings us now to consider a more recent, yet interesting, phenomenon of delegation of powers between institutions of the EU. This phenomenon is constituted by the conferral, by means of acts

[1306] See Chapter 1, para. 5 and Chapter 2, para. 2.10.
[1307] See Chapter 2, para. 2.10.2.
[1308] With reference to GAUTIER, the exclusion of the notion of delegation is clearly based on the narrow definition of delegation of powers adopted by French literature, see GAUTIER Yves, *op. cit*. (1995), pp. 4-71. However, it is noteworthy that in the German and US legal systems the notion of delegation also encompasses the empowerment of agencies. See CHAMON Merijn, *op. cit*. (2016), p. 241.
[1309] See Chapter 1, para. 3.
[1310] See CHAMON Merijn, *op. cit.* (2016), p. 240.
[1311] See TRIEPEL Heinrich, *Delegation und Mandat in öffentlichen Recht* (Stutgard und Berlin, 1952). It is noteworthy, however, that according to the author the *Delegationsnorm* can also be inferred from customary law.
[1312] See Chapter 1, para. 5.

of secondary law, to the European Central Bank (ECB) of tasks and functions which go beyond the powers conferred on this institution by the Treaties.

Since the creation of the Economic and Monetary Union (EMU), the ECB was conferred relevant powers in the Treaties, becoming the key decision-making institution in this policy field. However, the recent financial crisis put the existing legal and institutional framework to the test, highlighting its limits and shortcomings. As we will see, in reaction to the crisis, one of the measures adopted implied the extension of the powers of the ECB not through a Treaty reform, but by means of regulations. Therefore, a new phenomenon of the delegation of powers between EU institutions was established, and therefore fell within the scope of this analysis.

In the following pages, after having briefly recalled the main institutional features of the ECB, the context and the provisions whereby the ECB is delegated new powers by acts of secondary law will be analysed. The measures taken in reaction to the financial and sovereign debt crisis will be described, focusing on the tasks of prudential supervision conferred on the ECB in this context. Then, some conclusions will be drawn on the structure and features of this delegation of powers, whose limits and implications will be assessed in the following chapters.

5.1. The European Central Bank in the EU Institutional Framework

5.1.1. The Position of the ECB in the ESCB and its Independence

The ECB was established at the beginning of the third stage of the EMU[1313] and it represented a fundamental step in the long road[1314] which led to the establishment of a single currency for most EU Member States.[1315] Although, from the beginning, there was little doubt the ECB constituted an

[1313] After the first discussions on the EMU in the 1970s, in the Report on Economic and Monetary Union in the European Community (EC Commission, 1988) it was recommended that the EMU should be achieved in three stages. The first one would entail the completion of the internal market, closer economic convergence and the participation of all MS in the European Monetary System. The second one, begun in 1994, envisaged the creation of the European System of Central Banks and a common monetary policy. In this phase, a European Monetary Institute (EMI) was established and it represented the forerunner of the ECB. The third one, begun in 1999, determined the locking of exchange rates and the introduction of a single currency, the euro. See ANTONIAZZI Sandra, *La Banca Centrale Europea tra Politica Monetaria e Vigilanza Bancaria*, (Giappichelli, 2013); ANDENAS Mads, GORMLEY Laurence, HADJIEMMANUIL Christos and HARDEN Ian, *European Economic and Monetary Union: the Institutional Framework* (Kluwer, 1997); ZILIOLI Chiara and SELMAYR Martin, *op. cit.* (2001); CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), pp. 698-713; CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *European Union Law. Cases and Materials,* III ed. (Cambridge University Press, 2014), pp. 704-753.

[1314] The first mention of the ECB is in the Maastricht Treaty, adding an Article 4a in the text: "A European system of central Banks (hereinafter referred to as "ESCB') and a European Central Bank (hereinafter referred to as "ECB") shall be established in accordance with the procedures laid down in this Treaty; they shall act within the Iimits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB (hereinafter referred to as "Statute of the ESCB') annexed thereto."

[1315] It is worth recalling that the first consideration of a common currency emerged in the European Summit at The Hague in 1969, where a working group chaired by Pierre Warner was established. The Report

integral part of the EU institutional structure,[1316] only the Lisbon Treaty formally inserted the ECB among the EU institutions listed in Article 13 TEU.[1317] As recognised by the Court,[1318] the ECB is fully part of the institutional balance and it enjoys a peculiar role under primary law.

Based in Frankfurt, the ECB is part of the European System of Central Banks (ESCB), composed by the Central Banks of the Member States where the euro is adopted as the currency.[1319] The primary objective of this system is the maintenance of price stability, and it contributes to the attainment of the general objectives of the Union, supporting its economic policies.[1320] The tasks of the ESCB include the definition and implementation of the monetary policy of the Union, as well as the promotion of the smooth operation of the payment system.[1321] In its role of *primus inter pares* within the ESCB, the ECB enjoys the monopoly on authorising the issue of the euro banknotes within the Union and, consequently, on the setting of short-term interest rates.[1322] It has, moreover, regulatory powers in the monetary field.

As a key player in the institutional architecture of the EMU, the ECB has legal personality, and enjoys organisational and financial autonomy.[1323] Article 130 TFEU assures the independence of this institution, prohibiting its members from seeking or taking instructions "from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body".[1324] This independence is granted to the decision-making bodies of the ECB: the Executive Board and the Governing Council.[1325]

This particular institutional position of the ECB has resulted in criticism regarding the weak accountability mechanisms in place, calling for more transparency and democratic oversight in

thereby represents the first blueprint for the creation of the EMU. On the history of the EMU, the leading reference is JAMES Harold, *Making the European Monetary Union* (Harvard University Press, 2012).

[1316] See TRIDIMAS Takis, "Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement", 28 *Yearbook of European Law No.* 1 (2009), p. 225.

[1317] See TESAURO Giuseppe, *Diritto dell'Unione europea,* VI ed. (Cedam, 2011), p. 56.

[1318] Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306.

[1319] Article 127 TFEU.

[1320] On the decentralised character of the system, see JACQUE Jean Paul, *op. cit.* (2012), p. 413.

[1321] Pursuant to Article 127 (2) TFEU, the tasks of the ESCB are the following: (a) "to define and implement the monetary policy of the Union"; (b) "to conduct foreign-exchange operations consistent with the provisions of Article 219"; (c) "to hold and manage the official foreign reserves of the Member States"; (d) "to promote the smooth operation of payment systems."

[1322] Article 128 TFEU. See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 731.

[1323] See Article 282(3) TFEU and Articles 26-33 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

[1324] Article 130 TFEU.

[1325] According to Article 283 TFEU, the Executive Board is composed of a President, a Vice-President and four other members, while the Governing Council is composed by the members of the Executive Board and the Governors of the national central banks. The Governing Council represents the supreme decision-making body, while the Executive Board deals with the preparation of the meeting and the day-to-day management. See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 725.

relation to its activities.[1326] At the same time, however, the independence of the ECB was considered the key factor for assuring the credibility and legitimacy of its activities, which, shielded from political interferences, can pursue its core mission, i.e. the maintenance of price stability.[1327]

5.1.2. The Powers of the ECB under Primary Law

In the context of the EMU, the ECB is entrusted with a variety of powers by primary law. According to Article 132 TFEU, it has the power to adopt regulations and decisions to implement the tasks entrusted to it under the Treaties and the Statute, as well as opinions and recommendations.[1328] In particular, it can make regulations on minimum reserves to be held on account by credit institutions and on clearing and payment systems.[1329] Moreover, the ECB can impose fines or periodic penalty payments on undertakings "for failure to comply with obligations under its regulations and decisions", under the conditions defined by the Council.[1330] Therefore, the ECB is entrusted with relevant autonomous powers in the field of monetary policy, finding a direct legal basis in the Treaties for the adoption of the acts.[1331]

However, what is interesting for the purposes of this study is the extension of the powers of the ECB through acts of secondary law. In this regard, the need to resort to the legal institution of the delegation of powers was already envisaged in the first studies on the creation of the EMU, recognising the necessity to restructure the pre-existing institutional structure in order to formulate and implement the common policies.[1332] Although the Maastricht Treaty already

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[1326] See AMTENBRINK Fabian, "On the Legitimacy and Democratic Accountability of the European Central Bank: Legal Arrangements and Practical Experiences", in ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), pp. 147-163; CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), pp. 726-731.

[1327] See, *inter alia*, ZILIOLI Chiara and SELMAYR Martin, "The European Central Bank: An Independent Specialized Organization of Community Law", 37 *Common Market Law Review* (2000), pp. 35-36; FROMAGE Diane and IBRIDO Renato, "The "Banking Dialogue" as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?", 49 *Journal of European Integration* No. 3 (forthcoming).

[1328] Article 132 TFEU.

[1329] See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 733.

[1330] Article 132 (3) TFEU. See Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, OJ L 318, 27.11.1998, p. 4–7. Under Article 6(2) of this Regulation, the ECB "may adopt regulations to specify further the arrangements whereby sanctions may be imposed in accordance with this Regulation as well as guidelines to coordinate and harmonise the procedures in relation to the conduct of the infringement procedure." See ZILIOLI Chiara and SELMAYR Martin, *op. cit.* (2000), p. 632.

[1331] For a detailed analysis of the powers of the ECB, see, *inter alia*, ZILIOLI Chiara and SELMAYR Martin, *op. cit*. (2000), pp. 591–644; CONTALDI Gianluca, "L'evoluzione dei poteri della Banca centrale europea", in *Dialoghi con Ugo Villani* (2017), p. 531-539; ZILIOLI Chiara and SELMAYR Martin, *The Law of the European Central Bank,* (Hart Publishing, 2001); SCHELLER Hanspeter K., *The European Central Bank : History, Role and Functions,* (European Central Bank, 2004); PAPADIA Francesco and SANTINI Carlo, *La Banca centrale europea,* 4th ed. (Il Mulino, 2004).

[1332] See Committee for the Study of Economic and Monetary Union, *Report on Economic and Monetary Union in the European Community* (Luxembourg, 1989), para. 31: "Management of the economic and monetary

introduced the possibility of conferring further powers on the ECB by means of regulations,[1333] it is due to the recent financial crisis that this delegation of powers to the ECB has seen the light of the day.

5.2. The Financial and Sovereign Debt Crisis

In this regard, it is worth recalling the European sovereign debt crisis which began in October 2009, with the disclosure of the real figures on the national budget deficit by the Greek authorities. The concern about the financial solvency of this State, together with the disruption in global financial markets caused by the falling of the Lehmann Brothers bank, generated a financial market anxiety which made it very difficult for certain States to borrow money from the financial markets to sustain their public finances.[1334] The crisis affected the EU Member States in different ways and with different intensity, determining for some of them the necessity to receive support from the other Member States in order to safeguard the financial stability of the euro area as a whole.[1335] Different mechanisms of financial support were put in place, which involved the use of EU law,[1336] international law[1337] and informal measures[1338] by EU institutions and international actors.[1339] This financial support was generally granted under strict conditionality, imposing

union would call for an institutional framework which would allow policy to be decided and executed at the Community level in those economic areas that were of direct relevance for the functioning of the union. This framework would have to promote efficient economic management, properly embedded in the democratic process. Economic and monetary union would require the creation of a new monetary institution, placed in the constellation of Community institutions (European Parliament, European Council of Ministers Commission and Court of Justice). The formulation and implementation of common policies in non-monetary fields and the coordination of policies remaining within the competence of national authorities would not necessarily require a new institution; but a revision and, possibly, some restructuring of the existing Community bodies, including an appropriate *delegation of authority*, could be necessary."

[1333] See Article 105 (6) TEC: "The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."

[1334] See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), pp. 714-717.

[1335] For instance, Greece received a loan of € 110 billion in May 2010 and another € 130 billion in March 2012; Ireland € 85 billion in November 2010; Portugal € 78 billion in May 2011; Spain € 100 billion in July 2013 and Cyprus € 10 billion in April 2013. See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 714.

[1336] See Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1–4.

[1337] The European Stability Mechanism Treaty is an international treaty between the States of the euro area, signed on 2 February 2012.

[1338] The ECB announced the unlimited purchase of the government bonds of the euro area States, the so-called Outright Monetary Transactions (OMT), not with a formal decision, but with a Press Release. See European Central Bank, Press Release "Technical Features of Outright Monetary Transactions", 6 September 2012, available at https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (last accessed 06.07.2017).

[1339] Reference here is to the International Monetary Fund (IMF), which is party to the Memorandum of Understanding (MoU) negotiated with the State seeking financial support, together with the Commission and the ECB.

significant austerity measures in the States involved, with dramatic effects on their societies and with broad constitutional implications for the EU and national legal systems.[1340]

The initial support, however, was only a stopgap.[1341] The financial crisis revealed the weakness of the EU institutional framework of the EMU, as the existing rules and procedures proved to be inadequate to avoid unsustainable fiscal and economic performances of the Member States.[1342] Therefore, a rethinking of the EU policy for economic cooperation, involving a closer supervision of national budgets and of banks, was perceived as essential to prevent such a crisis from occurring again in the future.[1343] A number of measures were adopted, including a Treaty amendment, which strengthened the Union surveillance of the economic and financial sectors.[1344]

5.3. Building the Banking Union through Delegation

The recent crisis has shown how the weakness of the baking sector severely affected the public finances of the Member States, which used public money to rescue failing banks in order to avoid

[1340] See, *inter alia*, CHITI Edoardo and TEXEIRA Pedro Gustavo, "The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis", 50 *Common Market Law Review* (2013), pp. 683-708; DAWSON Mark and DE WITTE Floris, "Constitutional Balance in the EU after the Euro-Crisis", 76 *Modern Law Review* (2013), pp. 817-844; DE WITTE Bruno and others (eds.), *The Euro Crisis and the State of European Democracy* (EUI, 2013).

[1341] DE SCHUTTER Olivier, "Social Rights in the New Socio- Economic Architecture of the European Union", *Journal européen des droits de l'homme* No 2 (2017), p. 77.

[1342] See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit*. (2014), p. 717.

[1343] See CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), p. 710.

[1344] Without entering into details, the measures adopted can be divided in three groups: (i) the "six-pack", composed of five Regulations and a Directive on the surveillance and sanctioning of Member States for financial imbalances (see Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, p. 1–7; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011, p. 8–11; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306, 23.11.2011, p. 12–24; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011, p. 25–32; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306, 23.11.2011, p. 33–40; and Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306, 23.11.2011, p. 41–47); (ii) the "fiscal compact", a Treaty amending the TFEU (see Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2.05.2012, not published in the Official Journal); and (iii) the "two-pack", two regulations which strengthen the surveillance on national budgets (see Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140, 27.5.2013, p. 1–10; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, 27.5.2013, p. 11–23).

spill-over effects.[1345] In order to prevent this from repeating, the Commission announced the adoption of several initiatives for the creation of a "Banking Union", entailing a shift towards the EU level of banking regulation, supervision and resolution.[1346] Among the measures adopted in this field,[1347] Regulation No. 1024/2013, introducing the Single Supervision Mechanism (hereinafter, the SSM Regulation), established a system of common bank supervision, conferring relevant powers on the ECB.[1348] Although these powers are exercised in close collaboration with the national authorities[1349] and with other European authorities,[1350] the ECB plays a crucial role as the "central EU banking supervisory authority".[1351]

5.3.1. The Powers Delegated to the ECB

Under the SSM Regulation, the ECB is exclusively competent in relation to the prudential supervision of all the credit institutions of the Eurozone.[1352] However, considering the large number of existing institutions, the ECB exercises direct supervision only over the most "significant" institutions,[1353] leaving to the national authorities the supervision of the rest of the

[1345] See CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit*. (2014), p. 721.
[1346] See Communication from the Commission to the European Parliament and the Council, A Roadmap towards a Banking Union, COM/2012/0510 final.
[1347] The Banking Union is composed of three pillars: (i) the Single Resolution Mechanism (SRM), establishing a resolution regime for restructuring banks in crisis (see Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90; Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, signed in Brussels on 14 May 2014); (ii) the Single Deposit Guarantee Scheme, which protects depositors of credit institutions (see Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149–178; Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM/2015/0586 final); and (iii) the Single Supervisory Mechanism, which will be discussed *infra*. See BOZINA BEROS Marta, "Some Reflections on the Governance and Accountability of the Single Resolution Board", *TARN Working Paper 3/2017* (March 2017), p. 2.
[1348] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89. For a detailed report of the adoption of the regulation, see KERN Alexander, "The ECB and Banking Supervision: Building Effective Prudential Supervision?", 33 *Yearbook of European Law* No 1 (2014), pp. 417-432.
[1349] See Article 6 of SSM Regulation.
[1350] The ECB cooperates with EBA, ESMA, EIOPA and the European Systemic Risk Board. See Article 3 of SSM Regulation.
[1351] WEISSMANN Paul, "The European Central Bank (ECB) under the Single Supervisory Mechanism. Its Functioning and its Limits", *TARN Working Paper 1/2017* (March 2017), p. 2.
[1352] Article 4 (1).
[1353] The significance is determined according to the criteria enshrined in Article 6 of the SSM Regulation. In particular, they refer to the size, the importance for the economy of the Union, the significance of cross-border activities, and the total value of its assets. Moreover, the three most significant credit institutions of a Member State are *de plano* included. See also ECB, *Guide to Banking Supervision,* (European Central Bank, 2014), p. 8. It is noteworthy that the only case before the Court in relation to the SSM Regulation concerned precisely the qualification of a credit institution as "significant" under the relevant provisions, see Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337.

institutions.[1354] In order to carry out its duties, the ECB is granted a variety of powers.[1355] In particular, it can authorise and withdraw authorisation for all the credit institutions, assess notifications of the acquisition and disposal of qualifying holdings in credit institutions and carry out supervisory reviews, including "stress tests".[1356] Moreover, it can impose prudential requirements in relation to liquidity, solvency and exposure to risks, as well as on governance arrangements and recovery plans.[1357] Finally, it may request information from these institutions, carry out investigations and, under certain conditions, on-site inspections.[1358]

In relation to its supervisory tasks, the ECB can adopt not only guidelines[1359] and recommendations,[1360] but also decisions[1361] and regulations.[1362] In particular, these regulations, adopted "only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by [the SSM] Regulation"[1363] are binding for all the credit institutions subject to the ECB supervision. In other words, the SSM Regulation confers on this institution the power to adopt legally binding measures which may be of general application. Therefore, allowing the ECB to define requirements applicable to all credit institutions, Article 4 of the SSM Regulation clearly establishes a delegation of rule-making powers to the benefit of this EU institution.

[1354] The SSM is responsible for the supervision of around 4,900 credit institutions in total: 1,200 are subject to direct supervision, while around 3,700 are subject to indirect supervision. See ECB, *Guide to Banking Supervision,* (European Central Bank, 2014), p. 9.

[1355] For an analysis, see *inter alia* CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 721; WEISSMANN Paul, *op. cit.* (2017), pp. 2-4.

[1356] Article 4 (1) of SSM Regulation.

[1357] Article 4 (1) of SSM Regulation.

[1358] Articles 9-13 of SSM Regulation.

[1359] See, for instance, Guideline (EU) 2017/697 of the European Central Bank of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9), OJ L 101, 13.4.2017, p. 156–163; Guideline (EU) 2016/1993 of the European Central Bank of 4 November 2016 laying down the principles for the coordination of the assessment pursuant to Regulation (EU) No 575/2013 of the European Parliament and of the Council and the monitoring of institutional protection schemes including significant and less significant institutions, OJ L 306, 15.11.2016, p. 32–36.

[1360] See, for instance, Recommendation of the European Central Bank of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10), OJ C 120, 13.4.2017, p. 2–9; Recommendation of the European Central Bank of 13 December 2016 on dividend distribution policies (ECB/2016/44), OJ C 481, 23.12.2016, p. 1–3.

[1361] See, for instance, Decision (EU) 2017/1198 of the European Central Bank of 27 June 2017 on the reporting of funding plans of credit institutions by national competent authorities to the European Central Bank (ECB/2017/21), OJ L 172, 5.7.2017, p. 32–35; Decision (EU) 2017/935 of the European Central Bank of 16 November 2016 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42), OJ L 141, 1.6.2017, p. 21–25. The latter contains a delegation of authority to specific persons within the internal organisation of the ECB.

[1362] Article 4 (3) of SSM Regulation. See, for instance, Regulation (EU) 2016/445 of the European Central Bank of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4), OJ L 78, 24.3.2016, p. 60–73; Regulation (EU) 2015/534 of the European Central Bank of 17 March 2015 on reporting of supervisory financial information (ECB/2015/13), OJ L 86, 31.3.2015, p. 13–151.

[1363] Article 4 (3) of SSM Regulation.

Although resulting in acts of general application, these powers are limited to the prudential supervision of the identified credit institutions[1364] and they appear strictly related to the implementation of the SSM system. In this regard, however, it has been interestingly noted that the delegation of these supervisory tasks "draws the ECB into a potential space of politicisation".[1365] In particular, although special arrangements are in place to ensure full separation between the monetary and the supervisory tasks,[1366] the objectives of prudential supervision are very different from the monetary policy and, thus, potentially problematic for the peculiar position of the ECB in the institutional balance.

5.3.2. The Legal Basis for Delegation

This empowerment of the ECB finds its legal basis in Article 127 (6) TFEU, which allows the Council to "confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions."[1367] Therefore, contrary to the case of EU agencies, this delegation of powers arguably has an explicit *Delegationsnorm* in primary law, thus appearing less problematic from a constitutional perspective than other forms of delegation.[1368]

However, it has been noted that Article 127 (6) TFEU allows only a delegation of "*specific* tasks", thus limiting the scope of the empowerment in quantitative or qualitative terms. [1369] The compliance of the SSM Regulation with the requirements of this legal basis, therefore, will be further analysed in relation to the limits to the delegation of powers to the ECB.

5.3.3. The Chain of Delegation

Focusing more specifically on the chain of the delegation of powers contained in the SSM Regulation, it appears that the Council, on the basis of the competence conferred under primary law, has delegated its powers to the ECB in the field of banking supervision, establishing the single supervisory mechanism under the ECB's responsibility. Although limited to a single measure, this

[1364] Article 1 of the SSM Regulation.
[1365] FROMAGE Diane and IBRIDO Renato, *op. cit.* (forthcoming). See also ALEXANDER Kern, "The ECB and Banking Supervision: Building Effective Prudential Supervision?" 33 Yearbook of European Law No. 1 (2014), p. 429
[1366] See Recital 65, Articles 25 and 26 of the SSM Regulation.
[1367] The full text of Article 127 (6) TFEU reads as follows: "The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."
[1368] In particular, the delegation of powers to decentralised agencies, see Chapter 4, para. 2.5.
[1369] See WEISSMANN Paul, *op. cit.* (2017), p. 11. The issue of specificity of the delegation will be analysed in detail infra with reference to the requirements of the enabling act, see Chapter 4, para. 6.

delegation is significant as it presents the essential elements of this legal institution in a paradigmatic way.

Firstly, the Treaty provisions determine the EU competence in monetary policy, conferring on different institutions the relevant powers according to a certain order of competences. In particular, these powers are distributed among the ESCB, the ECB, the Council and the Parliament. Secondly, Article 127 (6) TFEU allows the Council, after consulting with the Parliament and the ECB, to confer specific tasks on the latter, thus explicitly allowing a delegation of powers in favour of this institution. Thirdly, as we have seen, Regulation 1024/2013 brought this delegation of powers into effect, delegating it the power to adopt guidelines and opinions, as well as decisions and recommendations.[1370] On the basis of this act of secondary law, thus, the ECB adopts acts legally binding on third parties, completing the delegation procedure with the enactment of its acts.

5.3.4. The Role of the National Authorities

While the legal mechanism underpinning the relationship between the Council and the ECB is clearly identifiable as a delegation of powers, the mechanism for the empowerment of the national authorities for the supervision of less significant entities within the SSM is more controversial. The point emerged, in particular, in Case T-122/15, concerning the refusal of the ECB to qualify the *Landeskreditbank Baden-Württemberg* as "less significant entity", thus subject to the national authorities' supervision.[1371] To support its argument, the applicant claimed that the SSM represents a system of shared supervision, which "serves to distribute the exercise of competences delegated to the ECB and held by the national authorities."[1372]

The Court, however, took a different view on the legal mechanisms at issue. Indeed, it clarified that the "the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities."[1373] Therefore, in exercising the competence conferred by the Treaties, the Council has established a system at the EU level, delegating to the ECB exclusive competence in banking supervision.[1374] Arguably, the empowerment of national authorities, thus, should not be understood as a

[1370] Article 4 (6) of SSM Regulation.
[1371] Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337. See also KARAGIANNI Argyro, "Delegation of enforcement tasks in the case of the ECB", *Paper presented at the Ius Commune Conference* (23-24/11/2017).
[1372] Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337, para. 47.
[1373] Ibidem, para. 54.
[1374] Ibidem, para. 63.

delegation from the Council or as a maintenance of their original powers, but as a form of sub-delegation from the ECB.

5.3.5. The Role of the Supervisory Board

Considering in particular the exercise of the delegated powers, a closer look at the SSM Regulation reveals that the supervisory tasks are actually carried out by a body specifically created within the ECB, i.e. the Supervisory Board. This Board is composed of a Chair and a Vice Chair,[1375] by four representatives of the ECB,[1376] and one representative of the national competent authority (generally the national central bank) of each Member State participating in the Single Supervisory Mechanism. Although the representation of the Member States is granted by the national representatives, the members of the Board are required to act in the interest of the Union as a whole. A representative of the Commission may take part in the meeting of the Board as an observer, but only upon invitation.[1377] The Board is assisted by a secretariat, and by a steering committee of a more limited composition.[1378]

Albeit specialised in prudential supervision, the Supervisory Body is not formally a decision-making body.[1379] It carries out the preparatory work and prepares draft decisions, which are formally adopted by the Governing Council unless it raises an objection by a qualified majority vote.[1380] In the case of an objection, a mediation panel is established.[1381] These additional requirements to overturn the draft decisions of the Supervisory Body give it, *de facto*, decisive power in relation to the supervisory tasks, affecting the exercise of the powers within the ECB internal structure. Being merely an internal body, the Supervisory Body has no legal personality and the measures remain formally adopted by the ECB, thus differentiating the status of this internal body from a fully-fledged agency.[1382] However, from a substantive perspective, it is questionable whether its position can be assimilated to the agencies which have *de facto* decision-making powers since it arguably appears to be the "substantive decision-maker" in the case.[1383]

[1375] Article 26(3) of the SSM Regulation.
[1376] The four representatives of the ECB are appointed by the Governing Council, see Article 26(5) of the Regulation. See also Decision of the ECB of 6 February 2014 on the appointment of representatives of the ECB to the Supervisory Board (ECB/2014/4), OJ L 196, 3.7.2014, p. 38.
[1377] Article 26(11) of the Regulation. See also Article 3.5 of the Rules of Procedure of the Supervisory Board, OJ L 182, 21.6.2014, pp. 56-60, where also the possibility to invite a representative of EBA is envisaged.
[1378] The steering committee is composed of 8 members of the Supervisory Board, appointed ensuring a fair balance and rotation between the national competent authorities. Article 26(9) and (10) of the Regulation. See also Articles 9-12 of the Rules of Procedure of the Supervisory Board, OJ L 182, 21.6.2014, pp. 56-60.
[1379] CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 726.
[1380] Article 26 (8) of SSM Regulation.
[1381] Article 25(5) of SSM Regulation.
[1382] See WEISSMANN Paul, *op. cit.* (2017), pp. 9-10.
[1383] CHALMERS Damian, DAVIES Gareth and MONTI Giorgio, *op. cit.* (2014), p. 726. See also ADAMSKI Dariusz, *op. cit.* (2014), pp. 830-831.

6. Conclusion

In this chapter, an analysis of the delegation of powers to EU agencies and to the ECB was undertaken, describing the characteristics and the historical development of these phenomena within the EU legal system. Although they emerged in different periods and established in relation to different policy areas, these forms of delegation concern bodies whose independence is an essential characteristic of their position in the institutional framework. Moreover, they arguably involve powers which, although exceptionally resulting in acts of general application, are related to the implementation of a given legislative framework, concerning highly technical assessments. However, in both cases, these bodies are increasingly called to intervene in complex and highly sensitive domains, drawing these technical bodies into politicised arenas.

In particular, the definition of EU agencies has lead us to distinguish between executive and decentralised agencies, whose evolution has been presented in a separate analysis. On the one hand, the executive agencies are bodies, located in Brussels or Luxembourg, which carry out executive and operational tasks related to specific spending programmes, being limited to purely managerial tasks. Operating under the close supervision of the Commission, the executive agencies are regulated by a comprehensive legal framework, *i.e.* Regulation No. 58/2003, which sets forth the organisation, functions and controls in relation to these bodies. Reflecting on the delegation mechanism to these agencies, we concluded that it represents more precisely a form of sub-delegation of powers from the Commission.

On the other hand, a more extended analysis has been necessary to give an account of the establishment and empowerment of decentralised agencies. These agencies, which are located in different Member States and exercise a wide variety of tasks and powers, constitute a formidable development of the EU institutional structure. In this regard, four waves have been identified, each representing a significant step forward in the agencification of the EU administration. In tracing the development of this phenomenon, it was recognised that the delegation of powers to these bodies has been increasingly significant both in quantitative and qualitative terms. Indeed, from the first agencies in the 1970s, which were entrusted with merely operational tasks, the number of decentralised agencies has exponentially increased to more than 30 bodies, which are nowadays called to exercise important powers in complex and politically sensitive domains. This development, however, is highly problematic, raising relevant concerns on the limits of the delegation of powers to these entities and, more in general, in relation to their legitimacy.

At the same time, the agencification has also resulted in a certain institutional "disorder", contributing to a fragmentation of the EU administration.[1384] In this regard, the creation and functioning of decentralised agencies still lacks a coherent legal framework since neither the Common Approach, agreed among EU institutions in 2012, nor the Lisbon Treaty have succeeded in addressing relevant questions on the role and the position of decentralised agencies in the EU institutional architecture. In particular, although formally mentioning EU agencies in primary law, the Lisbon Treaty has resulted in an incomplete constitutionalisation of this phenomenon, which makes it problematic to assess the delegation of powers to these bodies from a constitutional perspective.

In an attempt to systematise the powers delegated to these bodies, a classification has been put forward, distinguishing between decision-making agencies, which can adopt legally binding acts of individual or general application, and non-decision-making agencies. Accordingly, while decision-making agencies clearly constitute a case of delegation of powers, it was noted that, in certain cases, non-decision-making agencies may also be so influential that they exercise *de facto* decision-making powers in relevant EU policy domains. Moreover, the analysis of the relationships underpinning the empowerment of EU agencies has identified in the legislator (should it be the Parliament and the Council, or the Council alone) the delegator of those powers in legal terms, qualifying this phenomenon as properly a delegation of powers.

The same legal mechanism was recognised in the recent empowerment of the ECB with the prudential supervision of credit institutions in the Single Supervisory Mechanism (SSM) pursuant to Article 127 (6) TFEU. Established in response to the financial and sovereign debt crisis, the Banking Union has made this institution the most important banking supervisory authority in the Eurozone. In the context of the SSM, relevant powers of regulation, supervision and enforcement are delegated in relation to the credit institutions of the States which have adopted the euro as a common currency. Although the legal mechanism for this empowerment of the ECB is clearly a delegation of powers which has a express legal basis in primary law, the legal framework of the SSM raises interesting issues in relation to the compliance of this delegation with the specific limits of Article 127(6) TFEU, and to the legal mechanisms at stake in the interplay between Council, ECB and national authorities.

Finally, it is worth highlighting that the analysis has shown interesting connections between these two forms of delegation. Indeed, the exercise of the powers delegated to the ECB is strongly interrelated with the activities of other institutional bodies, both inside the ECB - in particular, the Supervisory Board which *de facto* exercises relevant decision-making powers - and outside it - for

[1384] CURTIN Deirdre, *op. cit.* (2009).

its close collaboration with the ESAs and the ESRB. Therefore, the interplay between these institutional actors and their specific position within the EU institutional framework will be taken into account in the analysis of the limits to the delegation of powers to this institution.

Chapter 4

Limiting the Delegation of Powers: The Enabling Act

1. Introduction

In the light of the considerations of the preceding chapters, it has clearly emerged that EU law has known (and still knows) different forms of the delegation of powers which have evolved in parallel in the case law and in institutional practice. Although they all originate from the need to insure flexible and efficient decision making and implementation at the EU level, each of these forms is regulated by different legal sources which have been interpreted by the Court separately. Thus, it was remarked that in the EU institutional framework it is not possible to talk about a single delegation system, but different systems of delegation coexist.[1385] From this perspective, it was further argued that in EU law there is no single legal regime which governs all the different forms of delegation,[1386] whose conditions and limits need to be understood independently. In this sense, the plurality of delegation regimes contributes to establishing a composite structure of EU governance.

Although the peculiarities of the different forms are undeniable, it is arguable, however, that they have developed to respond to the same challenges that the delegation of powers, as a specific legal mechanism affecting the constitutional order of competences and the balance between institutions, poses to the democratic legal system. Indeed, the transferral of powers from the legislator, i.e. the Council and the Parliament, whose legitimacy to enact general provisions is established directly in primary law and rests, respectively, on the Member States and on the people's will, to other institutions which are not originally entrusted with those powers nor enjoy the same legitimacy, entails the risk that the delegate would adopt measures which go beyond the scope of delegation, detaching itself from the chain of transmission of legitimacy and from the protection from power abuse guaranteed by the principle of legality and the institutional balance.

It is precisely the respect of these fundamental guarantees of a "Community based on the rule of law"[1387] which requires that, also in the choice of resorting to the delegation of powers, the EU legislator be constrained by certain conditions and limits. Thus, it stems not only from the express

[1385] See, in primis, Case C-270/12, *Short Selling*, EU:C:2014:18, para. 78.
[1386] See GAUTIER Yves, *La délégation en droit communautaire, PhD thesis* (Université de Strasbourg, 1995), p. 461; CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 234.
[1387] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, p. 23.

provisions of the principles of democracy and rule of law in the Treaties,[1388] but also from a certain substantive concept of legality which the EU endorses,[1389] that the legislator cannot enjoy absolute discretion in delegating its powers nor, consequently, can the delegate enjoy unlimited powers.

Therefore, considering the different requirements imposed by positive law and the different doctrines elaborated upon by the case law as an expression of the same democratic principles, it will be argued that certain minimum requirements are common for all the forms of delegation in EU law. In the following chapters, analysing the provisions of primary and secondary law, as well as the case law of the Court of Justice, the commonalities between the different regimes will be highlighted. In particular, it will be clarified whether and to what extent the evolution of the case law and the innovations of the Lisbon Treaty may have contributed to reducing the divergences between the different regimes, although maintaining the complexities of the EU institutional framework.

To this end, the structure of the discussion will follow the structure of the delegation of powers as a procedure which is articulated in two phases.[1390] Thus, in this chapter, the focus will be on the basic or enabling act, i.e. the measure that provides for the transferral of certain powers to the benefit of another institution or body (chapter 5), while in the following chapters attention will be paid to the exercise of the delegated powers, considering the different procedures in which it is embedded (chapter 6), and to the acts consequently enacted by the delegate, reflecting specifically on their form, their position within the hierarchy of norms and their judicial review (chapter 7).

Therefore, focusing firstly on the limits in the enabling act, formal and substantive requirements will be identified. As for the formal requirements, the legal basis of the enabling act and related issues will be analysed, moving then to considerations on the form which it can assume according the typology of acts introduced by the Lisbon Treaty and the traditional legal instruments of EU law. Then, turning to the substantive requirements, the content of the enabling act will be addressed, examining what elements it must include and how they must be articulated. From this analysis, a comprehensive understanding of the characteristics which the basic act needs to present for a lawful delegation of powers and the specific issues related will emerge, shedding light on the commonalities and differences between the delegation systems.

[1388] See Articles 2, 10 and 11 TEU. For a reflection of the limits to the legislator stemming from Articles 10 and 11 TEU, see MENDES Joana, "The Making of Delegated and Implementing Acts, Legitimacy beyond Institutional Balance.", in BERGSTROM Carl Frederik and RITLENG Dominique, Rulemaking by the European Commission. The New System for Delegation of Powers, (Oxford University Press, 2016), p. 234.
[1389] See Chapter 1, para. 5.1.
[1390] See Chapter 1, para. 4.

2. The Legal Basis of the Enabling Act

As any act of EU law, the enabling act needs to have a valid legal basis. In accordance with the principle of conferral, the Union can act only within the powers conferred on the Union by the Members States and, within the scope of the Union's competence, as far as there is a specific treaty provision which provides a legal basis for its action. Accordingly, the enabling act must be adopted according to the procedure established in the legal basis, which identifies the roles and powers of the different institutions. As already remarked upon, such a legal basis identifies the main principles guiding the Union action in the field and defines the decision-making powers which the Union institutions enjoy for the attainment of that objective.[1391]

2.1. The Legal Basis for the Delegation to the Commission and the Council

In the light of the reflections above, it appears that, provided that the act has a valid legal basis in the Treaties identified according to the relevant criteria,[1392] a provision containing a delegation of powers to the Commission or to the Council can be inserted in any policy measure within the Union's competence. Accordingly, provisions delegating powers to the Commission or to the Council can be found in the areas of exclusive competence of the EU, such as customs union[1393] or common commercial policy,[1394] as well as in areas of shared competence, such as agriculture[1395] and the internal market.[1396] With regard to the competence of the EU to take action to support, coordinate, or supplement Member State action,[1397] although the EU cannot harmonise national laws in these areas, it can sometimes pass legally binding acts on the basis of the relevant specific policy provisions. Thus, within the limits given by the nature of the competence, the EU institutions can also adopt an act delegating powers to the Commission or the Council in these fields.[1398]

[1391] See DASHWOOD Alan, DOUGAN Michael, RODGER Barry, SPAVENTA Eleanor and WYATT Derrick, *Wyatt and Dashwood's European Union Law* (Hart Publishing, 2011), p. 99.
[1392] See Chapter 1, para. 10.1.
[1393] See, for instance, Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1–101.
[1394] See, for instance, Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008, OJ L 303, 31.10.2012, p. 1–82.
[1395] See, for instance, Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, OJ L 347, 20.12.2013, p. 487–548.
[1396] See, for instance, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374.
[1397] Article 6 TFEU.
[1398] See, for instance, Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, OJ L 347, 20.12.2013, p. 221–237.

The delegation of powers, however, needs to remain within the limits of the legal basis as established in the Treaties. In this respect, the use of Article 114 TFEU in relation to acts delegating powers to the Commission appeared particularly problematic, and it has resulted in some litigation before the Court. In this regard, it is important to recall that Article 114 TFEU provides a legal basis for "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[1399] Thus, unlike the other policy-specific legal bases, but similar to Article 352 TFEU, the competence is defined "in terms of a cross-sectoral objective to be achieved", which is the establishment and functioning of the internal market.[1400] However, Article 114 TFEU provides a legal basis only for measures whose object is the harmonisation of national laws.[1401] Therefore, albeit relating to the achievement and functioning of the internal market, measures which do not entail an "approximation" of national provisions cannot be adopted on the basis of this article.

In particular, in *Smoke Flavouring*,[1402] the Court was confronted with the use of Article 114 TFEU for a regulation which did not harmonise laws itself, but it established the procedures to be followed by the Commission for the approval of a list of smoke flavourings to be used on foods.[1403] The UK challenged this act, arguing that this legal basis allowed only provisions directly harmonising national provisions and not a delegation of powers which could contribute indirectly to the harmonisation of the internal market.[1404] Following the Opinion of Advocate General Kokott,[1405] the Court held that Article 114 TFEU could be used not only for direct harmonisation, but also for "a harmonisation which comprises several stages", thus upholding the validity of the intermediate measures which contribute to this end.[1406] However, two substantive conditions need to be satisfied by the act. Firstly, the legislator must determine in the basic act "the essential elements of the harmonising measure" in question.[1407] Secondly, the mechanism of the

[1399] Article 114(1) TFEU.
[1400] DE BURCA Grainne and DE WITTE Bruno, "The Delimitation of Powers between the EU and its Member States", in ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), p. 214.
[1401] DE BURCA Grainne and DE WITTE Bruno, *op. cit.* (2002), p. 215.
[1402] Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743. See also Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, where the Court dismissed the claim that Article 114 TFEU was not the appropriate legal basis for the adoption of Directive 2002/46/EC on the approximation of laws of the Member States relating to food supplements just recalling its case law on the point, without elaborating on the particular point of the delegation.
[1403] Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods, OJ 2003 L 309/1. See BARNARD Catherine, *The Substantive Law of the EU*, 3rd ed. (Oxford University Press, 2010), pp. 613-616.
[1404] Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743, para. 18.
[1405] Opinion of Advocate General Kokott in Case C-66/04, UK v EP and Council (Smoke flavourings), EU:C:2005:520.
[1406] Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743, para. 47.
[1407] Ibidem, para. 48.

implementation of these elements must be designed in such a way that it leads to a harmonisation, establishing the detailed rules for making decisions, determining and circumscribing precisely the powers of the Commission.[1408] Thus, if the basic act contains the essential elements which typify the harmonisation measures, and it specifies the legal framework for their implementation, it is possible to determine whether the system established in the regulation results in the harmonisation of the internal market.

Interestingly, the conditions posed by the Court appear to apply to the particular scope of Article 114 TFEU the substantive requirements for the legality of the delegation of powers, which will be analysed in detail *infra*.[1409] In other words, since the possibility to use Article 114 TFEU needs to be assessed in the light of the attainment of the internal market objective, it depends significantly on the content of the basic act, merging formal and substantive requirements of the basic act. In any case, in the light of this case law and of the consolidated institutional practice, few doubts remain on the fact that Article 114 TFEU can also provide a valid legal basis for a delegation of powers to institutions which contribute to an indirect harmonisation of the internal market.

2.2. The Legal Basis for the Delegation to Agencies

The possibility to base the enabling act on any policy-specific provision of the Treaties has been more controversial in relation to the delegation of powers to EU agencies. In practice, the agencies of the first and second waves of agencification were established on the basis of the flexibility clause,[1410] which, requiring unanimity in the Council, was considered by some scholars and by the Council Legal Service as the only appropriate legal basis for such an institutional innovation as the creation of a decentralised agency.[1411] However, since the 2000s, the use of the policy-specific legal bases was promoted by the Commission[1412] and was progressively accepted as the standard

[1408] Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743, para. 49.
[1409] On the essential elements doctrine, see *infra* para. 5.
[1410] Now Article 352 TFEU.
[1411] See VOS Ellen, "European Agencies and the Composite EU Executive" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 21. For a detailed discussion of the pre-ENISA doctrinal debate, see CHAMON Merijn, *op. cit*. (2016), pp. 137-141.
[1412] See European Commission, Communication of 11 December 2002. The operating framework for the European Regulatory Agencies, COM/2002/0718 final. See also the proposals of the Commission for the establishment of the CPVO and the EMA based on the policy-specific legal basis, which were amended by the Council in favour of Article 235 EEC (now 352 TFEU), Proposal for a Council Regulation (EEC) on Community Plant Variety Rights, COM/90/347final, OJ C 244, 28.9.1990, p. 1–27; Proposal for a Council Regulation (EEC) Laying down Community Procedures for the Authorization and Supervision of Medicinal Products for Human and Veterinary Use and Establishing a European Agency for the Evaluation of Medicinal Products, COM/90/283FINAL, OJ C 330, 31.12.1990, p. 1–17.

practice by the Council.[1413] Consequently, currently, 25 EU agencies find their legal basis in policy-specific provisions.[1414]

Such a shift in the legal basis for the creation of EU agencies did not occur without significant litigation before the Court of Justice, in particular in relation to the use of Article 114 TFEU.[1415] On this issue, it was claimed that, also in the light of the restrictive interpretation by the Court in the *Tobacco advertising* case,[1416] Article 114 TFEU cannot be used for the delegation of powers to decentralised agencies where the basic act is not to be implemented by national rules, because the creation of a parallel system of administration at the EU level could never constitute a harmonisation of national laws,[1417] nor where the agency is delegated decision-making powers of such an institutional importance that it cannot be maintained that they have a supplementary character in relation to the harmonisation objective of the basic act.[1418]

In this regard, it is important to distinguish two different questions raised in relation to the legal basis for the creation of an agency. On the one hand, it is questionable whether the specific legal bases in the Treaties allow the EU institutions to establish a new body with a separate legal personality within the EU institutional structure, altering the architecture established in primary law. This would not be possible if the Treaties were interpreted as establishing a closed list of institutions and bodies.[1419] On the other hand, a different question is the empowerment of the agency, which relates more pertinently to the delegation of powers to such bodies. The two issues are generally interlinked since the establishment of an agency in a legislative act is necessarily

[1413] EVERSON Michelle and VOS Ellen, "Unfinished Constitutionalisation: The Politicised Agency Administration and Its Consequences", *Paper presented at the TARN Conference* (Florence, 10-11/11/2016), p. 9; CHAMON Merijn, *op. cit*. (2016), p. 140. Only in its opinion on 18 May 2001 the Legal Service of the Council of the European Union took the view that the establishment of a new agency was possible also under the specific legal basis, see Doc 8891/01, para. 3.

[1414] The list includes the following agencies: ACER (article 114), BEREC (article 114), CEPOL (articles 87 and 88), EASA (article 100), EASO (article 74 and 78), EBA (article 114), ECDC (article 168), ECHA (article 114), EEA (article 192), EFCA (article 43), EFSA (article 43, 114, 207 and 168), EIGE (article 19 and 157), EIOPA (article 114), EMA (article 114 and 168), EMCDDA (article 168), EMSA (article 100), ENISA (article 114), ERA (article 91), ESMA (article 114), ETF (article 166), EUROJUST (article 82, 83 and 85), EUROPOL (article 87 and 88), EBCG (article 77 and 79), GSA (article 188), IT-Agency (article 74, 77, 78, 79, 82, 85, 87 and 88) and SRB (article 114).

[1415] CHAMON Merijn, *op. cit.* (2016), p. 140. The use of Article 114 TFEU, in particular, has been contested before the Court, see case C-217/04, *United Kingdom v European Parliament and Council*, EU:C:2006:279; Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling),* EU:C:2014:18.

[1416] Case C-376/98, *Germany v EP and Council (Tobacco advertising)*, EU:C:2000:544.

[1417] See, *inter alia*, DASHWOOD Alan, "The Limits of European Community Powers", 21 *European Law Review* (1996), p. 120.

[1418] See VOS Ellen, *Institutional Framework of Community Health and Safety Regulation* (Hart Publishing, 1999), p. 199.

[1419] See CHAMON Merijn, *op. cit*. (2016), p. 136. On this point, *inter alia*, it is worth reporting the position of Pierre Pescatore: "rien n'empêcherait le Conseil de prendre même des dispositions de caractére organique, en vue de créer des organismes nouveaux dans le cadre de la structure institutionnelle", PESCATORE Pierre, *L'ordre juridique des Communautés européennes: étude des sources du droit communautaire*, (Presses Universitaires de Liège, 1975), p. 137.

coupled with the conferral of certain tasks to that agency. Yet, it may occur that certain powers are delegated to an already existing agency with a separate measure, as in the case of the empowerment of ESMA by Regulation No. 236/2012.[1420]

2.2.1. The ENISA Case

The issue of the possibility of establishing an EU agency on the basis of Article 114 TFEU was expressly raised before the Court of Justice in *ENISA*.[1421] In this case, the UK challenged the regulation establishing the European Network and Information Security Agency (ENISA), arguing that what is now Article 114 TFEU was not the appropriate legal basis for setting up a new body and conferring tasks to it, whereas what is now Article 352 TFEU should have been used. According to the applicant, the establishment of ENISA only contributed incidentally to harmonising national laws and, on the contrary, the concrete tasks attributed (i.e. providing non-binding advice) were so limited that they could never really amount to an "approximation"; thus in practice its contribution to the achievement of the internal market objective was insignificant.[1422] In her Opinion, Advocate General Kokott, drawing from the *European Cooperative Society* case,[1423] argued that measures for the approximation of national provisions are not confined to measures which themselves approximate national laws, but they also comprise measures which contribute to harmonisation indirectly, "in a multistage model with intermediate steps".[1424] However, although a contribution of ENISA to the approximation of laws could not be entirely excluded, its potential contribution was not predictable or sufficient enough to consider it "an intermediate step on the way to the approximation of laws of the Member States".[1425]

Dissenting from the Advocate General, the Court emphasised the discretion enjoyed by the legislator as regards the most appropriate method of harmonisation, especially "in fields with complex technical features".[1426] In its discretion, the legislator may consider it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation "in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate".[1427] However, the tasks delegated to

[1420] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.
[1421] See Case C-217/04, *UK v EP and Council (ENISA)*, EU:C:2006:279.
[1422] Ibidem, paras. 11-21.
[1423] Case C-436/03, *EP v Council (European Cooperative Society)*, EU:C:2006:277.
[1424] Opinion of AG Kokott in case C-217/04, *UK v EP and Council (ENISA)*, EU:C:2005:574, para. 25.
[1425] But rather "a step into the uncertain", see Opinion of AG Kokott in case C-436/03, *EP v Council (European Cooperative Society)*, EU:C:2005:574, para. 36.
[1426] Case C-217/04, *UK v EP and Council (ENISA)*, EU:C:2006:279, para. 43.
[1427] Ibidem, para. 44.

such a body must be "closely linked to the subject-matter of the acts approximating [the national provisions]".[1428] Therefore, assessing whether the objectives and tasks conferred to ENISA were closely linked to the subject matter of the act and, thus, supporting its implementation, the Court found this to be the case.[1429] The reasoning of the Court was corroborated by the findings that the ENISA Regulation was "part of a normative context"[1430] and was established temporarily, for a period of five years.[1431] Therefore, albeit the reasoning of the Court appeared open to criticism,[1432] the ENISA judgment clarified that, under certain conditions, Article 114 TFEU can be given as a wide interpretation as also comprising the establishment of an agency.

2.2.2. The Short Selling Case

The interpretation of the Court was confirmed subsequently in the *Short Selling* case, in which the UK challenged, *inter alia*, the conferral of intervention powers in the matter of short selling to ESMA on the basis of Article 114 TFEU.[1433] In particular, the issue at stake in this case was not the establishment of an EU agency, but rather the subsequent delegation of powers to this body under such a legal basis. Here as well, the Advocate General and the Court reached different conclusions on the validity of the enabling act.

[1428] Ibidem, para. 45. See also Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743.
[1429] Case C-217/04, *UK v EP and Council (ENISA)*, EU:C:2006:279, paras. 47-58.
[1430] Ibidem, para. 60.
[1431] Ibidem, para. 65. On the relevance of this element in the Court's assessment, see BOUVERESSE Aude, "Bases juridiques autorisant la creation d'organismes dotes d'une personnalité juridique proper", *Europe* (2006), p. 10.
[1432] For some critical remarks on the judgment, see RANDAZZO Vincenzo, "Case C-217/04, United Kingdom v European Parliament and Council of the European Union", *Common Market Law Review* (2007), pp. 155-169; GUTMAN Kathleen, "Case C-66/04, *Smoke Flavourings*; Case C-436/03, *SCE*; & Case C-217/04, *ENISA*", *The Columbia Journal of European Law* (2006), pp. 147-187; FABIANO Laura, "Articolo 95 TCE e agenzie comunitarie: una nuova pronuncia della Corte di giustizia", *Diritto pubblico comparato ed europeo* (2006) pp. 1219-1224; VAN CLEYNENBRUEGEL Pieter, "Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014), pp. 66-70.
[1433] Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18. For comments on this specific aspect of the case, see CHAMON Merijn, "The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v Parliament and Council (Short Selling) and the Proposed Single Resolution Mechanism", 39 *European Law Review* No. 3 (2014), pp. 380-403; MALETIC Isidora, "Delegating Harmonisation of the Internal Market: the Ruling in Case C-270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (Short Selling Ban), Judgment of 22 January 2014", 33 *Yearbook of European Law* No. 1 (2014), pp. 501-517. For a comment on the case in general, see, *inter alia*, ADAMSKI Dariusz, "The ESMA Doctrine: A Constitutional Revolution and the Economies of Delegation", 39 *European Law Review* (2014), pp. 812-834; ALBERTI Jacopo, "Delegation of Powers to EU Agencies after the Short Selling Ruling", *Il Diritto dell'Unione Europea* No. 2 (2015), pp.451-492; BERGSTROM Carl Fredrik, "Shaping the New System for Delegation of Powers to EU Agencies: United Kingdom v European Parliament and Council (Short Selling)", 52 Common Market Law Review (2015), pp. 219-242; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The ESMA-Short Selling Case. Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants", 41 *Legal Issues of Economic Integration* No. 4 (2014), pp. 389-406; SZEGEDI Laszlo, "EU-Level Market Surveillance and Regulation by EU Agencies in Light of the Reshaped Meroni Doctrine", *European Networks Law and Regulation Quarterly* No. 4 (2014), pp. 298-304.

Recalling the judgments *Smoke flavouring*[1434] and *ENISA*,[1435] Advocate General Jääskinen considered that Article 114 TFEU represented a valid legal basis for the establishment of ESMA and for the conferral of general powers to adopt measures legally binding on third parties.[1436] However, he found that the special powers conferred on ESMA on short selling, including the decision-making powers to adopt individual measures on particular actors in substitution of national authorities under Article 28 of Regulation No. 236/2012, went beyond the concept of internal market harmonisation. Indeed, the scale of the powers vested in ESMA is such to result in a power of intervention on the conditions of competition in a particular financial market, a power similar to the one enjoyed by the Commission in agriculture and antidumping.[1437] Since the function of Article 28 is to lift certain implementing powers from the national authorities to the EU agency in emergency circumstances, it cannot be considered a form of harmonisation, but "the replacement of national decision making [...] with EU level decision making".[1438] In his view, this exceeds the genuine object of the improvement of the conditions for the establishment and functioning of the internal market.[1439] Conversely, the adequate legal basis for Article 28 of Regulation No. 236/2012 should, according to him, have been Article 352 TFEU, which allegedly would also have opened "an important channel for enhanced democratic input".[1440]

The Court, however, dismissed the plea of the UK, adopting a more permissive approach on the issue. In deciding whether the intervention system was enacted validly under Article 114 TFEU, the Court adopted a two-step approach. Firstly, it investigated whether Article 28 of Regulation No. 236/2012 comprises "measures of the approximation" of national provisions, recalling that the legislator has a margin of discretion in choosing the most appropriate method of harmonisation.[1441] Emphasising the specific and technical expertise of the matter, it held that the

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[1434] Case C-66/04, *UK v EP and Council (Smoke flavourings)*, EU:C:2005:743.
[1435] Case C-217/04, *UK v EP and Council (ENISA)*, EU:C:2006:279.
[1436] Opinion of Advocate General Jäänisken in Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2013:562, para. 34.
[1437] Ibidem, para. 45.
[1438] Ibidem, para. 52.
[1439] Ibidem, para. 46. The AG further remarks: "If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or distortions of competition liable to result therefrom were sufficient to justify the choice of Article 114 TFEU as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory."
[1440] Opinion of Advocate General Jäänisken in Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2013:562, paras. 54-59. On the idea the unanimity in the Council represents an element of democratic legitimacy, see also Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, para. 235. This remark, however, is contestable in the light of the reduced input by the EP in the procedure under Article 352 TFEU and the veto power accorded to a single Member State, see ORATOR Andreas, "Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen", 22 *Europäische Zeitschrift für Wirtschaftsrecht* (2013), p. 854; VAN GESTEL Rob, "European Regulatory Agencies Adrift?", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014a), p. 192; CHAMON Merijn, op. cit. (2016), p. 148.
[1441] Case C-270/12, *Short Selling*, EU:C:2014:18, para. 102.

legislature could delegate such powers to an agency for the implementation of the harmonisation,[1442] which can include powers to adopt individual measures if necessary to ensure the unity of the market.[1443] Arguing from the recitals of the Regulation, it concluded that Article 28 was indeed directed at the harmonisation of national provisions.[1444] Secondly, the Court investigated whether the harmonisation measures had as their object the establishment and functioning of the internal market. In this regard, in the light of the differences of the Member States' legislation on short selling, it was clear that the system is intended "to prevent the creation of obstacle to the proper functioning of the internal market and the continuing application of divergent measures by Member States".[1445] Therefore, its purpose is to improve the conditions for the establishment and functioning of the internal market, thus fulfilling the requirements of Article 114 TFEU.

2.2.3. Assessing the Approach of the Court

In the light of this case law, the establishment and empowerment of EU agencies on the basis of Article 114 TFEU and, more in general, of policy-specific legal bases is sanctioned decisively by the Court. In so doing, the Court consolidated the practice of the last decades[1446] and did not depart from the interpretation of Article 114 TFEU in its previous case law.[1447] However, in this context, the approach of the Court appears remarkably permissive, allowing for the delegation of a wide array of powers: binding and non-binding, of general and individual application.[1448]

In this regard, the substantive conditions elaborated by the Court in *Smoke Flavouring* are not recalled in relation to EU agencies, while the reasoning of the Court reflects the more general considerations of the *Alliance for Natural Health* case and its emphasis on the discretion enjoyed by the legislator in the choice of the approximation method.[1449] In the Court's reading, the

[1442] Ibidem, para. 105.
[1443] Ibidem, para. 106. The Court, in particular, draws from the Case C-359/92, *Germany v Council*, EU:C:1994:306, where measures of approximation were interpreted as including measures relating to a specific product of class of products.
[1444] Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2014:18, para. 112.
[1445] Ibidem, para. 114.
[1446] See CHAMON Merijn, *op. cit.* (2016), p. 149. However, although the clarification of the Court, further litigation is not excluded, see MALETIC Isidora, *op. cit.* (2014), p. 514.
[1447] See, *inter alia*, Case C-380/03, *Tobacco Advertising II,* EU:C:2006:772; Case C-210/03, *Swedish Match*, EU:C:2004:802; Case C-434/02, *Arnold André*, EU:C:2004:800; Case C-465/00, *Österreichischer Rundfunk*, EU:C:2003:294. For a review of the case law on Article 114 TFEU, see BARNARD Catherine, *op. cit.* (2010), pp. 603-616; MALETIC Isidora, *The Law and Policy of Harmonisation in Europe's Internal Market,* (Edward Elgar, 2013); DE BURCA Grainne and DE WITTE Bruno, *op. cit*. (2002), pp. 201-222.
[1448] See CLEMENT-WILZ Laure, "Les agences de l'Union européenne dans l'entre-duex constitutionnel", *RTDeur* (2015), p. 339. See also EVERSON Michelle and VOS Ellen, op. cit. (2016), p. 11; VAN CLEYNENBRUEGEL Pieter, *op. cit.* (2014), p. 78.
[1449] See also Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, especially paras. 24-40.

"virtually unlimited" internal market objective, coupled with a broad interpretation of the notion of approximation, determines that the scope of Article 114 TFEU can be "theoretically extended infinitely as long as the agencies remotely contribute to harmonisation or to the adoption of uniform practices at the different national levels".[1450] Thus, the Court failed to establish significant constitutional boundaries in relation to the use of Article 114 TFEU for such an institutionally relevant modification as the creation of new bodies of EU administration. As a result, the "fairly low barrier" posed to the empowerment of agencies under the competence for internal market harmonisation raises significant concerns on the risk of EU executive competence creep through the proliferation of agencies.[1451] In this sense, it would have been advisable for the Court to enforce more clearly the limits in the use of Article 114 TFEU.

2.2.4. The Delegation of Powers under a Different Legal Basis

Finally, it is noteworthy that the question of the legal basis of the empowerment of EU agencies re-emerged more recently in a case concerning the powers of EBA in the supervision of credit institutions and investment firms.[1452] One of the issues in this case was the empowerment of the agency with new powers under a legal basis different from the one of the establishment. In particular, the UK argued that those powers, conferred under Article 53(1) TFEU, were *ultra vires* since the EBA was established under Article 114 TFEU and, consequently, it could not be empowered with tasks which exceed the scope of its founding legal basis. On this aspect, the Advocate General Jääskinen took the position that, although the establishment of an agency is based on a certain legal basis, nothing precludes the legislator from delegating other powers under a different legal basis. Indeed, the validity of the use of that legal basis depends exclusively on the content of the new powers, making the legal basis for the establishment of the agency irrelevant in this assessment.[1453]

Although the Court could not rule on the issue for the withdrawal of the application, the reasoning of the Advocate General raises the interesting point that the legislative act establishing an agency does not represent a valuable yardstick for the assessment of the legality of subsequent empowerments by a new legislative act, since it does not take priority over the latter for the sole fact of being the founding act. The two measures belong to the same level of the hierarchy of norms and the potential conflicts shall be solved solely according to the *lex posterior* criterion.[1454]

[1450] VAN CLEYNENBRUEGEL Pieter, *op. cit.* (2014), p. 78.
[1451] EVERSON Michelle and VOS Ellen, *op. cit*. (2016), p. 9.
[1452] Case C-507/13, *UK v EP and Council*, EU:C:2014:2481.
[1453] Opinion of Advocate General Jäänisken in Case C-507/13, *UK v EP and Council*, EU:C: 2014:2394, para. 63.
[1454] Ibidem, para. 59.

2.3. The Need for a Delegationsnorm *in the Treaties?*

From a constitutional perspective, the existence of a legal basis in the Treaties for the adoption of normative acts of a binding character may not be considered sufficient for a valid adoption of an enabling act, delegating powers to institutions or bodies. As it was seen, in State legal systems where a rigid Constitution establishes the order of competences and the powers enjoyed by the public authorities, such interference in the distribution of powers among institutions needs to be justified specifically in constitutional terms in order to comply with the rule of law. Indeed, according to the leading doctrine,[1455] the principle of legality requires that a provision at the same hierarchical level of the attribution of powers - typically at the constitutional level - expressly provides for the possibility of delegating powers.[1456] From this perspective, the enabling act needs to find its legitimacy from two legal bases: one concerning the substantive provisions of the policy measures and the other relating to the specific institutional arrangement, i.e. the delegation.

In the EU legal system, such a requirement of a *Delegationsnorm* or a double legal basis for the delegation of powers has been avoided in the pre-Lisbon case law. The Court has consistently upheld the case where the enabling act was based on the specific legal basis for the adoption of the substantive provisions of the policy, without demanding an express provision on the delegation in the Treaties. As the Court stated clearly in *Tralli*, "the powers conferred on an institution include the right to delegate, in compliance with the requirements of the Treaty, a certain number of powers which fall under those powers, subject to conditions to be determined by the institution."[1457] In other words, the Treaty provision conferring the powers to an institution or body is also considered to contain a sort of implicit *Delegationsnorm*. Therefore, when the procedure established in that specific legal basis is respected, this represents the only relevant element in the assessment of its validity.[1458]

2.4. The Delegationsnorm *for the Delegation of Powers to the Commission and to the Council*

In the assessment of the validity of a delegation phenomenon, however, the Court often corroborates its reasoning through reference to other provisions of primary law, which indirectly imply the possibility of such delegation. This was evident, first of all, in the case of *Köster*, where

[1455] See, in particular, BARBEY Gunther, *Rechtsübertragung und Delegation: eine Auseinandersetzung mit der Delegationslehre Heinrich Triepels* (Münster, 1962); CERVATI Angelo Antonio, *La delega legislativa*, (Giuffrè, 1972).
[1456] See Chapter 1, para. 5.
[1457] Case C-301/02 P, *Tralli v ECB*, EU:C:2005:306, para. 41.
[1458] Joined Cases C-184/02 and C-223/02, *Spain and Finland v PE and Council*, EU:C:2004:497. See VIMBORSATI Anna Chiara, *op. cit.* (2008), p. 1250.

the Court, asked to pronounce for the first time on the legitimacy of the comitology system, inferred from Article 155 EEC (and, problematically, from the practice of the institutions)[1459] the compliance with the Treaty legal system of the delegation of powers to the Commission.[1460] That provision, however, provided only that "the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter",[1461] without regulating the modes and limits of such a transferral of powers. As we have seen, a more detailed provision on the delegation of powers to the Commission and to the Council was inserted only later, with the Single European Act.[1462]

More precisely, the Single European Act has regulated the delegation of powers to the Commission and to the Council, inserting in Article 145 EC a specific legal basis also for the adoption of the Comitology decisions. However, it was with the Lisbon Treaty that the institutional system of delegation adopted the current outlook. Articles 290 and 291 TFEU now provide express legal bases for the adoption of delegated acts and implementing acts, respectively, thus functioning as express *Delegationsnormen* for the related systems of delegation of powers. The forms of delegation which operate within the scope of those provisions, therefore, are granted a fully-fledged legal basis in primary law, which enhance their legality from a formal perspective.

2.5. The Absence of a Delegationsnorm *for the Delegation to EU Agencies*

In EU primary law, no express provision addresses the specific issue of the legal institution of the delegation of powers in relation to EU agencies. As we have seen, references to EU agencies are to be found only in the provisions relating to judicial review, transparency and participation.

2.5.1. The Agencies Expressly Mentioned in Primary Law

It is important to note here that a limited number of agencies are mentioned expressly in the Treaties: the European Defence Agency,[1463] Europol[1464] and Eurojust.[1465] Although not directly establishing the agency, the related provisions give some indications as to the role, the tasks and the procedure for the creation of these agencies, thus providing a fully-fledged form of *Delegationsnorm* in primary law. For these agencies, thus, the existence of a legal basis for their

[1459] See Chapter 2, para.2.2.2.
[1460] Case 25/70, *Köster*, EU:C:1970:115, para. 6.
[1461] Article 155 EEC.
[1462] See Article 145 EC.
[1463] Article 45 TEU.
[1464] Article 85 TFEU.
[1465] Article 88 TFEU.

establishment and empowerment is beyond doubt, being expressly provided for in the Treaties.[1466] However, it is clear that they represent the exception to the rule in agencification.

2.5.2. The Position of the Court

The issue of the need for a specific *Delegationsnorm* for EU agencies also arose in the case law. In *Meroni,* when specifically asked about the possibility of entrusting bodies with separate legal personality with certain tasks, the Court ruled that, in the framework of the Treaties, such a possibility could not be excluded. Therefore, the possibility of delegating its powers appeared inherent in the powers conferred by the Treaties, and as long as the powers delegated corresponded to the powers conferred to the institution by primary law, the delegation was considered lawful.[1467] An express decision to delegate its powers was thus considered sufficient to enact a valid delegation of powers, even without an explicit provision in the Treaties.[1468]

In *Short Selling*, the issue was brought again to the attention of the Court. In this case, however, the Court corroborated its reasoning by referencing the Treaties provisions which mentioned the existence of the agencies and their acts. In particular, the Court, addressing the compatibility of the ESMA powers with Articles 290 and 291 TFEU, recalled the institutional framework established by the Lisbon Treaty, which innovatively listed the acts of agencies, offices and bodies in the provisions on the review of their acts.[1469] Although remarking that there is no provision in primary law on the possibility of conferring powers to agencies, the Court nevertheless concluded that those provisions "presuppose that such a possibility exists".[1470] In this sense, the mentioning of the acts of the agencies in the Treaties is considered sufficient as a recognition of the possibility of delegating powers to such bodies.

However, although *prima facie* logical, this conclusion is particularly controversial, since a quite fundamental step from a constitutional perspective appears to be based on a rather tiny loophole.[1471] Indeed, the indications provided by those provisions as regards the specific use of delegation are scarce and even less significant than what could be inferred from Article 155 EEC cited in *Köster*. In this sense, while that article could function as an implicit *Delegationsnorm*, the

[1466] See CHAMON Merijn, *op. cit.* (2016), p. 12.
[1467] Cases 9-10/56, *Meroni*, EU:C:1958:7, p. 150.
[1468] Ibidem, p. 151.
[1469] Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18, para. 80. See also para. 65, where the Court interprets Articles 263 and 277 TFEU as "expressly permit[ting] Union bodies, offices and agencies to adopt acts of general application".
[1470] Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18, para. 79.
[1471] See the critical remarks by ORATOR Andreas, "Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen", *Europäische Zeitschrift für Wirtschaftsrecht* (2013), pp. 852-855

listing of the acts of the agencies among the reviewable acts is far from being a sufficient recognition of such a possibility, lacking the minimum of institutional indications for constituting a legal basis for the delegation of powers. Moreover, the fact that certain agencies are mentioned expressly in primary law, whose acts are thus clearly subject to judicial control, may serve as a counter-argument to the conclusion of the Court. Therefore, the delegation of powers to most agencies still does not result in any form of *Delegationsnorm* in the Treaties, a situation which has relevant institutional implications.

2.6. The Implications of the Absence of a Delegationsnorm *for EU Agencies*

The absence of a clear *Delegationsnorm* in the Treaties in relation to the other EU decentralised agencies represents a deeply problematic aspect of this phenomenon. The need to insert a specific provision in primary law on the delegation of powers was clear since the Nice Intergovernmental Conference, but the failure to reach the required consensus in this sense resulted in an incomplete constitutionalisation of the role of the agencies in the institutional structure.[1472] The consequences of such constitutional neglect for the legality of the delegation of powers to the agencies and, indirectly, for the constitutional structure of the EU are far reaching.

2.6.1. The Implications for the Principle of Legality

As we have seen in relation to the delegation in State legal systems, the absence of a *Delegationsnorm* in primary law is problematic, *inter alia*, from a principle-of-legality perspective.[1473] However, as already noted, the *Delegationsnorm* doctrine stems from a concept of the legal system as a closed system of legal sources, which does not allow for the creation of new legal sources and of acts which are not embedded in the constitutionally set hierarchy of norms.[1474] This may not be applicable to any legal system. Indeed, legal systems which are not based on the same premises, such as for instance the Italian legal system before the enactment of the 1948 Constitution, did allow a delegation of powers without a constitutional provision in this sense.[1475]

[1472] See Chapter 3, para. 4.2.5.2. See, *inter alia*, VOS Ellen, "Agencies and the European Union", in ZWART Tom and VERHEY Luc (eds.), *Agencies in European and Comparative Law*, (Intersentia, 2003), p. 128.

[1473] See, inter alia, HOFMANN Herwig C. H. and MORINI Alessandro, "Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"", 37 *European Law Review* No. 4 (2012), p. 442.

[1474] See Chapter 1, para. 5.

[1475] The original Constitution of the Italian Kingdom, so-called Statuto Albertino, did not provide for the possibility of delegating legislative powers to the Government. In spite of the fact that the legal system was ordered according to the principle of separation of powers, the delegation of powers was not controversial in Italian earlier literature since the Statuto Albertino represented a flexible Constitution. Therefore, the constitutional order could be changed by ordinary legislation, so that each law introducing legislative delegations to the benefit of the Government could derogate from the Statuto. This practice was eventually codified in Legge No. 100/1926 which regulated in general terms the possibility for the Government to

Such a conceptualisation of the institutional system, however, does not seem to be in line with a mature legal system fully endorsing the principles of democracy and the rule of law. In this regard, while it is true that the EU legal system was not originally conceived in these constitutional terms, the innovations proposed in the Convention for Europe were expressly inspired by the idea of introducing a clearer hierarchy of norms and separation of powers, coming closer to the constitutional principles of the Member States' traditions in relation to the rule-making procedures. Therefore, accepting that powers can be delegated to EU agencies, outside the acts and procedures of the Treaties, fundamentally means that this attempt of the Lisbon Treaty to introduce a complete hierarchy of norms and to structure the executive power in the EU legal system rationally through the introduction of Articles 290 and 291 TFEU is inevitably undermined. In other words, despite the innovations brought by the Lisbon Treaty, the EU legal system still cannot be considered a closed system strictly endorsing the principle of legality and an exhaustive hierarchy of norms.

Considering the position of the acts resulting from the delegation, the delegation of powers entails a distortion in the order of competences established in the Treaties, which, in a legal system fully based on the hierarchy of norms, cannot be modified pursuant to an act of a lower level, but it requires an express provision from a source at the same hierarchical level. In this respect, the position of the Court, which held that the power to delegate is included in the policy-specific competence and does not need an *ad hoc* provision in the Treaties, results in the possibility for EU agencies to enact acts which are not foreseen in the Treaties and operate in the shadow of the hierarchy.[1476] Recognising that the agencies can be delegated powers outside Articles 290 and 291 TFEU arguably amounts to a circumvention of the Treaty provisions on the hierarchy of norms and the implementation system for EU law. This is ultimately at odds with the principle of conferral and with a substantive understanding of the principle of legality.[1477]

2.6.2. The Implications for the Institutional Balance, the Principle of Legal Certainty and Coherence

Even accepting that, the absence of an explicit provision on the delegation to agencies has further relevant implications, which call for considering a Treaty revision on this point.[1478] Firstly, it is

adopt rules with statutory effect. See Statuto del Regno or Statuto Fondamentale della Monarchia di Savoia of 4 March 1848; Legge 31 January 1926 No. 100, Sulla facoltà del potere esecutivo di emanare norme giuridiche, in GURI 1 February 1926, No. 25; LIGNOLA Enzo, *La Delegazione Legislativa* (Giuffrè, 1956), p. 2;

[1476] See EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), pp. 180-204.

[1477] EVERSON Michelle and VOS Ellen, *op. cit*. (2016), p. 14.

[1478] In addition to the mentioned amendments drafted by institutional actors, proposals for a Treaty amendment have flourished in legal literature on agencies, see, *inter alia*, SCHOLTEN Miroslava, "The Political Accountability of EU Agencies: Learning from the US Experience", (Universitaires Pers Maastricht, 2014), p. 303; CHAMON Merijn, *op. cit.* (2016), pp. 378-380.

clear that the absence of a specific provision on agencies in the Treaties implies that a solid normative framework is missing since the establishment, modes and limits to their empowerment are not regulated in primary law,[1479] but they are left to the discretion of the legislator - a situation which has led to an incoherent and case-by-case evolution of the agencification phenomenon.[1480] Although this gap has been partially filled with the adoption of the Common Approach, the contribution of this instrument is rather limited, being a non-binding measure and leaving many issues related to the delegation of powers and the accountability of such bodies unsolved. Therefore, in primary law, there are not express limits to this form of delegation of powers, but they need to be deduced from the principles established in the case law, lacking the sufficient clarity that the principle of legal certainty would require.[1481] Thus, this situation appears at odds with the principles of legal certainty and with the coherence of the legal system.[1482]

In this respect, paradoxically, in the light of the recent *Short Selling* judgment, the consequence is that less limits are applied to the delegation to EU agencies than to the delegation of the Commission, which, conversely, is a form of delegation specifically provided in the Treaties and involving a democratically accountable institution.[1483] Although the introduction of a specific provision does not necessarily entail more detailed limits on the delegation, since it eventually depends on the wording of such a provision,[1484] a *Delegationsnorm* in the Treaties would pose clearer requirements and limits, binding on the legislator for being provided in primary law.

Secondly, another consequence, which represents somehow the other side of the same coin of the lack of negative limits to the delegation of powers to agencies, is that the positive conditions for recourse to this form of delegation are also not provided. As it was remarked by eminent scholars, "agencies lack a clear position within, first, the separation of powers between the European Union and the Member States as well as, secondly, between EU institutions, most notably the Commission, Council and the European Parliament."[1485] Thus, EU agencies cannot enjoy a clear constitutional role, according to which their involvement in the regulation and governance at the

[1479] VAN GESTEL Rob, *op. cit.* (2014a), p. 195; GRILLER Stefan and ORATOR Andreas, "Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine", 35 *European Law Review* No. 1 (2010), p. 27.
[1480] DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2008), p. 790; HOFMANN Herwig C. H. and MORINI Alessandro, *op. cit.* (2012), p. 421.
[1481] See KOTZUR Markus, "Article 290", in GEIGER Rudolf, KHAN Daniel-Erasmus and KOTZUR Markus (eds.), *European Union Treaties* (Hart, 2015), p. 947.
[1482] VOS Ellen, "Reforming the European Commission: What Role to Play for EU Agencies?", 37 *Common Market Law Review* (2000), p. 1124.
[1483] See OHLER Christoph, "Zur Übertragung von Rechtsetzungsbefugnissen auf die Europäische Wertpapier- und Marktaufsichtsbehörde (ESMA)", *Juristenzeitung* (2014), p. 250, cited by CHAMON Merijn, *op. cit.* (2014), p. 391.
[1484] See, for instance, the different degree of detail of Article 290 and 291 TFEU.
[1485] HOFMANN Herwig C. H. and MORINI Alessandro, *op. cit*. (2012), p. 441.

EU level could be shaped coherently. Accordingly, EU agencies do not dispose of specific prerogatives in primary law, which could guide the choice of the legislator in using this peculiar institutional arrangement as a valid alternative to the delegation to other institutions.

Finally, this constitutional neglect hides the composite character of EU executive, formally presenting an institutional architecture which does not correspond to the reality of the EU day-by-day administration. Considering the impact of agencification on the institutional architecture of the EU, the establishment of new bodies with legally binding powers inevitably resulted in the legislature amending the constitutional structure of the Union without a constitutional mandate.[1486] Also from this perspective, which goes beyond the delegation-of-powers issue, the respect of the principle of conferral seems problematic.

2.7. The Creation of a Secondary Legal Basis

After having analysed the institutional implications of the lack of a *Delegationsnorm* in the Treaties, it is interesting now to consider what can be interpreted as the implications of the insertion in the Treaties of a specific provision regulating the delegation of powers to an institution or body. As mentioned, the delegation of powers to the Commission and the Council is now expressly provided for and regulated in Articles 290 and 291 TFEU. The introduction of specific provisions on the delegation, however, has broader implications from a constitutional perspective, especially in the light of recent positions of the Court. In addition to providing a stronger legitimation of these forms of delegation, the regulation of the modes and limits of the exercise of delegated powers of the Commission and Council may have affected the traditional interpretation of the Treaties provisions on the procedures for rule-making acts.[1487] Indeed, these provisions are conceived as the expression of the balance of powers between the institutions in a way which prevents the adoption of acts according to a different procedure. This approach emerges, in particular, from the line of case law concerning the secondary legal bases in which the Court was confronted with the possibility of empowering the Council to adopt binding acts according to procedures established in secondary law.

[1486] Ibidem, p. 442.

[1487] See HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), p. 496, where the author, however, does not consider the stricter position of the Court as a consequence of the introduction of Articles 290 and 291 TFEU, but of the expansion of the practice beyond the agricultural sector. However, in my view, the fact that, at the time of the first judgments, the Lisbon Treaty had not yet entered into force, but it was already signed, may have played a key role in influencing the Court's *révirement*.

2.7.1. The Minimum Common List Case

The first of these cases concerning the possibility to establish a secondary legal basis for the purpose of adopting legislative measures with a simplified procedure was C-133/06,[1488] which related to the adoption by the Council of a minimum common list of safe third countries in the field of a common policy on asylum without the involvement of the Parliament before the entry into force of the Lisbon Treaty. The issue at stake was, thus, the possibility to adopt acts according to a procedure which does not correspond to the one foreseen in the Treaties, thus allowing a different form of delegation from the ones provided in primary law. While the Advocate General approached the issue from the perspective of the essential elements doctrine[1489] and qualified it as a problem of delegation of legislative powers,[1490] the Court resorted directly to the principles of conferral and to the institutional balance to justify its decision to annul the contested measure.

Recalling that each institution must act within the limits of the powers conferred upon it by primary law,[1491] the Court took a strong stance on the point that "the rules regarding the manner in which the Community institutions arrive at their decision are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves".[1492] In the case at issue, the Council could have adopted the measures contested pursuant to Article 67 EC (the specific legal basis for visas, immigration and asylum policy), or, duly motivating its choice, reserved the powers to adopt them under Article 202 EC (corresponding to Article 291(2) TFEU) but decided to introduce a new procedure which differed from any procedure established in the Treaties. However, in the Court's view, "to acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty."[1493] Therefore, the Council could not create a secondary legal basis, with the

[1488] Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2008:257. For a detailed analysis of the case, see CRAIG Paul, "Case C-133/06, European Parliament v. Council (Delegation of legislative power), judgment of the Grand Chamber of 6 May 2008, [2008] ECR I-3189", 46 *Common Market Law Review* (2009), pp. 1265-1275; VIMBORSATI Anna Chiara, "Prassi normative e fondamenti normativi di diritto derivato: la Corte vieta le deleghe legislative "intra-sistemiche" che cristallizzano il Trattato", *Rivista italiana di diritto pubblico comunitarie* (2008), pp. 1244-1250; BARATTA Roberto, "Le basi giuridiche derivate nell'ordinamento comunitario", *Giustizia civile* (2008), pp. 2076-2079; MINCHELLA Davide, "Nonostante una sentenza a favour del Parlamento europeo, quale sarà il locus standi dei singoli in relazione agli elenchi dei Paesi terzi sicuri?", *Rivista italiana di diritto pubblico comunitario* (2008), pp. 711-725.
[1489] See Opinion of Advocate General Poiares Maduro in Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2007:551, paras. 18-22. For the essential elements doctrine, see *infra* para. 5.
[1490] See Opinion of Advocate General Poiares Maduro in Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2007:551, para. 23.
[1491] Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2008:257, para. 44.
[1492] Ibidem, para. 54. The Court refers to the case 68/86, *UK v Council*, EU:C: 1988:85.
[1493] Case C-133/06, *Parliament v Council (Minimum common list),* EU:C:2008:257, para. 56.

effect of making the procedure established more cumbersome[1494] or simpler, without acquiring in so doing powers which exceed those provided in the Treaties.[1495] Indeed, this would result in "provisions of secondary legislation taking primacy over primary legislation", thus distorting the hierarchy between primary law and secondary law.[1496] Moreover, according to the Court, this would also have the effect of undermining the principle of institutional balance, encroaching upon the prerogatives of the other institutions, in particular the Parliament.[1497] Consequently, neither the politically sensitive nature of the measures nor the existence of a previous institutional practice could avoid the annulment of the contested Directive.[1498]

2.7.2. The Visa Information System Case

It is important to underline that C-133/06 concerned the establishment of secondary legal bases for the adoption of legislative measures. However, in *Visa Information System*, the Court clarified that this approach must also be applied in relation to non-legislative acts.[1499] It clearly stated that "the specific rules relating to the adoption of implementing measures laid down in the Treaties are binding on the institutions in the same way as the rules relating to the adoption of legislative acts and cannot therefore be negated by acts of secondary legislation".[1500] Therefore, also the Treaty provisions on implementation cannot be disregarded by EU institutions laying down measures for the implementation of legislation. The approach was confirmed in the following case law, in particular in *Europol,*[1501] which concerned a Council Decision on the list of third States or organisations with which Europol could conclude agreements. In this case, the measure was upheld since it was adopted by the Council with the consultation of the Parliament, thus through a procedure which basically corresponded to the one established by the applicable provisions.[1502]

[1494] The inadmissibility of introducing more cumbersome requirements in the procedure, such as unanimity instead of qualified majority, was already stated in Case 68/86, *UK v Council*, EU:C: 1988:85, para. 38.
[1495] Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2008:257, para. 56.
[1496] Ibidem, para. 58.
[1497] Ibidem, para. 57.
[1498] Ibidem, paras. 59, 60 and 67.
[1499] Case C-540/13, *Parliament v Council (Visa Information System)*, EU:C:2015:224, para. 33. The case related to the Regulation on the Visa Information System adopted before the Lisbon Treaty which allowed the Council to decide on the date of entry into force of the Regulation.
[1500] Case C-540/13, *Parliament v Council (Visa Information System)*, EU:C:2015:224, para. 34. See also Joined Cases C-317/13 and C-679/13, *Parliament v Council*, EU:C:2015:223, paras. 42-45 (adopted on the same day); Case C-44/14, *Spain v Parliament and Council*, EU:C:2015:554, para. 31.
[1501] Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579, para. 43. See also Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*, EU:T:2015:671, para. 49.
[1502] In this sense, this judgment appears to confirm the admissibility of secondary legal bases which, without strengthening or easing the rules of adoption, maintain the same roles for the EU institutions (in view of adding a consultation obligation of an institution or agency, for instance). See BARATTA Roberto, *op. cit*. (2008), p. 2079.

2.7.3. Assessing the Approach of the Court

This line of case law appears to be an expression of a rigid approach towards the system of legislative and implementing powers, which cannot be circumvented through the creation of alternative legal bases in secondary law. Although relating to cases where the legal framework of the Lisbon Treaty was not yet applicable,[1503] the strict approach of the Court in relation to the creation of secondary legal bases raises the question whether the Court may also intend the system of Articles 290 and 291 TFEU to be a closed system of implementing powers which does not allow alternative procedures for the implementation of EU acts. In this sense, prohibiting the creation of new competences and procedures not foreseen in the Treaties, the Court appears to endorse a strict concept of the principle of legality,[1504] according to which the sources of normative acts are limited to those defined in the Treaties and the creation of new legal bases would undermine the system so established. In other words, arguably this case law suggests that the Court considers the provisions on the adoption of legal acts in the Treaties as a *numerus clausus* of sources, not open to unforeseen secondary powers and procedures. As we have seen, such a concept has relevant implications for the legality of the delegation of powers since its strict application would imply the need for a legal basis in a hierarchically higher provision,[1505] thus requiring an express *Delegationsnorm* in primary law for any form of delegation of powers in EU law.

However, this recent approach appears to be contrary to the previous case law of the Court, which allowed the delegation of powers also without an express provision in the Treaties.[1506] Indeed, the traditional case law on the validity of the comitology procedures, in particular *Eridania*, is particularly clear on the possibility to adopt implementing measures according to procedures not foreseen in the Treaties, provided that the essential elements of the matter are adopted according to primary law.[1507] Even more, such a conclusion appears to be strongly in contrast with the *Short Selling* judgment, where the Court upheld the possibility of empowering EU agencies with "de facto implementing powers"[1508] and recognised that other forms of delegation are possible in the EU institutional architecture even outside the implementation system established in Articles 290

[1503] Both in Visa Information System and in Europol, the implementing measures were adopted pursuant to legal bases established pre-Lisbon which continue to be applicable until they are repealed, annulled or amended. See Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579, para. 70.
[1504] See Opinion of Advocate General Poiares Maduro in Case C-133/06, *Parliament v Council (Minimum common list)*, EU:C:2007:551, paras. 23 et seq.
[1505] See Chapter 1, para. 5.
[1506] See Case 25/70, *Köster*, EU:C:1970:115; Case 230/78, *Eridania*, EU:C:1979:216; Case 9/56, *Meroni*, EU:C:1958:7.
[1507] *Inter alia*, Case 230/78, *Eridania*, EU:C:1979:216. See also Joined Cases C-63/90 and 67/90, *Portugal and Spain v Council*, EU:C:1992:381, para. 14.
[1508] CHAMON Merijn, "Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty", 53 *Common Market Law Review* (2016a), p. 1536.

and 291 TFEU.[1509] A rigid understanding of the Treaty provisions on delegation and implementation would not have allowed such a permissive approach on the empowerment of agencies.

2.7.4. Reconciling the Different Approaches

In this regard, a possible interpretation reconciling the two contrasting visions emerging in the case law of the Court can be attempted by stressing the institutional-balance element which characterises the case law on secondary legal bases. In this respect, it is evident that the underlying concern, which triggered litigation on the challenged measure, was the disregard of the role of the Parliament, whose involvement in the adoption of the measure was bypassed by the introduction of the new procedure.[1510] In this sense, it is important to recall that legal bases in primary law have the specific function of crystallising the reciprocal positions of the EU institutions in the procedure for the adoption of legislative and implementing acts.[1511] It is this "crystallisation" of the balance between the institutions which cannot be circumvented by an act of secondary law. Therefore, the empowerment of the Council needs to comply with the particular balance among institutions already established in the Treaties, which eventually corresponds to the respect of the principle of conferral.[1512]

However, this particular "crystallisation" of the balance exists only in the case of the existence of a specific *Delegationsnorm* in primary law. Accordingly, since it is already specifically provided for in the Treaties, the delegation to the Council - but, if the reasoning holds true, also to the Commission - is admissible only with respect to those specific arrangements, which thus represent closed systems of delegation in relation to those institutions. In the case of agencies, conversely, the absence of such a provision gives more flexibility to the legislator, which has the discretion to delegate its powers without the need to respect the institutional balance established for different delegation phenomena. In this sense, while *Short Selling* is clear in stating that there is no single delegation system in EU law, and different institutional actors can be delegated powers, it is equally clear that, once a certain delegation system (or rather the delegation to a

[1509] See Opinion of the Advocate General Jääskinen in Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2013:562. See also VAN GESTEL Rob, *op. cit.* (2014a), p. 196; CHAMON Merijn, *op. cit.* (2014), p. 396. For an alternative interesting reading of this point of Short Selling, see ALBERTI Jacopo, "Delegation of Powers to EU Agencies after the Short Selling Ruling", *Il Diritto dell'Unione Europea* No. 2 (2015), p. 471.

[1510] In this regard, the different outcome of Europol is significant. See Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579

[1511] See Chapter 1, para. 13.2.

[1512] See DE WITTE Bruno, "Institutional Principles: A Special Category of General Principles of EC Law", in BERNITZ Ulf and NERGELIUS Joakim, *General Principles of European Community Law. Reports from a Conference in Malmö*, 27-28 August 1999 (Kluwer Law International, 2000), pp. 143-159.

certain institution) is regulated in primary law, those provisions must be interpreted rigidly in order to comply with the institutional balance and the principle of conferral.

2.8. The Legal Basis for the Delegation to the ECB

With regard to the delegation of powers to the ECB, Article 127(6) TFEU provides a clear legal basis for the delegation of powers to this institution, thus resulting in primary law clearly covering this form of delegation. Therefore, this form of delegation enjoys an express *Delegationsnorm* in the Treaties.

In the light of the described case law on secondary legal bases, it may be interesting to consider whether the existence of this provision in primary law would impede the delegation of powers to the ECB outside the scope of Article 127(6) TFEU. In this regard, it is important to remark that, unlike Articles 290 and 291 TFEU, the application of Article 127(6) TFEU is limited to the conferral of tasks "concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings".[1513] Therefore, in relation to this field, the delegation of powers to the ECB must be done according to the specific procedure established in primary law.

Conversely, it is controversial whether, outside the scope of prudential supervision, the ECB can be delegated other powers. In this regard, it has been argued that Article 127(6) TFEU must be interpreted restrictively as the sole possible form of delegation in favour of the ECB, and the delegation of tasks concerning other fields would be lawful only in the case of an amendment of this provision.[1514] However, considering the position of the Court in relation to the delegation of EU agencies, it is arguable that the requirement in Article 127(6) TFEU of prudential supervision represents the scope of application of that particular legal basis, but it would not constitute an obstacle to the empowerment of the ECB in other fields under different legal bases. Accordingly, while in the field of prudential supervision the delegation of powers must be based on that provision and follow the established procedure, the ECB may be entrusted with different tasks according to different procedures and on different legal bases, provided that the fundamental role of the ECB within the institutional framework is respected.[1515]

[1513] Article 127(6) TFEU.
[1514] KERN Alexander, "The ECB and Banking Supervision: Building Effective Prudential Supervision?", 33 *Yearbook of European Law* No 1 (2014), pp. 431-432.
[1515] See Articles 119, 123, 127-134, 138-144, 219 and 282-284 TFEU; Protocol (No 4) on the Statute of the ESCB and the ECB, annexed to the Lisbon Treaty.

3. The Category of Act for the Enabling Act

In the analysis of the formal requirements of the enabling act, it is now appropriate to reflect upon the type of act which can be adopted as an enabling act. In this regard, according to the new categorisation of the Lisbon Treaty, distinguishing between "legislative acts" and non-legislative acts (which include delegated acts, implementing acts, and *sui generis* acts having their legal basis directly in the Treaties), the question is, thus, which of these categories the basic act needs to belong to in order to constitute a valid delegation of powers under EU law.

3.1. The Category of Act for Delegation under Article 290 TFEU

With reference to delegated acts, Article 290 TFEU clearly provides that the enabling act must be a legislative act. Overcoming some initial doubts in this regard, Article 290 TFEU has also been applied in acts adopted through special legislative procedures.[1516] Therefore, the provisions empowering the Commission to adopt delegated acts need to be enacted according to the ordinary legislative procedure or according to a special legislative procedure.[1517]

In this regard, it has been noted that such formalism of the Lisbon categorisation entails that relevant measures, which have their legal basis in the Treaties and are not expressly falling within the category of legislative acts, cannot constitute a valid basic act for delegated acts.[1518] These acts, such as Council decisions concluding international agreements pursuant to Article 218 TFEU or Council regulations based on Article 31 fixing autonomous Common Customs Tariff duties,[1519] cannot delegate powers to the Commission under Article 290.[1520] Therefore, these acts can contain only provisions empowering the Commission with implementing acts and cannot be amended or supplemented by delegated acts.

3.2. The Category of Act for Delegation under Article 291 TFEU

With reference to implementing acts, Article 291 TFEU is more generic in the indication of the category of acts which can constitute the enabling act. Indeed, Article 291 TFEU explicitly determines that implementing power can be conferred on the Commission by "legally binding

[1516] DRIESSEN Bart, "Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU", 35 *European Law Review* No. 6 (2010), p. 844. See also European Commission, Communication of 9th December 2009 to the European Parliament and the Council. Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, point 3.
[1517] Article 289 TFEU.
[1518] CRAIG Paul, "Delegated Acts, Implementing Acts and the New Comitology Regulation", 31 *European Law Review* No. 5 (2011), p. 677.
[1519] See also Articles 103 and 109 TFEU.
[1520] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 14.

Union acts". As becomes clear from the *travaux préparatoires* of the Convention for Europe, this notion was originally meant to comprise the categories of legislative acts, delegated acts and other acts having their legal basis in the Treaties.[1521] Therefore, mirroring the three-level hierarchy proposed in the Convention for Europe,[1522] the letter of the Treaty in principle envisages the possibility for implementing acts to be made pursuant not only to legislative acts, but also to delegated acts, since clearly they represent legally binding acts.[1523] Yet, this "cascade of delegation of powers"[1524] appears highly problematic.

3.2.1. The Cascade of Delegation of Powers and its Issues

In this regard, concerns were expressed in literature on the possibility for the Commission to confer on itself the power to adopt an implementing act pursuant to a delegated act.[1525] Indeed, this practice would amount to a form of "sub-delegation of the powers" to itself, which would be at odds with the general principle of public law enshrined in the already mentioned maxim "delegatus non potest delegare".[1526] Without entering the debate on whether such a principle is pertinent in EU law, it is clear that the use of a cascade of delegation of powers in any case needs to comply with the principle of conferral and with the institutional balance which underpin the EU legal system.

In this respect, the compliance with the principle of conferral appears to be granted by the express provision of this possibility in Article 291 TFEU,[1527] provided that the second empowering of the Commission remains within the powers conferred by the legislator in the first delegation of powers. However, considering the duty to give reasons, in most cases it would be very difficult to explain how further specifications, which could have been foreseen already in the legislative act,

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[1521] Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 339.
[1522] For a discussion of such conceptual approach, see Chapter 2, para. 2.7.
[1523] See, *inter alia*, CRAIG Paul, "The Role of the European Parliament under the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, (Springer, 2008), p. 120; HOFMANN Herwig, *op. cit*. (2009), p. 493. See also European Commission, Guidelines for the services of the Commission of 25 October 2012 on Implementing Acts, SEC(2012)617, para. 3.
[1524] The expression is used by HOFMANN Herwig, *op. cit*. (2009), p. 502; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 240.
[1525] See, *inter alia*, HOFMANN Herwig, *op. cit.* (2009), pp. 502-503; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), pp. 239-241; BRADLEY Kieran St. C., "Delegation of Powers in the European Union. Political Problems, Legal Solutions?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers*, (Oxford University Press, 2016), p. 63; BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *RTD eur.* (2012), p. 93; BARATTA Roberto, "Sulle fonti delegate ed esecutive dell'Unione europea", *Il Diritto dell'Unione europea* (2011), p. 301.
[1526] See HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 239.
[1527] Ibidem, p. 240.

were inserted into the delegated act only later without exceeding the empowerment for the delegated act.

Moreover, this delegation cascade appears even more problematic from an institutional-balance perspective, raising relevant issues in particular as regards the forms of control over such implementing acts. Firstly, considering the mechanisms for control by Member States of the Commission's exercise of implementing powers, it is arguable that resorting to this sub-delegation could not be a mean for the Commission to circumvent the comitology procedures.[1528] Although there might be exceptional cases where the adoption of implementing acts by the Commission does not require to be subject to the control of Member States, the scope of application of the Comitology Regulation comprises any situation "where a legally binding Union act identifies the need for uniform conditions of implementation",[1529] thus including the case of delegated acts. Pursuant to Article 2 of the same Regulation, the basic act or the delegated act would need to provide for the application of the advisory procedure or the examination procedure. In the former case, the difficulty lies in the need to spell out the conditions for such further delegation and the limits it has to abide by in advance.[1530] In the latter case, the conditions for the exercise of the implementing powers must be detailed in the delegated act. Therefore, the choice of the applicable comitology procedure would be left to the Commission, the institution subject to control. In this case, the Commission, most probably, would try to bypass the comitology procedures[1531] or, in any case, prefer the procedure maximising its margin of discretion and limiting the intensity of the Member States' control over the exercise of the delegated powers.[1532] Clearly, such a situation would be hardly acceptable by the other institutions and raises doubts with regard to the compatibility of Article 2 of the Comitology Regulation with Article 291 TFEU for this particular case.[1533]

Secondly, specific legal problems would also arise in relation to the control mechanisms in place for delegated acts, meaning the objection and the revocation by the Council or the Parliament. In

[1528] Ibidem, p. 240. Contra BRADLEY Kieran St. C., *op. cit.* (2016), p. 63.
[1529] Article 1 of Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.
[1530] BIANCHI Daniele, *op. cit*. (2012), p. 93.
[1531] BRADLEY Kieran St. C., *op. cit*. (2016), p. 63.
[1532] For an overview of the Institutions' preferences in the choice of comitology procedures, see BLOM-HANSEN Jens, "Interests, Instruments and Institutional Preferences in the EU Comitology System: The 2006 Comitology Reform", 17 *European Law Journal* (2011), pp. 344-365; HERITIER Adrienne, MOURY Catherine, BISCHOFF Carina and BERGSTROM Carl Friederik, *Changing Rules of Delegation. A Contest for Power in Comitology*, (Oxford University Press, 2013); BERGSTROM Carl-Fredrik, FARRELL Henry and HERITIER Adrienne, "Legislate or delegate? Bargaining over Implementation and Legislative Authority in the European Union", 30 *West European Politics* (2007), pp. 338-366.
[1533] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 240.

case of a delegated act containing a delegation of implementing powers to the Commission, the Council and the Parliament could (and in the light of the above, most probably would) raise an objection to such act, which will have the effect of impeding its entry into force and, consequently, putting an end to the delegation of implementing powers. However, the legal consequences are more problematic in relation to the use of the revocation mechanism. Indeed, where, for example, the delegated act has entered into force and the powers to adopt implementing acts has already been exercised by the Commission, the effect of a subsequent revocation is questionable. In this regard, as we will see, the revocation takes effect *ex nunc*, in the moment of its entry into force and not retroactively.[1534] Therefore, the empowerment of the Commission in relation to the implementing acts would remain valid, allowing the Commission to exercise those powers in spite of the opposition of the legislator. In particular, from an accountability perspective, the oversight role of the Parliament, which is significantly reduced in relation to implementing powers in comparison with Article 290 TFEU, would be severely undermined by this practice.

3.2.2. The Cascade of Delegation as an Institutional Chimera

In the light of these considerations, it comes as no surprise that the Member States, the Council and the Parliament have strongly opposed this possibility. Following some initial attempts to introduce enabling provisions in delegated acts, which raised internal legal debates and caused a strong reaction from the other institutional actors already during the preparation of the delegated act, the Commission has shown more caution and expressly discouraged the practice in its internal Guidelines of 2011.[1535] Consequently, implementing acts based on a delegated act are likely to remain an "institutional chimera", with no or very marginal application in practice.[1536]

3.2.3. An Implementing Act Based on an Implementing Act

Finally, it is noteworthy that the wording of Article 291 TFEU does not exclude the possibility of basing an implementing act on a previous implementing act, developing in further detail the implementation of the legislative act. Considering that this practice already existed in the pre-

[1534] Ibidem, p. 240.
[1535] See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 26: "In this respect, it is not theoretically excluded that a delegated act, which is a "legally binding Union act" within the meaning of Article 291, could confer implementing powers on the Commission. However, in practice, and given various examples which have been attempted, it has proved difficult to demonstrate that the implementing powers given by the Commission to itself are not in fact a means of "bypassing" the delegation. Thus, it is recommended that services do not use a delegation of power under Article 290 to "create" implementing powers under Article 291. Rather, the services should seek to identify clearly in the basic legislative act where delegated and implementing powers may be needed in tandem."
[1536] BRADLEY Kieran St. C., *op. cit*. (2016) Press, 2016), p. 63.

Lisbon framework,[1537] it is arguably less problematic than the cascade of delegation of powers from a delegated act. Indeed, rather than a form of sub-delegation, this can be interpreted as a separate exercise of the same powers conferred in the legislative act. Albeit exercised in different implementing acts, the limits and the scope of these implementing powers cannot exceed the powers conferred on the Commission or the Council in the enabling act, remaining subject to the same conditions and control mechanisms.[1538]

3.3. The Category of Act for the Delegation to the ECB

With reference to the empowerment of the ECB, Article 127 (6) TFEU determines expressly that the basic act shall be adopted "in accordance with a special legislative procedure",[1539] which requires the adoption by the Council upon unanimity after consulting the Parliament and the ECB itself. Therefore, the enabling act is necessarily a legislative act adopted according to this specific special legislative procedure. Accordingly, Regulation No. 1024/2013 was adopted by the Council in 2013 after the opinion of the Parliament was issued earlier that year and the opinion of the ECB in 2012.[1540]

In light of the case law on secondary legal basis, the empowerment of the ECB that does not follow this special legislative procedure would result in a circumvention of this Treaty provision, entailing a violation of the principle of conferral and of the institutional balance as crystallised in this legal basis.[1541] However, considering the limited scope of Article 127 (6) TFEU, outside the field of prudential supervision of credit institutions and other financial institutions, the ECB could be empowered according to different procedures. In the absence of indications in primary law and in the practice, guidance on this point can be drawn from the considerations on the delegation of powers to EU agencies.

[1537] See, for instance, the facts of the Joined Cases C-191/14 and 192/14, *Borealis Polyolefine*, EU:C:2016:311; Case C-443/05 P, *Common Market Fertilizers SA v Commission*, EU:C:2007:511.
[1538] For a general statement of the need to follow the comitology procedures for any kind of implementing measure (even non-binding ones), see Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*, EU:T:2015:671, para. 49.
[1539] Article 127 (6) TFEU: "The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."
[1540] See Procedure 2012/0242/CNS in www.legislativeobservatory.eu.
[1541] See *supra* para. 2.7.

3.4. The Category of Act for the Delegation to EU Agencies

In the absence of a specific provision in primary law in the delegation of powers to the agencies, no guidance is provided on the formal requirements of the enabling act in the Treaties. However, the practice shows a certain consistency in the category of acts used for empowering EU agencies.

One of the distinguishing features of decentralised agencies is their establishment through an act of secondary law.[1542] In fact, all the decentralised agencies were created by an act directly based on the Treaties, providing the material rules of the policy measure and, at the same time, establishing the new EU body with legal personality. Considering that in most cases the powers are delegated to the EU agencies in the same act regulating their establishment or in the acts amending it, it entails that generally the enabling act is a legislative act.

However, this does not mean that the powers of the agencies cannot be regulated by means of non-legislative acts. While the delegation of powers is generally contained in the act of secondary law which establishes the body, the detailed rules on the exercise of those powers and the applicable procedures can be adopted by the Commission or the Council through delegated or implementing acts. For instance, it was the case of ESMA: while the tasks the agency is to perform in relation to short selling operations were conferred in Regulation 236/2012, the same Regulation empowered the Commission to adopt delegated acts specifying the criteria and facts to be taken into account in the exercise of the delegated powers.[1543] Therefore, the legal framework governing the agency was composed of legislative and non-legislative acts. Yet, the contribution of non-legislative acts to the regulation of the delegation of powers is limited since these acts cannot contain essential elements of the matter and thus arguably they cannot affect the essential role and powers of the agency.[1544]

Finally, it is important to note that a number of EU agencies are mentioned in primary law,[1545] but this does not lead to the actual establishment of the agency, which requires the intervention of the

[1542] See Chapter 3, para. 4.1. Conversely, according to Article 3 of Regulation No. 58/2003, the decision to set up an executive agency is adopted by the Commission through a comitology procedure (see also Article 24). Therefore, the enabling act is not constituted by a legislative act, but by an implementing act. However, it is important to underline that, although directly based on this Commission decision, behind the establishment of an executive agency there is also Regulation 58/2003 and the legislative act which lays down the material rules on the programme that the agency is called to manage. See CHAMON Merijn, *op. cit*. (2016), p. 156.

[1543] See Articles 30 and 42 of Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

[1544] See Case C-355/10, *Parliament v Council (Schengen Border Code)*, EU:C:2012:516, where a Commission's implementing measures affected the powers of Frontex and was annulled by the Court for violation of the essential elements doctrine. See *infra* para. 5.

[1545] See Article 45 TUE mentioning the European Defence Agency; Article 85 TFEU mentioning EUROJUST; and Article 88 TFEU mentioning EUROPOL.

legislator.[1546] Unlike EU institutions and bodies such as the ECB or the EIB, the definition of the specific tasks, the structure and the functioning of these agencies is left to the adoption of a measure by the legislator. Therefore, also in relation to agencies mentioned in primary law, the founding act is constituted by an act of secondary legislation.[1547] In particular, it is interesting to note that the procedures for the establishment of EUROJUST and EUROPOL are expressly referred to as "special legislative procedures", thus stating clearly that the basic act is a legislative act.

4. The Legal Instruments for the Enabling Act

Reflecting on the formal requirements of the enabling act, the last considerations need to be dedicated to the kind of acts, commonly referred to in the Brussels jargon as the "legal instruments".[1548] In this regard, it is important to recall that Article 288 TFEU states that "to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions", clarifying the characteristics of each of these instruments.[1549] Therefore, in relation to the delegation of powers, it is questionable whether the enabling act can take the form of any legal instrument or the specific characteristics of some of them impede their use for this purpose.

4.1. The Legal Instruments for Delegation under Article 290 TFEU

With reference to the empowerment of the Commission to adopt delegated acts, although Article 290 TFEU does not provide express indications with regard to the legal instrument for the enabling act, the reference to "legislative acts" - which according to Article 289 TFEU can be only regulations, directives or decisions - excludes the possibility of recourse to recommendations and opinions. In addition to this literal argument, it is evident that, being non-binding acts, recommendations and opinions do not constitute suitable instruments for the introduction of a legal institution, such as the delegation of powers, which entails a modification of the legal positions of the institutional actors involved.

[1546] See CHAMON Merijn, *op. cit*. (2016), p. 12.
[1547] Ibidem, p. 12.
[1548] For an analysis of the legal instruments after the Lisbon Treaty, see DE WITTE Bruno, "Legal Instruments and Law-Making in the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?,* (Springer, 2008), pp. 77-108. See also VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, "Legal Instruments in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis", *Yearbook of European Law* (2004), pp. 91-136; BAST Jürgen, "On the Grammar of EU Law: Legal Instruments", Jean Monnet Working Paper 9/03 (Heidelberg 24-27 February 2003), pp. 1-52.
[1549] Article 288 TFEU.

In this regard, the compatibility of the use of directives and of decisions (in particular decisions addressed to the Member States)[1550] with the peculiar characteristics of these legal instruments may appear controversial. Leaving to the national authorities the choice of forms and method to achieve the prescribed result, the directive is the instrument *par excellence* of indirect administration in EU law, which refers the implementation of the matter to the Member States. However, although requiring a transposition by the Member States, the legal regime established in a directive may need to be supplemented or amended by subsequent acts. Together with the objectives the transposition of which is left to national authorities, the text of the directive may contain material rules which can require a further intervention by the Commission. Therefore, the use of this particular legal instrument may be compatible with the requirements of a delegation of powers under Article 290 TFEU.

In the choice among the legal instruments, the legislator is not constrained by specific needs related to the delegation of powers, but it must abide by the general principles of EU law, in particular the principle of proportionality and of subsidiarity.[1551] Thus, depending on the specific nature and implications of the measure, delegations of power under Article 290 TFEU have been inserted in regulations,[1552] directives[1553] and, albeit less often, decisions.[1554]

4.2. The Legal Instrument for Delegation under Article 291 TFEU

In relation to the delegation of implementing powers, Article 291 TFEU expressly mentions "legally binding acts" as acts which can confer implementing powers to the Commission or the Council. Therefore, also in this case, the delegation can be contained in regulations, directives and decisions, in conformity with Article 288 TFEU.[1555]

[1550] For a discussion on the kind of legal concepts which can be distinguished in the decision, see DE WITTE Bruno, *op. cit*. (2008), pp. 83-84; BAST Jürgen, "Legal Instruments and Judicial Protection", in VON BOGDANDY Armin and BAST Jürgen, Principles of European Constitutional Law (Hart Publishing, 2011), p. 391.

[1551] Article 296 TFEU; Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Lisbon Treaty, OJ C 115, 9.5.2008, p. 206–209. See DE WITTE Bruno, *op. cit.* (2008), pp. 96-97.

[1552] See, for instance, Articles 31-32 of Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No. 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No. 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No. 1852/2001, OJ L 327, 11.12.2015, p. 1–22.

[1553] See, for instance, Articles 11, 12, 17, 18 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45–65.

[1554] See, for instance, Articles 19 and 30 of Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 347, 20.12.2013, p. 924–947. To the author's knowledge, only 10 decisions containing delegating provisions can be counted, in contrast with 57 directives and 156 regulations.

[1555] See also European Commission, Guidelines for the services of the Commission of 25 October 2012 on Implementing Acts, SEC(2012)617, para. 3.

In the aftermath of the signature of the Lisbon Treaty, doubts have been raised in the literature on the possibility to use regulations or directives as enabling acts.[1556] On the one hand, with regard to regulations, it has been argued that, since they constitute binding acts directly applicable within the Member States' legal systems, it is "difficult to see how the need for 'uniform conditions for implementing legally binding Union's acts' justifying conferral of implementing powers to the Commission would be of relevance in relation to such legislative acts themselves".[1557] On the other hand, with regard to directives, which leaves discretion to the Member States in relation to the means of implementation, the specific characteristics of these legal instruments were considered at odds with the function of providing uniform implementation at the EU level.[1558] In both cases, for the peculiarities of the acts, the scope of application was considered limited and the use of these legal instruments was deemed to exacerbate the problems related to the difficult divide between Article 290 TFEU and Article 291 TFEU.[1559]

Although recognising that in the pre-Lisbon regime most implementing measures had their legal basis in decisions, these positions were contested in the literature, providing concrete examples of the need to use regulations and directives to delegate implementing powers to the Commission in agricultural and environmental fields.[1560] In the following years, moreover, it has become common practice to introduce provisions on the conferral of implementing powers to the Commission or the Council under Article 291 TFEU equally in regulations,[1561] directives[1562] and decisions,[1563] thus overcoming the initial uncertainties in this regard.

4.3. The Legal Instrument for the Delegation to the ECB

In relation to the legal instrument for the delegation of powers to the ECB, Article 127 (6) TFEU provides the most precise indication. This Treaty provision determines the use of "regulations" adopted in accordance with a special legislative procedure. Therefore, the use of directives or decisions to confer powers on the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions is excluded. However, it is arguable that, in

[1556] See, in particular, CRAIG Paul, *op. cit.* (2008), pp. 120-123.
[1557] CRAIG Paul*, op. cit*. (2008), p. 120.
[1558] Ibidem, p. 121.
[1559] Ibidem, p. 123.
[1560] PONZANO Paolo, "Executive and delegated acts: The situation after Lisbon", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?,* (Springer, 2008), p. 140.
[1561] See, for instance, Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10.10.2013, p. 1–101.
[1562] See, for instance, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.
[1563] See, for instance, Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 347, 20.12.2013, p. 924–947.

cases of the empowerment of the ECB outside the scope of Article 127(6) TFEU, the enabling act may also be established in directives or decisions.

4.4. The Legal Instrument for the Delegation to EU Agencies

Considering the delegation of powers to EU agencies, the absence of clear indications in primary law calls for a reflection focused on the practice and on the characteristics of each of the legal instruments provided in the Treaties.

4.4.1. The Legal Instrument for the Establishment of EU Agencies

All EU decentralised agencies (with the exception of CEPOL)[1564] were created through regulations. Regulations have been considered the most appropriate measure for the establishment of EU agencies, in particular in relation to the attribution of legal personality to these bodies.[1565] Indeed, being directly applicable in the Member States' legal systems, the conferral of legal personality through regulations guarantees that the agency can enjoy the most extensive legal capacity immediately vis-à-vis the Member States and individuals. Conversely, the use of a directive would require the transposition of the measures into the national law of the Member States. Considering that directives leave the "choice of form and methods" to attain the objective to the Member States, this would result in a separate recognition of the legal personality of the agency in each Member State and its configuration as a "bundle of legal personalities" in the different legal systems.[1566]

Moreover, while the use of decisions addressed to the Member States[1567] poses similar problems, decisions which do not specify to whom they are addressed may constitute a valid instrument for the establishment of EU agencies.[1568] In fact, decisions were actually used to establish certain EU bodies,[1569] including most significantly the executive agencies.[1570] However, since the

[1564] CEPOL was initially created by Council Decision 20056/681/JHA, now repealed by Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA, OJ L 319, 4.12.2015, p. 1–20
[1565] CHAMON Merijn, *op. cit.* (2016), p. 154.
[1566] Ibidem, p. 155.
[1567] Here the kind of decision referred to is that which corresponds to the Article 249 EC decision and to the concept of *Entscheidung* in German domestic law. As remarked by some authors, Article 288 TFEU has merged two different concepts of decision, which appear clearly in the distinction between *Entscheidung* decisions (Article 249 EC) and *Beschluss* decisions (*sui generis* or decisions without addressees). See DE WITTE Bruno, *op. cit*. (2008), pp. 95-96; BAST Jürgen, *op. cit.* (2011), p. 391.
[1568] DESOMER Marlies, *The Reform of Legal Instruments of the European Union*, PhD thesis (KU Leuven, 2009), p. 192, cited in CHAMON Merijn, *op. cit*. (2016), p. 155.
[1569] In addition to Cepol, see, for instance, the European Statistical Governance Advisory Board, the European Administrative School, the European Regulators' Group for Electricity and Gas and the European Regulators' Group for Electronic Communications Networks and Services.
[1570] See Article 3 of Council Regulation (EC) No. 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L

establishment of a decentralised agency is generally coupled with material rules in the policy field, the use of decisions may be ill-suited to regulate the structure, the functioning and the legal framework which embeds the activities of these bodies appropriately.[1571]

4.4.2. The Legal Instrument for the Empowerment of EU Agencies

It is important to distinguish, however, the specific issue of the delegation of powers to such a body from the case of the establishment of an EU agency with legal personality, which constitutes the underlying focus of the preceding reflections. In this respect, it is clear that the prevailing practice is the empowerment of EU decentralised agencies through regulations.[1572] This practice was indirectly sanctioned by the Court, which referred to the legislator's claim that the regulation represents an appropriate legal instrument for conferring relevant powers to EU agencies.[1573]

However, although the regulation constitutes an instrument which is very well suited to empowering an agency, arguably the use of directives and decisions to this end cannot be excluded *a priori*. Similar to the case of delegation to the Commission, in a directive, material rules to be transposed in the Member States' legal systems may be coupled with provisions which delegate certain powers to an agency, as a complementary element of the legal framework established by that measure. Moreover, a decision without addressees, constituting a binding instrument often used for organic measures or for setting up EU programmes,[1574] can be used specifically for the transferral of certain powers from the legislator to an EU body.

5. The Essential Elements Doctrine

Focusing now on the substantive requirements of the enabling act, the analysis of the case law and the positive law shows that the content of the enabling act needs to have certain elements and

11, 16.1.2003, p. 1–8. In this regard, however, it has been noted that, in the case of executive agencies, the establishment of the legal personality to these bodies is not contained in the Commission's decision, but directly in Article 4(2) of Regulation No. 58/2003. Therefore, being the Commission' decision simply implementing the Regulation, this example cannot support the argument of the establishment of an EU agency through a decision, on the contrary proving that a regulation is necessary to this end. See CHAMON Merijn, *op. cit.* (2016), p. 155.

[1571] CHAMON Merijn, *op. cit.* (2016), p. 155.

[1572] In addition to the regulations establishing the agencies, see Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

[1573] See Case C-270/12, *Short Selling*, EU:C:2014:18, para. 110: "The EU legislature also indicated, at recital 3 in the preamble to Regulation No. 236/2012, that it is appropriate and necessary for the rules provided for in the regulation to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and regarding uncovered short selling are applied in a uniform manner throughout the Union. A regulation was also deemed necessary to confer powers on ESMA to coordinate measures taken by competent authorities or to take the necessary measures itself in the area concerned."

[1574] See DESOMER Marlies, *op. cit.* (2009), pp. 120-121, cited in CHAMON Merijn, *op. cit.* (2016), p. 155.

certain characteristics in order to result in a valid delegation of powers. Considering such a "minimum content" of the enabling act,[1575] it is firstly appropriate to reflect on the essential elements doctrine elaborated by the Court in relation to delegation to the Commission, considering whether and to what extent it is applicable to the other forms of delegation. Subsequently, attention will be paid to the specificity requirement and its meaning for the control of the delegation. Finally, we will reflect on the need of further elements in the enabling act, recognising the peculiarities of certain forms of delegation.

5.1. The Essential Elements Requirement

Since the first assessments on the legality of the comitology system, the Court identified a minimum content which the enabling act has to provide. As we have seen,[1576] such a minimum content corresponds first of all to what has been labelled as the "essential elements doctrine" of the Court. In particular, in *Koster*,[1577] the Court upheld the challenged Commission's regulation, asserting that Article 43 EC, the Treaty provision giving competence to the Council to adopt rules in the CAP, was satisfied where "the *basic elements of the matter* to be dealt with have been adopted in accordance with the procedure laid down by that provision."[1578] Therefore, the legislative act must determine the essential elements of the matter, and the power to fix such elements cannot be delegated to the Commission.

This doctrine of the Court on the necessary content of the delegating act is settled case law, however the wording used by the Court may have differed in the various judgments.[1579] While in some cases, the Court described them as "the basic elements of matter to be dealt with",[1580] in others it referred to "the essential elements of the matter to be dealt with"[1581] or to "the essential rules governing the matter in question".[1582] It has also been worded as "rules essential to the

[1575] The expression "minimum content" of the enabling act is taken from DE MARIA Bruno, "Legge europea e sistema delle fonti", in SCUDIERO Michele (ed.), *Il Trattato costituzionale nel processo di integrazione europea*, (Jovene, 2005), p. 604. See also VOSA Giuliano, "Delegation or implementation? The ambiguous divide", 42 *European Constitutional Law Review* No. 5 (2017), p. 738, who describes the essential element doctrine as the "minimum standard of legislative density", referring to BAST Jürgen, *op. cit.* (2003), p. 37.
[1576] See Chapter 2, para. 2.2.2.
[1577] Case 25/70, *Köster*, EU:C:1970:115.
[1578] Ibidem, para. 6.
[1579] See RITLENG Dominique, "The Reserved Domain of the Legislature. The Notion of Essential Elements of an Area", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers*, (Oxford University Press, 2016), p. 137.
[1580] See, *inter alia*, Case 230/78, *Eridania*, EU:C:1979:2016, para. 7; Case 46/86, *Romkes*, EU:C:1987:287, para. 17; Case C-63/90, *Portugal and Spain v Council*, EU:C:1992:381, para. 14; Case C-203/86, *Spain v Council*, EU:C:1988:420, para. 34; Case C-133/06, *Parliament v Council*, Opinion of Advocate General Poiares Maduro, ECLI:EU:C:2007:551, para. 18.
[1581] See, *inter alia*, Case C-156/93, *Parliament v Commission*, EU:C:1995:238, para. 18; Case C-303/94, *Parliament v Council*, EU:C:1996:238, para. 23; Case C-14/01, *Niemann*, EU:C:2003:128, para. 33.
[1582] See, inter alia, Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 64; Case C-48/98, *Söhl & Söhlke*, EU:C:1999:548, para. 34; Case C-240/90, *Germany v Commission*, EU:C:1992:408, para. 41. Other

subject-matter envisaged"[1583] or "essential elements of the harmonising measure in question".[1584] However, it is generally acknowledged that these different phrases refer to the same concept.[1585]

This concept elaborated in the early case law on the delegation of powers to the Commission was soon also inserted in the legislative framework of the comitology system. Indeed, the First Comitology Decision provided that, in delegating powers to the Commission for the implementation of its rules, "the Council shall specify the essential elements of these powers".[1586] This provision was reiterated in the following Comitology Decision[1587] and, with renewed emphasis, in the 2006 Decision, where the possibility to amend and supplement the basic act through the RPS procedure was expressly circumscribed to the non-essential elements of the act.[1588]

5.2. The Role of the Essential Elements Doctrine

Considering the role of this doctrine from an institutional perspective, the case law on the essential elements appears to have carved out an area exclusively pertaining to the legislator in the different rule-making phenomena at the EU level, preserving a certain sphere of regulation to the institutions originally having the competence to rule.[1589] In this sense, this doctrine served as a shield against the potential "sliding" of the powers from the institutions vested with those powers by the Treaties, in particular the Parliament, thus protecting the prerogatives of this institution.[1590] Therefore, the essential elements doctrine should be considered, *in primis*, within an institutional balance *ratio*.

Moreover, in the pre-Lisbon legal framework, the demarcation between essential elements and implementing powers corresponded with the dividing line between legislation and implementation,[1591] which represented the crucial dichotomy of rule-making under the existing

versions of the same concept have been: "rules essential to the subject-matter envisaged" (Case C-240/90, *Germany v Council*, EU:C:1992:408, para. 36); "essential elements of the harmonising measure in question" (Case 66/04, *UK v Parliament and Council*, EU:C:2005:743, para. 48). See RITLENG Dominique, *op. cit.* (2016), p. 137.

[1583] Case C-240/90, *Germany v Council*, EU:C:1992:408, para. 36.

[1584] Case 66/04, *UK v Parliament and Council*, EU:C:2005:743, para. 48.

[1585] RITLENG Dominique, *op. cit.* (2016), p. 138.

[1586] Article 1 of Decision No. 83/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred to the Commission, OJ L 197/33 of 18/07/1987.

[1587] Article 1 of Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.

[1588] Article 5a of Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006, OJ L 200, 22.7.2006, p. 11–13.

[1589] See, *inter alia*, RITLENG Dominique, *op. cit. (*2016), p. 144.

[1590] See, *inter alia*, BRADLEY Kieran St. C., *op. cit.* (2016) Press, 2016), p. 59.

[1591] See, *inter alia*, CHAMON Merijn, "How the Concept of Essential Elements of a Legislative Act Continue to Elude the Court. Parliament v Council", 50 *Common Market Law Review* (2013), pp. 849-860.

text. However, as will be seen, the introduction of a third category, *i.e.* the delegated acts, has somehow changed the meaning of this doctrine. In this regard, considering that the Lisbon Treaty has introduced a formal distinction between legislative and non-legislative acts, the essential elements doctrine tends to identify a "reserved domain of the legislature" not only in relation to the implementing acts, but also in relation to any non-legislative secondary measure.[1592] In this sense, it has acquired a role which bears strong resemblance to the concept of "*riserva di legge*" (reserved domain of the law) in the Italian legal system,[1593] which, within the realm of legislation, represents a reserved domain for formal law in relation to all the forms of executive rule making.[1594]

5.3. The Meaning of "Essential Elements"

Although the concept of essential elements emerged early as a fundamental limit for the delegation of powers, what is essential remains somehow unclear.[1595] Although clearly inspired by the *Wesentlichkeitstheorie* of German law, the EU doctrine does not correspond to the meaning elaborated in that legal system.[1596] In EU law, the notion has neither been specified by primary nor secondary law, although the Penelope project proposed an interesting list of what should be included in such a category.[1597] In the silence of legislation, the case law has progressively defined the criteria for what constitutes an essential element of an area.

[1592] As defined by RITLENG Dominique, *op. cit*. (2016), pp. 133-155.
[1593] Pursuant to the peculiar legal institution known as "riserva di legge" (reserved domain of the law), the Italian Constitution reserves the regulation of certain subject matters for the legislator. Therefore, certain matters can be regulated only by a formal law adopted by the Parliament according to Article 70 of Italian Constitution ("riserva formale"), or by formal law and by delegated legislation (*decreti legislativi* and *decreti-legge*), but not by the Government's autonomous powers (*regolamenti*) ("riserva ordinaria"). See, *inter alia*, CUOCOLO Fausto, op. cit. (2003), p. 407; DI GIOVINE Alfonso, *Introduzione allo studio della riserva di legge nell'ordinamento costituzionale italiano* (Giappichelli, 1969); SORRENTINO Federico, *Lezioni sulla riserva di legge* (Cooperativa libraria universitaria, 1980); IADICICCO Maria Pia, *La riserva di legge nelle dinamichedi trasformazionedell'ordinamento interno e comunitario* (Giappichelli, 2007).
[1594] See RITLENG Dominique, *op. cit.* (2016), p. 137; BARATTA Roberto, *op. cit.* (2011), p. 310. Contra TOVO Carlo, "Delegation of legislative powers in the EU: how EU institutions have eluded the Lisbon reform", 42 *European Law Review* No. 5 (2017), pp. 679-680, where the existence of a similar concept is denied in EU law.
[1595] See CHAMON Merijn, *op. cit*. (2013), pp. 849-860; AVGERINOS Yannis, "Essential and Non-Essential Measures: Delegation of Powers in EU Securities Regulation", 8 *European Law Journal* No. 2 (2002), pp. 269-289.
[1596] KOTZUR Markus, *op. cit*. (2015), p. 948.
[1597] Article 77(2) of the Feasibility Study "Penelope" of the Commission President Romano Prodi of 4 December 2002: "[EU law] shall determine the fundamental principles, the general orientations and the essential aspects of the measures to be taken to that end. It shall fix the rights and obligations of individuals and undertakings, as well as the nature of guarantees which they shall enjoy in all Member States", cited also in RITLENG Dominique, *op. cit. (*2016), p. 150.

5.3.1. The Approach of the Court

Initially, the Court established a distinction between the measures directly based on the Treaties, which had to contain the essential elements of the matter, and the measures intended to provide for the implementation to the basic act.[1598] However, especially in the field of the CAP,[1599] which elements were to be included in the basic act as "essential" appeared to be left to the Council to decide.[1600] Adopting a wide notion of implementation,[1601] the Court rejected criteria of distinction based on the relative "importance" of the provision[1602] or on its "general character",[1603] considering that relevant provisions of general application can also fall outside the scope of the notion of essential elements.

In this regard, the Court provided some guidance in the *Germany v Commission* case.[1604] The case concerned a Commission regulation lying down detailed rules in the sheep meat sector, which imposed penalties to be applied to the individuals for the effective application of the aid system. In its pleadings, the German government contended that only the Council had the power to impose penalties since, affecting the fundamental rights of the individuals, these powers could not be delegated to the Commission.[1605] In this approach, we can recognise an echo of the German legal tradition, according to which the fundamental rights represent a domain reserved for the legislator.[1606]

The Court, in dismissing the applicant's arguments, argued from the legislative system established in the Treaties and clarified that "such classification shall be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy."[1607] Accordingly, the power to impose penalties to ensure the implementation of these fundamental guidelines of the policy was not exclusively reserved for the Council, but it could be lawfully

[1598] Case 25/70, *Köster*, EU:C:1970:115, para. 6.
[1599] See ESPOSITO Antonio, *La delega dei poteri dal Consiglio alla Commissione*, (Philos, 2004), p. 69; CHAMON Merijn, *op. cit*. (2013), p. 856; BIANCHI Daniele, *op. cit*. (2012), p. 88.
[1600] See ESPOSITO Antonio, *op. cit.* (2004), p. 68.
[1601] See, *inter alia*, Case 23/75, *Rey Soda*, EU:C:1975:142, para. 10.
[1602] Case 41/69, *ACF Chemiefarma v Commission*, EU:C:1970:71, para. 65: "the rules laying down the procedure to be followed in this connexion, however important they may be, constitute implementing provisions."
[1603] Case 16/88, *Commission v Council*, EU:C:21989:397, para. 11: "The concept of implementation for the purposes of that article comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application. Since the Treaty uses the word 'implementation' without restricting it by the addition of any further qualification, that term cannot be interpreted so as to exclude acts of individual application."
[1604] Case C-240/90, *Germany v Commission*, EU:C:1992:408.
[1605] Ibidem, paras. 30-33.
[1606] TURK Alexandre, "Case Law in the Area of the Implementation of EC Law", in PEDLER Robin and SCHAEFER Guenther, *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process*, (EIPA, 1996), p. 173.
[1607] Case C-240/90, *Germany v Commission*, EU:C:1992:408, para. 37.

delegated to the Commission.[1608] This conclusion was corroborated by the observation that a similar system of penalties was also upheld in the *Köster* judgment.[1609] Conversely, the definition of a basic concept, such as the concept of "operator" in a regulation on the common organisation of agricultural markets was considered to be one of the elements essential to the subject-matter and had to be reserved for the legislator.[1610]

5.3.2. The Schengen Border Code Case

Further guidance was provided by the Court in the fundamental *Schengen Borders Code* case.[1611] The case concerned the adoption of a regulation on the measures allowed in relation to the border surveillance coordinated by Frontex, which was adopted under the pre-Lisbon regime. Although the provisions at issue concerned the previous legal framework, the Court elaborated an approach which could provide general indications, useful also for the post-Lisbon era.[1612]

In *Schengen Border Code*, the Parliament challenged an implementing decision which was adopted by the Council on appeal under the RPS procedure and included measures regulating the enforcement powers of the units participating in the Frontex operations, such as the searching and seizing of ships and the apprehension of people on board. As remarked by Advocate General Mengozzi, these measures touched upon a sensitive domain, *i.e.* border control policy, which is of a particularly controversial nature. In particular, they affected the very notion of "surveillance", which is fundamental in the shaping of the board control policy.[1613] Thus, also considering the particularly "strong" effect of the measures authorised by the implementing act, in the Advocate General's view, the relevant provisions fell within the notion of essential elements, not being suitable for delegation to the Commission or the Council.[1614]

The Court reached the same conclusion of the Advocate General, but it put forward a different line of reasoning to identify what constitutes essential elements of an area. The Court observed that the definition of essential elements should "take account of the characteristics and particularities

[1608] Ibidem, para. 37. See also Case C-356/97, *Molkereigenossenschaft Wiedergeltingen*, EU:C:2000:364, paras. 21-22.
[1609] Case C-240/90, *Germany v Commission*, EU:C:1992:408, para. 38.
[1610] Case C-104/97, *Atlanta v Commission and Council*, EU:C:1999:498, para. 76.
[1611] Case C-355/10, *Parliament v Council*, EU:C:2012:516. For a detailed analysis of the case, see CHAMON Merijn, *op. cit.* (2013), pp. 849-860; and HEIJER (den) Maarten and TAUSCHINSKY Elialill, "Where Human Rights Meet Administrative Law: Essential Elements and Limits to the Delegation. European Court of Justice, Grand Chamber C-355/10: European Parliament v. Council of the European Union", 9 *European Constitutional Law Review* No. 3 (2013), pp. 513–533.
[1612] RITLENG Dominique, *op. cit.* (2016), p. 151.
[1613] Opinion of AG Mengozzi in Case C-355/10, *Parliament v Council*, EU:C:2012:207, paras. 61-62.
[1614] Ibidem, para. 61. For an analysis of the AG Opinion, see CHAMON Merijn, *op. cit*. (2013), pp. 853-854.

of the domain concerned".[1615] However, the determination of this notion "is not [...] for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review."[1616] In this sense, the approach of the Court is comparable to that applied in relation to the choice of the legal basis of primary legislation.[1617] In both cases, the choice of the legislature is fundamental for the role and the "degree of influence" which each institution can exercise on it, thus affecting the balance among institutions.[1618] Therefore, the full review exercised by the Court of the legislator's choice guarantees the respect of the institutional balance.

Taking this more restrictive approach, the Court recalled that "provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated."[1619] Consequently, it assessed the powers delegated *in casu* as essential elements which could not be delegated. Interestingly, the Court focused on two aspects of the provisions. Firstly, it recognised that the definition of the enforcement powers of the border guards "entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments."[1620] In making these political choices, the sovereign rights of third countries could be affected, thus constituting a major development in the border control system.[1621] Secondly, the Court underlined the fact that power granted by the contested regulation determined that "the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required."[1622] Therefore, this element also characterised the provisions as containing essential elements of the matter and lead to the annulment of the Council Decision.

5.3.3. Assessing the Implications of Schengen Border Code

The identification of these criteria in *Schengen Border Code* has been applauded in the literature as a significant development of the essential elements doctrine, opening the door to a broader recognition of the role of human rights in the EU delegation system.[1623] The relevance of this clarification has also been evident in the subsequent case law, where the assessment of the

[1615] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 68; Case C-363/14, *Parliament v Council*, EU:C:2015:579, para. 47; Case C-540/140 P, *DK Recycling v Commission*, EU:C:2016:469, para. 48.
[1616] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 67.
[1617] See, *inter alia*, Case 45/86, *Commission v Council*, EU:C:1987:163, para. 11; Case C-300/89, *Commission v Council*, EU:C:1991:244, para. 10. See also Chapter 1, para. 11.1.
[1618] BRADLEY Kieran St. C., *op. cit.* (2016), p. 60.
[1619] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 65.
[1620] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 76.
[1621] Ibidem.
[1622] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 77.
[1623] See, in particular, HEIJER (den) Maarten and TAUSCHINSKY Elialill, *op. cit.* (2013), p. 533.

essentiality of certain provisions was conducted, taking as starting point the new definition provided in this case.[1624] Thus, as clearly emerges in *Czech Republic v Commission*, the standard test to recognise the essentiality of an element now focuses on two aspects: (i) the need of balancing conflicting interests by the delegate; or (ii) the interference with the fundamental rights of the persons concerned. In the Court's words, "an element is essential within the meaning of the second sentence of the second subparagraph of Article 290(1) TFEU in particular if, in order to be adopted, it requires political choices falling within the responsibilities of the EU legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments, or if it means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required".[1625]

Some critical remarks have been raised on the actual clarification provided by the judgment. Firstly, in relation to the criterion, according to which an element is essential when it entails balancing political choices, it is arguable that this formulation does not add much to the one already proposed in *Germany v Commission*.[1626] Adopting political choices corresponds to giving concrete shape to the fundamental guidelines of EU policy, and the new formulation in such abstract terms does not really help the interpreter in identifying what constitutes an essential element.[1627] Moreover, such a formulation needs to be reconciled with the settled case law on the wide discretion conferred on the Commission by way of delegation. Considering the difficult divide between political and technical choices, it is far from clear when the wide discretion lawfully given to the Commission verges on political choices and thus encroaches the reserved domain of the legislator.[1628]

Secondly, with regard to the criterion related to the interference of the fundamental rights of the persons concerned, it is noteworthy that the position of the Court apparently contrasts with the solution adopted in *Germany v Commission*.[1629] However, it has been correctly noted that in *Schengen Border Code* the Court did not refer to *any* interference with fundamental rights.[1630]

[1624] See Case C-44/16 P, *Dyson v Commission*, EU:C:2017:357, para. 61; Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579, para. 46; Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 78.
[1625] Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 78.
[1626] RITLENG Dominique, *op. cit.* (2016), p. 152.
[1627] CHAMON Merijn, *op. cit.* (2013), p. 859.
[1628] For further reflections on this point, see RITLENG Dominique, *op. cit.* (2016), p. 152.
[1629] As we have seen *supra* in para. 5.3.1, in that case, the argument of the German government - that the imposition of penalties by the implementing measure affected the fundamental rights of the people - was clearly dismissed by the Court. However, a certain opening to fundamental rights' instances has been remarked in Case 41/69, *ACF Chemiefarma v Commission*, EU:C:1970:71, paras. 59-65. See RITLENG Dominique, *op. cit.* (2016), p. 153.
[1630] RITLENG Dominique, op. cit. (2016), p. 152; HEIJER (den) Maarten and TAUSCHINSKY Elialill, *op. cit.* (2013), p. 527.

Precisely, it held that "the fundamental rights of the persons concerned may be interfered with *to such an extent* that the involvement of the European Union legislature is required".[1631] In other words, not all interferences with fundamental rights fall within the scope of the essential elements, but a certain intensity in this interference is needed to trigger the necessary involvement of the EU legislator. As confirmed by the *Europol* case, where the power of concluding agreements with third parties, which may entail a transmission of personal data was at issue, only "*some* of those interferences may be so serious that intervention by the EU legislature becomes necessary".[1632] The seriousness of the interference is assessed by the Court on a case-by-case basis.

5.3.4. Essential Elements and the EU Charter of Fundamental Rights

In light of the foregoing, it is questionable whether the criterion identified by the Court in *Schengen Border Code* is exclusively linked to the essential elements doctrine and the political choice[1633] or whether it stems from the application of Article 52(1) of the Charter. Indeed, according to this provision, the limitation of the exercise of rights and freedoms of the Charter are allowed only when "provided for by law". However, in line with the case law of the European Court of Human Rights,[1634] the Court has considered that that requirement is fulfilled not only when the limitation is contained in a legislative act in the sense of Article 289(3) TFEU,[1635] but also in case

[1631] Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 77.
[1632] Case C-363/14, *Parliament v Council*, EU:C:2015:579, para. 53.
[1633] See Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 77; Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 78.
[1634] As observed by RITLENG Dominique, *op. cit.* (2016), p. 153. In this regard, the interpretation of the European Court of Human Rights on what constitutes "law" has been particularly flexible (of "extraordinaire supplesse, si on ne veut pas parler de laxisme", according to PETTITI Louis-Edmond, DECAUX Emmanuel and IMBERT Pierre-Henri, *La Convention européenne des droits de l'homme*, (Economica, 2012), p. 985), allowing limitations provided by any form of national regulatory instrument, not restricted to the formal law adopted by the Parliament (see ECtHR, judgment of 26 April 1979, *Sunday Times*, Appl. No. 6538/74, para. 47; ECtHR, judgment of 16 April 2002, *Société Colas Est*, Appl.No. 37971/97, para. 43.) Instead of focusing on the classification of the legal instrument, the Strasbourg Court has put forward different qualities the act needs to have to qualify as "law", such as an adequate accessibility by the public and a sufficient degree of precision which allow the individual to foresee the consequences of his/her behaviour (ECtHR, judgment of 26 April 1979, *Sunday Times*, Appl. No. 6538/74, para. 49). See also see COHEN-JONATHAN G., *La Convention européenne des droits de l'homme*, (Economica, 1989), p. 467 et seq; OVEY Clare and WHITE Robin, *European Convention on Human Rights*, (Oxford University Press, 2002), pp. 202-204.
[1635] This position was argued by HOFMANN Herwig, "A Critical Analysis of the New Typology of Acts inthe Draft Treaty Establishing a Constitiution for Europe", *European Integration Online Papers* No. 9 (2003), pp. 10-11; ZILLER Jacque, "La constitutionalisation de la Charte des droits fondamentaux et les traditions constiutionnelles communes aux Etats membres", in DE GROVE-VALDEYRON N. and BLANQUET M. (eds.), *Liber amicorum - Mélanges en l'honneur du professeur Joël Molinier,* (LGDJ, 2012), pp. 669-670, cited in RITLENG Dominique, *op. cit.* (2016), p. 153.

of an implementing regulation.[1636] Therefore, the evolution of the case law on essential elements does not seem to be correlated to Article 52(1).[1637]

However, the formulation adopted by the Court sheds light on the interplay between the instances underpinning the essential elements doctrine and the fundamental function of the law as a guarantee of individuals' rights. Indeed, if the divide between essential elements and delegable elements is meaningful for the distinction between legislation and implementation - or, more precisely, regulatory power which can be exercised by other institutional actors than the legislator - also in EU law the scope of what constitutes "law" or "legislation" cannot disregard one of the functions which the law traditionally embodies in democratic legal systems,[1638] i.e. the protection of the fundamental rights of the individuals.

5.4. The Essential Elements and Delegated Acts

With the entry into force of the Lisbon Treaty and the subsequent splitting of the delegation mechanism for the Commission into two halves, the essential elements requirement has apparently followed the same fate.

5.4.1. The Express Provision in Article 290 TFEU

Article 290 TFEU explicitly refers to the principle identified in the case law, allowing for a delegation of power to the Commission "to supplement and amend certain non-essential elements of the legislative act"[1639] and stating that "the essential elements of an area shall be reserved for the legislative act and accordingly shall not be subject of a delegation of power".[1640] Therefore, with reference to the delegated acts, the Lisbon Treaty determined the inclusion of this concept in the Treaties, upgrading the essential elements notion to primary law. Such an insertion in primary law, in particular, makes clearer that, although determining what is essential depends on the legislator, the legislative acts are also subject to judicial review in relation to this aspect.[1641] In this new position, the essential elements doctrine has continued to be applied by the Court in cases concerning delegated acts, corroborating its reasoning with case law pre-dating the Lisbon

[1636] See Joined Cases C-92/09 and C-93/09, *Volker and Markus Schecke*, EU:C:2010:662, para. 66. Conversely, the requirement is not fulfilled by an EU act of individual application, see Case 407/08 P, *Knauf Gips*, EU:C:2010:389, paras. 87-91.
[1637] On the non-correlation between the two positions, see by BAST Jürgen, *op. cit.* (2011), p. 391; RITLENG Dominique, *op. cit.* (2016), p. 153.
[1638] See Chapter 1, para. 7.4.
[1639] Article 290(1) TFEU, first paragraph.
[1640] Article 290(1) TFEU, second paragraph.
[1641] RUGGERI Antonio, "Fonti europee e fonti nazionali al giro di boa di Lisbona: Ritorno al passato o avventura nel future?", *Diritto pubblico comparato ed europeo* No. 1 (2008), pp. 136.

Treaty.[1642] Therefore, it has annulled Commission's delegated acts which disregarded or amended an essential element of the enabling act, thus safeguarding the reserved domain of the legislature.[1643]

5.4.2. Essential Elements of an Area or Essential Elements of the Legislative Act?

In relation to Article 290 TFEU, however, a discrepancy in the wording of the notion has been highlighted.[1644] While the domain reserved to the legislator are the essential elements of "an *area"*, the limit to amend or supplement refers to the essential elements of "the legislative *act*". In this regard, it has been noted that the notion of "essential elements of an area" is a broader notion than "the essential elements of a legislative act". The discrepancy is not problematic where the enabling act has spelled out all the essential elements of the area. Indeed, when the legislator has laid down the essential elements of an area in the form of legislation, these elements become necessarily the essential elements of the legislative act which cannot be lawfully modified by the Commission.[1645] Conversely, when the legislative act did not regulate all the essential elements of an area, it has been argued that the Commission's discretion in the exercise of the delegated powers is limited not only in relation to the essential elements expressly inserted in positive law, but also in the sense that the Commission cannot add new essential elements to the legislative act.[1646]

In this respect, however, it has been noted, interestingly, that it is not possible to determine the "essentiality" of an element in the absence of a legislative act. Being a relative concept, assessing whether an element is essential or non-essential cannot be made in the abstract, but it presupposes the existence of a legislative act in relation to which the essentiality of an element is assessed.[1647] Therefore, it is not possible to identify an autonomous concept of "essential elements of an area" outside the essential elements of the legislative act, thus putting the difference in wording of Article 290 TFEU into perspective.

[1642] See Case C-363/14, *Parliament v Council*, EU:C:2015:579; Case C-44/16 P, *Dyson v Commission*, EU:C:2017:357; Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579; Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595. *Contra* Opinion on Advocate General Pedro Cruz Villalon of 19 December 2013 in Case C-427/12, *Commission v Parliament and Council (Biocides*), EU:C:2013:871, para. 77: "in the current post-Lisbon setting, it is necessary to move away from the idea that a 'law' is restricted to what is 'essential', as has previously been the interpretation of the case-law of the Court of Justice."

[1643] Case C-44/16 P, *Dyson v Commission*, 2017:357, paras. 61-63. See also Case C-540/14 P, *DK Recycling v Commission*, EU:C:2016:469, paras. 49-55.

[1644] See RITLENG Dominique, *op. cit.* (2016), p. 149; SCHUTZE Robert, *European Constitutional Law* (Cambridge University Press, 2012), p. 233.

[1645] See RITLENG Dominique, *op. cit*. (2016), p. 149. See also Case C-355/10, *Parliament v Council*, EU:C:2012:516, paras. 64-66.

[1646] RITLENG Dominique, *op. cit.* (2016), p. 149.

[1647] RUGGERI Antonio, *op. cit.* (2008), pp. 136.

5.5. The Essential Elements and Implementing Acts of the Commission

Article 291 TFEU does not mention the notion of essential elements, maintaining the wording set forth in the preceding Treaties. Different from the pre-Lisbon legal framework, however, the secondary law also does not contain a reference to the essential elements.[1648] The absence of such a reference in Article 291 TFEU and in Regulation No. 182/2011 has stimulated the debate on the applicability of the essential elements doctrine to the new system of implementing acts.[1649]

In this regard, nothing in the *travaux préparatoires* suggests that the *Köster* case law was intentionally overruled by the Lisbon Treaty.[1650] Accordingly, it may be argued that the Member States just assumed that the pre-Lisbon case law would automatically be applicable to Article 291 TFEU.[1651] Moreover, considering the discretion granted to the legislator with reference to the choice between the delegated and implementing acts,[1652] if the essential elements doctrine was not applicable to implementing acts, the legislature could easily circumvent this well-established limit to the delegation by resorting to Article 291 TFEU instead of Article 290 TFEU.[1653]

A more trenchant argument has been put forward by the Court. As remarked in the *Eures* case, it is clear from the Treaties' provisions that, since according to Article 290 TFEU only delegated acts can amend or supplement the non-essential elements of the legislative act, "in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements."[1654] Therefore, considering that all the elements of the basic act cannot be modified or integrated by the implementing provisions, *a fortiori*, its essential elements remain outside the scope of intervention of the Commission when empowered under Article 291 TFEU.

[1648] See Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.
[1649] See RITLENG Dominique, *op. cit*. (2016), p. 144; PEERS Steve and COSTA Marios, "Accountability for Delegated and Implementing Acts after the Treaty of Lisbon", 18 *European Law Journal* No. 3 (2012), pp. 445-446; HOFMANN Herwig, *op. cit.* (2009), p. 488. Contra SCHUTZE Robert, *op. cit*. (2012), pp. 240-241; VOERMANS Wim, HARTMANN Josephine and KEADING Michael, "The Quest for Legitimacy in EU Secondary Legislation", *The Theory and Practice of Legislation* (2014), p. 23.
[1650] RITLENG Dominique, *op. cit*. (2016), p. 144.
[1651] This appears the position also of the Council Legal Service (Opinion of 11 April 2011). See also SCHUTZE Robert, "Constitutional Limits to Delegated Powers", in ANTONIADIS Antonis, SCHUTZE Robert and SPAVENTA Eleanor, *The European Union and Global Emergencies: A Law and Policy Analysis*, (Hart Publishing, 2011a), p. 55; HOFMANN Herwig, *op. cit*. (2009), p. 488.
[1652] Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2014:170.
[1653] RITLENG Dominique, *op. cit.* (2016), p. 144.
[1654] Case C-65/13, *Parliament v Commission*, EU:C:2014:2289, para. 45. See also Opinion of Advocate General Jaaskinen in Case 270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2013:562, para. 89: "Of course, the fundamental constitutional principle […] reserving the essential elements of a field to a legislative act, restricts not only the scope of delegated acts, but of implementing acts as well".

This solution is in line with the constitutional role of the essential elements doctrine in EU law. As was seen, before the Lisbon Treaty, the essential elements represented the sole boundary between legislation and implementing acts. Now, with the introduction of the delegated acts, the role of the essential elements doctrine has become more prominent in relation to this more contiguous form of rule-making, resulting in it being less relevant for the implementing acts. However, this does not mean that the implementing acts are not bound by the respect for the essential elements, but that the cases of collision between the two notions are substantially reduced.[1655] Although controversial cases are more likely to arise with delegated acts rather than implementing acts, the essential elements doctrine remains a significant requirement for the basic act which contains a delegation of implementing powers. In this sense, this doctrine represents "a fundamental principle which restricts the substantive scope of both delegated acts and implementing acts",[1656] thus remaining good law also in relation to Article 291 TFEU.

5.6. The Essential Elements and the Council

This essential elements doctrine has also been applied by the Court in the case of delegation of powers to the Council.[1657] Thus, also in this case, "the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by [the Treaty]; the provisions implementing the basic regulations may be adopted by the Council according to a different procedure".[1658] The Court also confirmed the relevance of this case law after the Lisbon Treaty, consistently referring to the doctrine and applying the test as recently developed in relation to the Commission also in case of the exercise of implementing powers by the Council.[1659]

5.6.1. The Essential Elements and the Reservation of Powers

In this regard, it is interesting to note that the doctrine of essential elements has also been applied in cases which, in the previous chapters, were qualified not as a delegation of power, but as a

[1655] However, cases of implementing acts adding something to legislative acts cannot be excluded, see CRAIG Paul, op. cit. (2011), pp. 671-687.
[1656] BERGSTROM Carl Fredrik, *op. cit.* (2015), p. 228. See also HOFMANN Herwig, *op. cit*. (2009), p. 488; XHAFERRI Zamira, "Delegated Acts, Implementing Acts, and Institutional Balance Implication Post-Lisbon", 20 *Maastricht Journal of European and Comparative Law* 4 (2013), p. 565; RITLENG Dominique, "La nouvelle typologie des actes de l'Union. Un premier bilan critique de son application", 51 *Revue trimestrielle de droit européen* No. 1 (2015a), pp. 11-12.
[1657] See, *inter alia,* Case C-46/86, *Romkes*, EU:C:1987:287, para. 16; Case C-303/94, *Parliament v Council*, EU:C:1996:238, para. 23; Case C-417/93, *Parliament v Council*, EU:C:1995:127, para. 30; Case C-156/93, *Parliament v Commission*, EU:C:1995:238, para. 18; Joined Cases C-63/90 and 67/90, *Portugal and Spain v Council*, EU:C:1992:381, para. 14; Case 6/88, *Spain and France v Commission*, EU:C:1989:420, para. 15; Case C-203/86, *Spain v Council*, EU:C:1988:420, para. 34; Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 45.
[1658] Joined Cases C-63/90 and 67/90, *Portugal and Spain v Council*, EU:C:1992:381, para. 14.
[1659] See Case C-363/14, *Parliament v Council*, EU:C:2015:579, paras. 44-46.

reservation of powers since the Council was the sole legislator and decided to "reserve" for itself certain powers. As we have seen, Article 291 TFEU is applicable not only in relation to acts adopted jointly by the Council and the Parliament, but also where the Council is the sole legislator and decides to delegate implementing powers to itself. Also in this case the essential elements doctrine has been applied. Indeed, the case law of the Court focuses on the *procedure* followed for the adoption of the measures. While the essential elements need to be defined according to the Treaties, the non-essential elements can be detailed according to different procedures defined by acts of secondary law. Thus, provided that the essential elements are spelled out in the basic act, a different procedure can be defined for the adoption of the other provisions, including provisions which derogate from the basic act.[1660]

However, it is important to remark that in these cases, although not formally co-legislator, the Parliament had a role in the adoption of the basic act since the Treaty required either the approval or the consultation of this institution.[1661] The essential elements doctrine, thus, appears to have the fundamental role in relation to the safeguarding the prerogatives of this institution in the adoption of EU acts, regardless of the fact that the powers are originally conferred to the Council by the Treaties. Therefore, also where the Parliament is not formally a co-legislator in the adoption of the basic act, but it is somehow involved in the decision-making procedure, the distinction between essential elements and non-essential elements remains relevant since it marks the boundaries of the encroachment of the Parliament's prerogatives in that procedure. In this sense, the fundamental *ratio* of the doctrine is not exclusively linked to the transferral of powers from one institution to another, but more in general to the role of the institutions in the institutional balance.

In this regard, the essential elements doctrine needs to be considered in relation to the issue of the creation of secondary legal bases.[1662] The establishment of secondary legal bases for the adoption of EU measures finds its limits in the respect of the principle of conferred powers, which does not allow the institutions to dispose of the procedures and powers conferred on them by the Treaties, and of the institutional balance, which requires that each institution must exercise its powers with due regard to the other institutions' powers.[1663] While in the pre-Lisbon case law, the

[1660] See Case 230/78, *Eridania*, EU:C:1979:216, paras. 7-8. See also Opinion of Advocate General Warner in the Case, EU:C:179:173, p. 2781.
[1661] See, for instance Article 43 EEC, relevant in Case C-46/86, *Romkes*, EU:C:1987:287, which required the consultation of the Parliament.
[1662] See *supra* para. 2.7.
[1663] See Case C-133/06, *Parliament v Council*, EU:C:2008:257, paras. 56-57. See also Case C-540/13, *Parliament v Council (Visa Information System*), EU:C:2015:224; Case C-363/14, *Parliament v Council (Europol)*, EU:C:2015:579; Joined Cases C-317/13 and C-679/13, *Parliament v Council*, EU:C:2015:223, paras. 42-45; Case C-44/14, *Spain v Parliament and Council*, EU:C:2015:554, para. 31.

respect of these principles was assured by the requirement of spelling out the essential elements in the basic act, and the non-essential elements could be adopted according to a different procedure, the recent case law appears to take a stronger stance against the creation of secondary legal bases. Although these cases related to the creation of secondary legal bases outside Article 291 TFEU, the relevance of such an approach for the delegation systems of Article 290 and 291 TFEU should not be underestimated.

5.6.2. The Essential Elements and Sui Generis Powers of the Council

The cases of delegation and reservation of powers of the Council pursuant to Article 291 TFEU need to be distinguished from the cases where the Council exercises powers having their legal bases directly in primary law. The exercise of these *sui generis* powers was generally considered not to be limited to non-essential elements since, having their legal basis in a specific provision of the Treaties, the only limits to their content were to be found in that provision.[1664] However, in recent cases the Court tends to apply a reasoning comparable to the essential elements doctrine to *sui generis* powers directly conferred by Treaty provisions to the Council.[1665] Indeed, the Court, specifically in the field of the CAP, has shown an approach which, also in these cases, tends to distinguish "measures reserved to the EU legislature" from "mere technical implementing measures".[1666]

In particular, in the *Venezuela* case, which concerned the adoption of a Council Decision in the fisheries policy,[1667] the Court interpreted the divide between Article 43(2) TFEU, which empowers the Parliament and the Council to "establish […] provisions necessary for the pursuit of the objectives of […] the common fisheries policy", and Article 43(3) TFEU, according to which the Council alone can "adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities".[1668] In the former provision, it identified an "area

[1664] BERGSTRÖM Carl Friedrik, *Comitology. Delegation of Powers in the European Union and the Comitology System*, (Oxford University Press, 2005), p. 354.
[1665] For a reflection on the recent trends in ECJ case law, see CHAMON Merijn, *op. cit.* (2016a), pp. 1501-1544.
[1666] See Joined Cases C-103/12 and C-165/12, *Parliament and Commission v Council (Venezuela)*, EU:C:2014:2400, para. 74.
[1667] Council Regulation 2012/19/EU of 16 December 2011 on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, OJ L 6, 10.1.2012, p. 8–9.
[1668] In particular, in relation to Article 43(2) and (3) TFEU, which read as follows: "2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.
3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities."

of competence in which the decision-making power lies with the EU legislature"[1669] which was characterised by the fact that the resulting measures entailed "a policy decision", *i.e.* an autonomous decision which balances different policy interests of the EU.[1670] Conversely, the scope of application of Article 43(3) TFEU, which confers powers to the Council in its executive capacity, is limited to the adoption of "mere technical implementing measures".[1671] Accordingly, the Council Decision approving a fishing agreement with the Republic of Venezuela, which established a general framework for the management of fishing stocks in the concerned geographical area, was considered to go beyond the mere implementation and was thus annulled.

Similarly, in the *Multiannual Cod Plan* case,[1672] the Court was confronted with a Council Regulation amending certain aspects of the scheme establishing a long-term plan for cod stocks adopted pursuant to Article 43(3) TFEU.[1673] Although the Court expressly rejected the parallel drawn by the Commission between Article 291(2) TFEU and Article 43(3) TFEU,[1674] it interpreted the legal basis provided in the Treaties again in relation to the fisheries policy together, determining the scope of application of Article 43(3) in relation to Article 43(2).[1675] Building on its previous judgment, the Court reaffirmed that Article 43(2) TFEU relates to "measures which entail a policy choice reserved to the EU legislature because the measures are necessary for the pursuit of the objectives of the common policies for agriculture and fisheries"[1676] and annulled the contested regulation.

5.6.3. Assessing Venezuela and Multiannual Cod Plan

Albeit relating to the specific context of Article 43 TFEU, the similarities in the reasoning of the Court in cases of implementing measures adopted from a delegation of the legislature and of

[1669] Joined Cases C-103/12 and C-165/12, *Parliament and Commission v Council (Venezuela)*, EU:C:2014:2400, para. 80.
[1670] Ibidem, paras. 50 and 79.
[1671] Ibidem, para. 74.
[1672] Joined Cases C-124/13 and C-125/13, *Parliament and Commission v Council (Multiannual Cod Plan)*, EU:C:2015:790.
[1673] Council Regulation (EU) No. 1243/2012 of 19 December 2012 amending Regulation (EC) No. 1342/2008 establishing a long-term plan for cod stocks and the fisheries exploiting those stocks, OJ 2012 L 352, p.10.
[1674] Joined Cases C-124/13 and C-125/13, *Parliament and Commission v Council (Multiannual Cod Plan),* EU:C:2015:790, paras. 52-54. The Court remarked, in particular, that in Article 291(2) TFEU the power to adopt implementing rules is conferred to the Commission as a rule, being the Council's role limited to "duly justified specific cases".
[1675] Joined Cases C-124/13 and C-125/13, *Parliament and Commission v Council (Multiannual Cod Plan),* EU:C:2015:790, para. 58. See CHAMON Merijn, *op. cit.* (2016a), p. 1516.
[1676] Joined Cases C-124/13 and C-125/13, *Parliament and Commission v Council (Multiannual Cod Plan)*, EU:C:2015:790, para. 50.

measures adopted on the basis of the Treaties is remarkable, especially in certain linguistic versions of the judgments.[1677] This case law is particularly interesting from two perspectives.

Firstly, it appears to expand the application of the essential elements doctrine also to cases outside the scope of Article 290 and 291 TFEEU. Indeed, the distinction between essential elements and non-essential elements may also play a role in relation to powers of the Council which have their legal basis directly in the Treaties, reserving to the legislator the political choices of the area. In this sense, the Court appears to confirm the role of "reserved domain of the legislature"[1678] also for the essential elements beyond the case of delegation of powers. The application of this doctrine to the *sui generis* powers of the Council, as well as in the cases of reservation of powers, thus, confers a value on it for the generality of rule-making activities in EU law. In this sense, this notion more and more provides analogies to a "*riserva di legge*",[1679] carving out an area pertaining exclusively to the legislator which is also beyond the case of the delegation of powers.

Secondly, the Court appears to sketch out a categorisation of the measures directly based on primary law on the basis of their content. Indeed, while traditionally the powers conferred to the institutions by the Treaties were not characterised in terms of a legislative/executive distinction, but were referred to as generically "rule-making powers", in these cases the Court interprets the Treaties provisions conferring powers on the institutions as concerning either "measures reserved to the EU legislature" or "implementing acts", although "*sui generis*". Interestingly, the Court reserves for itself the task of drawing a demarcation line between the two categories, exercising a judicial review of the choice of the institutions according to "objective factors […] which include the aim and the content of the measure".[1680] In this sense, it suggests that the innovations brought about by the Lisbon Treaty in terms of a reorganisation of EU legal acts and EU institutional architecture may go beyond the scope of application of Articles 290 and 291 TFEU, having determined a new approach in the interpretation of the exercise of the rule-making powers conferred on the EU institution and their qualification in constitutional terms.

[1677] While in the English version Europol and Schengen Border Code refers to "political choices" and Venezuela and Multiannual Cod Plan of "policy choices", the Italian, French and German versions show no semantic distinction. In Dutch, Venezuela and Multiannual Cod Plan used the corresponding term for "political choice". See CHAMON Merijn, *op. cit*. (2016a), p. 1515, note 73.
[1678] As defined by RITLENG Dominique, *op. cit.* (2016), pp. 133-155.
[1679] See *supra* note 1591.
[1680] Joined Cases C-103/12 and C-165/12, *Parliament and Commission v Council (Venezuela)*, EU:C:2014:2400, para. 51. See CHAMON Merijn, *op. cit*. (2016a), p. 1516; XHAFERRI Zamira, *op. cit*. (2013), p. 564; RITLENG Dominique, "La délégation du pouvoir législatif de l'Union européenne", in *Chemins d'Europe. Mélanges en l'honneur de Jean Paul Jacqué* (Dalloz, 2010), p. 574.

However, it should be noted that the cases analysed pertained to the peculiar field of Article 43 TFEU.[1681] In the light of the peculiarities of this provision, the application of the case law of the Court to other policy domains and to other provisions conferring *sui generis* powers to the Council, especially where no corresponding "legislative" provision can be found in the Treaties,[1682] is still open to interpretation.[1683]

5.7. The Essential Elements and EU Agencies?

The essential elements doctrine has been elaborated upon and applied consistently in relation to the delegation of powers to the Commission and to the Council. Therefore, the applicability of this doctrine in the case of delegation of the powers to EU agencies is not immediately apparent and needs further elaboration and justification.

5.7.1. The Judicial Positions on the Applicability of the Essential Elements Doctrine

In this respect, there have been attempts in doctrinal and judicial contexts to bring this doctrine in line with the requirements elaborated by the case law in relation to the delegation of powers to the EU agencies.[1684] Arguably, the most explicit attempt to correlate the distinction of "essential elements"/"implementing powers" with the dichotomy of "clearly defined executive powers"/"discretionary powers" was proposed by Advocate General Lèger in *Tralli*.[1685] In summarising the criteria set out in *Meroni*, the AG did not hesitate to refer to the case law relating to comitology[1686] to define the notion of "executive powers" mentioned in *Meroni*.[1687]

In this regard, it is indeed remarkable that, in the description of "discretionary powers" in *Meroni*, the Court described this kind of powers as related to the "the execution of actual economic *policy*",[1688] in the sense that they tend "to reconcile the many requirements of a complex and varied economic policy."[1689] The discretionary powers, thus, are by definition related to weighing up different objectives which shape the policy at issue. In this sense, the essential elements, as

[1681] This is a provision conferring legislative powers on the Parliament and the Council in the field of CAP and CFP which is immediately followed by a provision empowering the Council to adopt measures relating to certain aspects of the same policy. See Article 43 TFEU.
[1682] See, for instance, Articles 74 and 109 TFEU.
[1683] CHAMON Merijn, *op. cit*. (2016a), p. 1516.
[1684] CHAMON Merijn, *op. cit*. (2016), p. 222.
[1685] Opinion of Advocate General Léger in Case C-301/02 P, *Tralli v ECB*, EU:C:2005:91, para. 31, esp. note 19.
[1686] See Case 25/70, *Köster*, EU:C:1970:115, para. 6; Case C-240/90, *Germany v Commission*, EU:C:1992:408, paras. 36-37.
[1687] See also Opinion of Advocate General Jääskinen in Case C-507/13, *UK v Parliament and Council*, EU:C:2014:2394, para. 62; Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, para. 77.
[1688] Cases 9-10/56, *Meroni*, EU:C:1958:7, p. 152
[1689] Ibidem, p. 153.

interpreted in *Schengen Border Code*, are also considered a sphere of *political* choices where the legislator is called to balance conflicting interests. In both cases, this balancing of conflicting interests with discretion represents the criterion which collocates them beyond the scope of implementation and, thus, in the realm of the legislator.[1690] In other words, these policy choices are precluded both for the Commission and to EU agencies. From this perspective, the introduction of the express reference to the essential elements doctrine in Article 290 TFEU has been welcomed as a reinforcement of the *Meroni* doctrine.[1691]

5.7.2. The Doctrinal Positions on the Applicability of the Essential Elements Doctrine

Also in the literature, a certain tendency to pull together the *Meroni* case law and the *Köster* jurisprudence has been noted. In this regard, the prohibition of delegating policy choices, which emerges from the case law on essential elements, is considered to apply *a fortiori* to EU agencies.[1692] Therefore, the prohibition of delegating discretionary powers to EU agencies has been equated to impeding the delegation of basic or essential choices to the Commission or Council, reserving the definition of the policy choices to the legislator.[1693]

The application of the essential elements doctrine to the delegation of powers to EU agencies, however, has been criticised in the light of the differences which characterise the two delegation systems. Firstly, in consideration of the different institutional positions of the Commission and the agencies, the limits to the delegation to these bodies cannot be interpreted as being as broad as those identified in the comitology case law.[1694] In this regard, however, considering that the essential elements constitute the minimum content of "discretionary powers" does not mean that they also represent the maximum content of "discretionary powers".[1695] Arguably, the prohibition of exercising discretionary powers for EU agencies can still be considered broader than the prohibition of modifying essential elements of legislation,[1696] without denying that EU agencies also have to respect the reserved domain of the legislator.

[1690] See PELKMANS Jacques and SIMONCINI Marta, "Mellowing Meroni: How ESMA Can Help Build the Single Market", *CEPS Commentary*, 18 February 2014, p. 5.
[1691] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 155.
[1692] See, *inter alia*, RITLENG Dominique, *op. cit.* (2015a), p. 19.
[1693] SCHUTZE Robert, *op. cit.* (2011a), p. 60, esp. note 61. See also GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), pp. 3-35; Case C-164/98 P, *DIR International v Commission*, EU:C:200:48.
[1694] TRIDIMAS Takis, "Financial Supervision and Agency Power: Reflections on ESMA", N. Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union*, (Oxford OUP, 2012) p. 8; TRIDIMAS Takis, "Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement", 28 *Yearbook of European Law* No. 1 (2009), p. 244.
[1695] CHAMON Merijn, *op. cit.* (2016), p. 228.
[1696] CHAMON Merijn, "Clarifying the Divide between Delegated and Implementing Acts?", 42 *Legal Issues of Economic Integration* No. 2 (2015b), p. 183.

Secondly, it has been noted that the *Short Selling* judgment appears to have overshadowed this aspect of the *Meroni* doctrine remarkably since, at the end, the Court gives no importance to the UK's allegation that ESMA is called to "arbitrate between conflicting public interests, make value judgments and carry out complex economic assessments".[1697] Since this requirement is no longer expressed in the Court's reasoning, it might be argued that in the new doctrine there is no limit to the delegation of powers to EU agencies in this respect. However, although from the wording in *Short Selling* it is less evident, the reasoning of the Court in *Short Selling* maintains the essential *ratio* of *Meroni*,[1698] which can be summarised as the need to respect the institutional balance established in the Treaties in the delegation process.[1699] Therefore, the approach of the Court arguably remains driven by institutional balance considerations, which aim at preserving the respective roles of the legislator and the agencies "in the new realities of EU governance".[1700]

For systemic reasons, it is thus arguable that reserving the essential policy choices for the legislator also remains a fundamental limit in relation to the delegation to EU agencies.[1701] Indeed, as already explained, the fundamental meaning of the essential elements doctrine also preserves the institutional balance in the dynamics of the EU rule-making processes. Especially now that the prohibition of delegating the power to adopt "acts having the force of law"[1702] was considerably scaled down by the Court,[1703] and EU agencies are increasingly engaged in sensitive and highly contentious fields, the delegation to EU agencies has the potential to encroach on the prerogatives of the Parliament and Council.

Moreover, the insistence in *Short Selling* on the "specific professional and technical expertise" (which echoes the considerations of the Court in relation to the highly specialised expertise possessed by the Commission on agricultural markets)[1704] and the insistence on the "various conditions and criteria" contribute to interpreting the powers exercised by the EU agencies as implementing powers which do not touch upon the essential elements of an area, but they are rather limited to the technical details of an area.

In the light of these considerations, although the essential elements doctrine has not been specifically applied to EU agencies, it is arguable that not only the Commission and the Council,

[1697] Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2014:18, para. 29. See on this point ADAMSKI Dariusz, *op. cit.* (2014), p. 827.
[1698] EVERSON Michelle and VOS Ellen, *op. cit*. (2016), p. 16.
[1699] VOS Ellen, *op. cit.* (2003), p. 131; VOS Ellen, *op. cit.* (1999), p. 203.
[1700] EVERSON Michelle, MONDA Cosimo and VOS Ellen, "European Agencies in between Institutions and Member States" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 3-8.
[1701] See GRILLER Stefan and ORATOR Andreas, *op. cit. (*2010), p. 28
[1702] Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, EU:C:1981:104.
[1703] Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2014:18, paras. 63-66.
[1704] For the correlation, see ADAMSKI Dariusz, *op. cit*. (2014), p. 827.

but also EU agencies cannot act within the reserved domain for the legislator, identified in the essential elements, constituting a fundamental guarantee for the respect of the principles of democracy and the institutional balance.

6. The Specificity of the Enabling Provision

6.1. The Role of the Specificity Requirement

After having analysed what elements the basic act must contain, it is important now to reflect on how these elements must be spelled out. In this respect, another fundamental aspect elaborated in the case law and identified in the literature is represented by the so-called principle of specificity.[1705] Accordingly, the enabling act is required to indicate with sufficient precision the scope and modes of exercise of the powers attributed to the delegated institution or body, in order to provide guidance and clear boundaries in the delegation.

In this regard, it is interesting to remark that a certain degree of precision in the empowering provisions is a common requirement in the delegation systems of many State legal systems[1706] where it is considered fundamental to maintain the division between the Parliament and the Government in the case of the delegation of legislative powers. Indeed, in the absence of clear indications, the Government would be free to determine the content of its rule-making powers autonomously, thus taking over the prerogatives of the Parliament.[1707] More in general, specific and precise enabling provisions reduce the risk of a "boundless" exercise of public powers, which in the absence of clear boundaries may become arbitrary and difficult to control.

From a constitutional law perspective, it is considered to stem from a certain substantive concept of the principle of legality, which requires not only a formal legal basis, but it also a substantive

[1705] SCHUTZE Robert, "Delegated Legislation in the (new) European Union: A Constitutional Analysis", 74 *The Modern Law Review* No. 5 (2011), p. 670. See also SCHUTZE Robert, *op. cit.* (2011a), p. 52.
[1706] See, with reference to US law, cases *Panama Refining Co. v Ryan*, 293 U.S. 388 (1935); *Chappel v Commonwealth*, 59 Pa. Commw. 504 (1981); *Yankus v US*, 321 U.S. 414 (1944); *West v Egan*, 142 Conn. 437 (1955) where the Supreme Court of Errors of Connecticut held that "This delegation of powers is proper if the statute declares a legislative policy, establishes primary standards for carrying it out, or lays down an intelligible principle to which the agency must conform, with a proper regard for the protection of public interest and with such a degree of certainty as the nature of the case permits, and enjoys a procedure under which, by appeal or otherwise, both public interest and private rights shall have due consideration". With reference to German law, Article 80(1) of the Basic Law of the Federal Republic of Germany: "The Federal Government, a Federal Minister or the Land governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis." With reference to Italian law, Article 77 of Italian Constitution: "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes."
[1707] See, with a comparative constitutional perspective, CARLASSARE Lorenza, *Regolamenti dell'esecutivo e principio di legalità*, (Cedam, 1966), p. 130.

arrangement of the powers delegated in order to allow for control over their exercise.[1708] In this sense, the specificity of the enabling provision is intrinsically linked to the possibility for the judicial review of the acts deriving from the delegation as it provides the benchmark and the criteria for assessing whether the delegated authority has acted *contra* or *ultra vires*.[1709] Therefore, the specificity requirement plays a key role in the protection of the rule of law in its corollaries of separation of powers, principle of legality and judicial protection against illegal acts of public authorities.

6.2. The Requirement of Specificity

In relation to the pre-Lisbon legal framework, the Court of Justice has often remarked the need for the enabling provision to be sufficiently *specific* in order to provide a sufficient legal basis for the measures adopted by the Commission. In this sense, the enabling act could not be constituted by a "blank" transferal of power, generically empowering the delegate to adopt any kind of measure for the implementation of the basic act.[1710] Even when adopting a wide interpretation of implementation, the Court looked into the wording of the enabling provision to verify that it provided a specific object of delegation.[1711]

6.2.1. The Case Law before the Lisbon Treaty

The need of specificity of the enabling provision appeared clearly from the case *Central-Import Münster*.[1712] Central-Import, a German importer of Turkish sultanas, contested the legality of a Commission Regulation, in particular, on the ground that the Council empowered the Commission to take protective measures on imports in very general terms,[1713] without defining the power conferred on the Commission to a sufficient extent. Considering this point, the Court confirmed that, "for such an enabling provision to be valid, it must be sufficiently specific — that is to say, the

[1708] See Chapter 1, para. 5. On the constitutional relevance for a legal act to be "measurable" or "checkable" ("misurabilità o raffrontabilità" in Italian literature, "messbarkeit" in the German one), see CARLASSARE Lorenza, *op. cit.* (1966), p. 131; SCHMITT Carl, *Verfassungslehre*, (München und Leipzig, 1928), p. 131.
[1709] See, from a comparative constitutional perspective, CARLASSARE Lorenza, *op. cit.* (1966), p. 132.
[1710] ESPOSITO Antonio, *La delega dei poteri dal Consiglio alla Commissione*, (Philos, 2004), p. 71.
[1711] See Case 41/69, *ACF Chemiefarma v Commission*, EU:C:1970:71, paras. 63-67. The case concerned the delegation of implementing powers to the Commission on the basis of a Council Regulation in competition policy. See also, in the context of the Association Decision EEC-Turkey, Case 30/88, Greece v Commission, EU:C:1989:422, para. 16.
[1712] Case 291/86, *Central- Import Münster*, EU:C:1988:361. This case concerned a Commission Regulation on protective measures applicable to imports of dried grapes (Commission Regulation No. 2742/82 of 13 October 1982 on protective measures applicable to imports of dried grapes, OJ 1982, L 290, p. 28), which established a minimum price for imported products in case of disruption of the market and a countervailing charge to be applied to products sold at a higher price. For a detailed analysis of the case, see TURK Alexandre, *op. cit*. (1996), p. 177.
[1713] Council Regulation 516/77 of 14 March 1977 on the common organisation of the market in products processed from fruits and vegetables, OJ L 73/1.

Council must clearly specify the bounds of the power conferred on the Commission."[1714] However, in the case at hand, since the analysis of the enabling provision revealed precise criteria and conditions for the delegated measures, it concluded that "the power conferred on the Commission is delimited by those factors in a sufficiently specific manner".[1715]

However, although the requirement of specificity constitutes settled case law, the degree of specificity required and the intensity of the judicial review on this aspect have not always been consistent. In this regard, the reasoning of the Court in *Central-Import Münster* was confronted[1716] with the position promoted in *Koster*[1717] and, especially, in *Germany v Commission*.[1718] In the latter case, the enabling act did not mention the possibility for the Commission to impose sanctions for the incorrect implementation of the scheme. On this aspect, the Court held that that "since the Council has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power".[1719] In this ruling, thus, the Court appeared to subsume the requirement of specificity within its essential elements doctrine, not giving autonomous value to it. Therefore, also a provision drafted in general terms could represent a sufficient basis for the Commission to act.

6.2.2. Looking for a Ratio in the Case Law

The ambiguity of the case law in relation to the requirement of the specificity of the enabling act at issue, however, was explained in light of the peculiar leniency showed by the Court in the area of the CAP.[1720] Indeed, in agricultural matters, the Court has repeatedly contended that the limits of the Commission's powers must be determined "with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word".[1721] The reason for this lies in the specific position of the Commission, which alone has the expertise and means to keep track of agricultural market trends and to act quickly when necessary. However, this particularly generous interpretation of the Court "can be accepted only in the specific framework of the rules on agricultural markets. It cannot be relied upon in support of provisions adopted by the Commission on the basis of its implementing powers in agricultural

[1714] Case 291/86, *Central- Import Münster*, EU:C:1988:361, para. 13.
[1715] Ibidem, para. 15. In particular, the Court recognised that "Those provisions thus determine the situations in which protective measures may be taken, the criteria for assessing whether such a situation exists, the kind of measures to be adopted and the period of their validity."
[1716] TURK Alexandre, *op. cit.* (1996), p. 178.
[1717] Case 25/70, *Köster*, EU:C:1970:115.
[1718] Case C-240/90, *Germany v Commission*, EU:C:1992:408.
[1719] Ibidem, para. 41.
[1720] TURK Alexandre, *op. cit*. (1996), p. 178; ESPOSITO Antonio, *op. cit*. (2004), p.72.
[1721] Case 23/75, *Rey Soda*, EU:C:1975:142, para. 14. See also Case 22/88, *Vreugdenhil*, EU:C:1989:277, para. 16.

matters where the purpose of the provision in question lies outside that sphere."[1722] This may explain the fact that a certain tolerance towards generic and abstract enabling provisions is applied by the Court specifically in cases relating to the CAP.[1723]

Leaving the degree of specificity required aside, the fact remains that the case law has identified the need of a specific empowerment as an essential condition for the validity of the delegation of powers to the Commission. As remarked in the case *Alliance for Natural Health*, the power conferred on the delegated authority must be "clearly defined" by the legislator because the wording of the enabling provision directly affects the discretion the delegate enjoys.[1724] Indeed, in the absence of such a specific determination, the Commission could exercise its powers "excessively and without transparency", thus severely undermining the order of competences established in the Treaties.[1725] In this sense, the need for objective criteria in the delegation of powers represents a fundamental condition for the possibility of judicially reviewing the *ultra vires* character of the acts adopted. In light of this case law, in EU law this requirement constitutes a guarantee of the institutional balance set in the Treaties, maintaining the relative positions of the Council and the Commission in the delegation of powers.[1726]

6.3. Specificity and Article 290 TFEU

In the post-Lisbon legal framework for the delegation of powers, the requirement of specificity and precision in the enabling provision appears to be maintained and, to a certain extent, reinforced with regard to the delegation to the Commission. This is particularly remarkable in relation to the delegated acts adopted according to Article 290 TFEU.

[1722] Case 22/88, *Vreugdenhil*, EU:C:1989:277, para. 17.
[1723] In this regard, however, it is noteworthy that the most explicit judgment of this judicial approach, Central Import Münster, also related to agricultural regulations. Yet, it has been argued that the restrictive position in Central-Import Münster represented an isolated attempt to realign this policy area with the case law outside it, which has been overruled by the subsequent decisions. See TURK Alexandre, *op. cit*. (1996), p. 179.
[1724] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others*, EU:C:2005:449, para. 90: "Finally, it should be noted that, when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria (see, to that effect, Case 9/56 *Meroni v High Authority* [1958] ECR 133, at p. 152) because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the internal market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question."
[1725] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others*, EU:C:2005:449, para. 90.
[1726] SCHUTZE Robert, *op. cit.* (2011), p. 670. See also SCHUTZE Robert, *op. cit.* (2011a), p. 52.

6.3.1. The First Indications by the Commission and by the Court

In this regard, the Commission's Communication on the implementation of Article 290 TFEU already in 2009 stated that "the delegation of power must be clear, precise and detailed".[1727] A further elaboration on this requirement was expressed by the same institution in its internal Guidelines of 24 June 2011 on delegated acts, where it reiterated that "the legislator must explicitly and precisely describe the powers it intends to delegate to the Commission".[1728] Therefore, vague formulations of the enabling provisions do not constitute a valid legal basis for delegated acts and the use of non-exhaustive lists of powers is allowed only in so far as a clear and precise general definition of the delegated powers is provided elsewhere.[1729]

Although not binding for the Court,[1730] precisely these Guidelines have been referred to in a recent judgment on the validity of a Commission Delegated Regulation in the field of commercial transport.[1731] In the case, the Czech Republic sought the annulment of the act arguing, *inter alia*, that the enabling act did not sufficiently define the objective, content, scope, and duration of the delegation as required by the second sentence of Article 290(1) TFEU. Interestingly, in the appeal procedure the Court, referring to the abovementioned case law,[1732] strongly emphasised that "the case-law requires in particular that the definition of the power conferred is sufficiently precise, in that it must indicate clearly the limits of the power and must enable the Commission's use of the power to be reviewed by reference to objective criteria fixed by the EU legislature".[1733] This requirement is clearly differentiated from the need to determine the essential elements in the basic act, which must be assessed by the Court separately.[1734] Although the Commission is recognised as having more or less extensive discretion according to "the nature of the matter in question",[1735] the basic act must delimit the delegation of powers in order to "ensure that such a

[1727] European Commission, Communication of 9th December 2009 to the European Parliament and the Council. Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, point 3.1.
[1728] European Commission, Guidelines for the services of the Commission of 20 June 2011 on Delegated Acts, SEC(2011) 855, para. 52.
[1729] Ibidem.
[1730] Nevertheless, the Commission's Guidelines represent a "useful source of guidance" for the Court. See Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 53; C-286/14, *Parliament v Commission*, EU:C:2016:183, para. 43.
[1731] Commission Delegated Regulation (EU) No. 885/2013 of 15 May 2013 supplementing ITS Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of information services for safe and secure parking places for trucks and commercial vehicles, OJ 2013 L 247, p. 1.
[1732] In particular to Case 291/86, *Central-Import Münster,* EU:C:1988:361, para. 13; and to Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others*, EU:C:2005:449, para. 90.
[1733] Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 49.
[1734] Ibidem, paras. 50-51. This two-step approach of the Court was anticipated by CHAMON Merijn, *op. cit.* (2013), pp. 849-860.
[1735] Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 52.

power emanates from an express decision of the legislature and that its use by the Commission respects the boundaries the legislature has determined in the basic act."[1736]

The relevance of the principle of specificity has been confirmed consistently in the subsequent case law.[1737] Therefore, a delegation of powers under Article 290 TFEU must be precisely delimited by precise criteria established in the basic act.

6.3.2. The Objectives, Content and Scope of the Delegation

In light of these judicial developments, the need for specificity appears to be strongly reaffirmed in relation to the delegation of powers under Article 290 TFEU. What is particularly remarkable is that in the Court's view this requirement is inextricably correlated to the prescription to provide "the objectives, content, scope and duration of the delegation of power" set forth in primary law. In this sense, the second paragraph of Article 290 (1) TFEU represents the "codification" and the elaboration of the principle identified in the case law.[1738]

In this regard, the first elaboration of the criteria of "objectives, content and scope" can be traced in the *travaux préparatoires* of the European Convention[1739] and, arguably, the actual wording is inspired by the institutional provisions on the delegation in the German and Italian Constitutions.[1740] Introduced without modifications in the Lisbon Treaty, the criteria of Article 290 TFEU were interpreted immediately as material limits to the delegation to the Commission, to be decided by the legislator in the basic act.[1741] In particular, the clear definition of whether the powers conferred to the Commission consist of the power to "amend" or only "to supplement"

[1736] Ibidem, para. 51.
[1737] See C-44/16 P, *Dyson v Commission*, EU:C:2017:357, para. 53; Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183, para. 46.
[1738] SCHUTZE Robert, *op. cit*. (2011a), p. 54; CHAMON Merijn, *op. cit.* (2016); KOTZUR Markus, *op. cit.* (2015), p. 948.
[1739] Secretariat de la Convention Européenne, Documents de travail préparatoires de la Convention européenne (Office des publications officielles de la Communauté européenne, 2004), p. 340.
[1740] Compare Article 80(1) of the Basic Law of the Federal Republic of Germany: "The *content*, *purpose* and *scope* of the authority conferred shall be specified in the law" and Article 76 of Italian Constitution: "The exercise of the legislative function may not be delegated to the Government unless *principles* and *criteria* have been established and then only for a *limited time* and for *specified objectives*" (emphasis added). See ZILLER Jacques, "National Concepts in the New Constitution for Europe. Part Two", 1 *European Constitutional Law Review* (2005), p. 452.
[1741] European Commission, Communication of 9th December 2009 to the European Parliament and the Council. Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, point 3.1. See also European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, (2010/2021(INI)): "the objectives, content, scope and duration of a delegation pursuant to Article 290 TFEU must be expressly and meticulously defined in each basic act".

non-essential elements was considered crucial in the elaboration of the basic act,[1742] as recently confirmed by the Court.[1743]

6.3.3. The Duration of the Delegation

Although listed together with the objectives, content and scope of the delegation, the idea of establishing the delegation for a certain *time* was initially proposed in relation to the control mechanisms on the exercise of the delegation, along with the revocation and the objection.[1744] In this sense, it was initially conceived as a sort of "sunset clause", which the Parliament had repeatedly proposed in its comitology battles,[1745] allowing the delegation only for a limited but renewable period.

However, the way it was finally inserted in the Lisbon Treaty, in the list of criteria of Article 290 TFEU appears to have somehow reduced the control function of the time provisions, leaving open the possibility to have delegations for an indeterminate period of time. In this regard, the institutions have expressed different views on the preferable duration of the delegation. While the Commission was strongly in favour of an indefinite duration, considering that the revocation could already have the same legal effects of a sunset clause,[1746] the Parliament maintained its preference for a determined time for the delegation, with the possibility to renew it tacitly in the absence of objections by the Council and the Parliament.[1747]

[1742] European Commission, Guidelines for the services of the Commission of 20 June 2011 on Delegated Acts, SEC(2011) 855, para. 52.

[1743] C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183.

[1744] Secretariat de la Convention Européenne, Documents de travail préparatoires de la Convention européenne (Office des publications officielles de la Communauté européenne, 2004), p. 341.

[1745] See Chapter 2, para. 2.6.

[1746] European Commission, Communication of 9th December 2009 to the European Parliament and the Council. Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, point 3.2: "Article 290 states that the duration of the delegation of power is laid down by the legislator. The Commission does not believe that this requirement sanctions the practice of sunset clauses which when inserted into a legislative act automatically set a time limit on the powers conferred on the Commission, thus compelling it in practice to present a new legislative proposal when the time limit imposed by the legislator expires. Article 290 requires above all that a clear and predictable framework be established for the delegated powers; but it does not require the Commission to be subject to strict cut-off dates. The legislator must be able to strike a balance between the need to establish a framework for the delegated powers and the need to ensure the continuity of the adoption of legal acts that are essential to the implementation of EU policies. Forcing the Commission periodically to present new legislative proposals to renew a delegation of power would be contrary to the very objectives of efficiency and speed that justify the use of delegated acts in the first place. The Commission believes it is preferable not to increase the institutions' workload by introducing a binding system of short-term delegations. Delegations of power should in principle, therefore, be of indefinite duration. Such a practice would, moreover, be entirely consistent with the current situation. Experience shows that the legislator does not, as a general rule, wish to impose a time limit on the powers conferred on the Commission, even when conferring on it responsibility for taking quasi-legislative measures."

[1747] European Parliament, Resolution of 5 May 2010 on the power of legislative delegation (2010/2021(INI)), para. 8: "[The Parliament] maintains that the duration of a delegation can be indefinite, taking into account the fact that the delegation can be revoked at any time; is of the opinion, however, that

6.3.4. The Contribution of the Common Understanding

The actual definition of the "objectives, content, scope and duration" of the delegation was settled through interinstitutional negotiations, which resulted in the adoption of the 2011 Common Understanding on delegated acts.[1748] Later amended and included as an annex to the Interinstitutional Agreement on Better Law-making of 2016, the Common Understanding contains standard clauses to be used in the elaboration of legislative acts, which provide practical indications on how to formulate and where to insert these requirements to comply with Article 290 TFEU.[1749] Moreover, the Common Understanding clarifies that the delegation can be either for an unlimited or for a limited time, thus settling a controversial point. In the latter case, in principle the basic act should provide for a tacit extension of the delegation for periods of an identical duration, subject to the right of the Council and the Parliament to oppose such an extension. The subsequent practice has resulted in cases of delegation both for an undetermined period and for a determined period, established by the institutions according to the circumstances and the nature of the powers delegated.[1750]

Therefore, in relation to Article 290 TFEU, the specificity requirement appears to be regulated in detail by the Treaty provisions and interinstitutional instruments, and consistently enforced in the case law. Accordingly, it provides a clear limit to the delegation of powers, guaranteeing the respect of the institutional balance and the principle of legality in the EU legal system.

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a delegation of a limited duration could provide for the possibility of periodic renewal following an express request by the Commission; considers that the delegation can only be renewed if neither Parliament nor the Council expresses any objections within a specified deadline".

[1748] Common Understanding on delegated acts of 4 April 2011, 8640/11. On the duration of delegation, points 8 and 9 read as follows: "The basic act may empower the Commission to adopt delegated acts for an undetermined or a determined period of time. Where a determined period of time is provided, the basic act should in principle provide for the delegation of power to be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes the extension not later than three months before the end of each period. The Commission shall draw up a report in respect of the delegated power not later than nine months before the end of each period. This paragraph does not affect the European Parliament or the Council's right of revocation."

[1749] Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123/1.

[1750] With reference to determined time, see, for instance, Article 75 of Regulation (EU) No. 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles, OJ L 60, 2.3.2013, p. 52–128; Article 23 of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, OJ L 315, 14.11.2012, p. 1–56; Article 71 of Regulation (EU) No. 167/2013 of the European Parliament and of the Council of 5 February 2013 on the approval and market surveillance of agricultural and forestry vehicles, OJ L 60, 2.3.2013, p. 1–51. With reference to undetermined time, see, *inter alia*, Article 462 of Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, OJ L 176, 27.6.2013, p. 1–337; Article 208 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99.

6.4. Specificity and Article 291 TFEU

While in relation to Article 290 TFEU the specificity requirement emerges clearly in the Treaty provision and in the case law, Article 291 TFEU does not contain any express indication in this sense. This requirement, moreover, has not been clearly tackled in the case law since, until this moment, the Court has not had the opportunity to address this aspect of the delegation.

Similar to the discussion raised in relation to the essential elements doctrine, the applicability of the specificity requirement has also been debated in the literature. On this point, most scholars argue that the pre-Lisbon case law automatically applies to implementing acts adopted under Article 291 TFEU, and the silence on this point is due to the simple fact that the Member States assumed that there was no need to state it.[1751] Conversely, other scholars claim that, after the Lisbon reform, Article 291 TFEU should be understood exclusively from an "executive federalism" perspective, which fails to adopt considerations stemming from the horizontal separation of powers concerns related to its application.[1752]

However, although the executive federalism model makes a relevant contribution to understand the *ratio* of the Treaty reform and the interplay between the vertical and horizontal level in the implementation of EU law, it is arguable that, when the requirement of "uniform conditions for implementing legally binding Union acts" is met, the competence to implement EU acts is set at the EU level.[1753] Accordingly, the implementing acts issued pursuant to Article 291 TFEU are clearly acts of EU law and, as such, need to abide by the institutional principles - among which the principle of legality and the judicial review - which characterise the EU as "a Community based on the rule of law".[1754] Considering the crucial role of the specificity of the enabling act in guaranteeing the effectiveness of the legality review and that the exercise of the delegated acts is not "boundless" and arbitrary, it is clear that this form of delegation cannot be exempted from these essential democratic guarantees.

Moreover, in the light of the discretion left to the legislator in the choice between delegated and implementing acts, such guarantees would be easily circumvented if the requirement of specificity were not applicable to both types of acts.[1755] Although such a circumvention is not in the interest of the legislator, which would in this way reduce its influence on the exercise of the implementing

[1751] See, *inter alia*, HOFMANN Herwig, *op. cit*. (2009), pp. 482-505.
[1752] SCHUTZE Robert, *op. cit.* (2011a), p. 55; SCHUTZE Robert, "From Rome to Lisbon: "Executive Federalism" in the (New) European Union, 47 *Common Market Law Review* (2010), pp. 1385-1427. See Chapter 3, para. 2.10.
[1753] As recognised also by the same SCHUTZE Robert, *op. cit*. (2010), p. 1398.
[1754] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, p. 23.
[1755] For a similar argument in relation to the essential elements doctrine, see RITLENG Dominique, *op. cit*. (2016), p. 144.

powers, it would eventually result in a detriment of the individuals' guarantees of protection against illegal EU acts. Therefore, the applicability of the specificity requirement to Article 291(2) TFEU is justified not only for reasons of continuity with the pre-Lisbon case law, but also for systematic and teleological reasons.

6.5. Specificity and the Delegation to the ECB

With regard to the delegation of powers to the ECB under Article 127(6) TFEU, the requirement of specificity is established explicitly in primary law. Indeed, the relevant provision requires the Council to confer "specific tasks" upon the ECB, thus unequivocally demanding a certain degree of precision for the enabling provisions. In this regard, it is noteworthy that the SSM Regulation has been criticised exactly on this point, the definition of the ECB's tasks being considered too generic to comply with the Treaty provision both in quantitative and qualitative terms.[1756] However, the issue has never been raised before the Court,[1757] and the possibility to declare the delegation to the ECB in the SSM Regulation unlawful on this point appears rather unlikely.

6.6. Specificity and the Delegation to EU Agencies

Also in relation to the empowerment of the EU agencies, the need of specificity emerges clearly from the relevant case law. Already in the Advocate General's Opinion in *Meroni*, it was considered that the rule of law, as a common principle in any modern State, requires the delegation to be "governed by a law which specifies the content of the delegation precisely".[1758] This point was upheld by the Court, which emphasised that the delegated powers not only need to be expressed in an explicit decision, but they also need to be "clearly defined" by the delegating authority.[1759] In this regard, it is the characteristic of being "so clearly and precisely" delineated that makes the powers "only executive powers",[1760] thus constituting a fundamental element in the Court's assessment. It is interesting to note that the close relation of this requirement with the judicial review and its meaning of guarantee against the arbitrary exercise of the conferred powers emerges very clearly in the grounds of judgment. In the Court's words, precise rules should

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[1756] See WEISSMANN Paul, "The European Central Bank (ECB) under the Single Supervisory Mechanism. Its Functioning and its Limits", *TARN Working Paper* 1/2017 (March 2017), p. 12.
[1757] The sole case concerning the SSM Regulation so far is Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337.
[1758] Opinion of Advocate General Roemer in Joined Cases 9/56 and 10/56, *Meroni*, EU:C:1958:4, p. 190. It is noteworthy that the AG infers from the rule of law as applied in national law only another condition: the complete legal protection against the measures adopted through delegation, meaning the possibility to contest them by legal proceedings in accordance to the general rules of administrative law. This aspect will be analysed infra, in Chapter 6, para. 4.
[1759] Cases 9/56 and 10/56, *Meroni*, EU:C:1958:8, pp. 151-152.
[1760] *Opinion 1/76 (Inland Waterway*), EU:C:1977:63, para. 16. See also Joined Cases 9/56 and 10/56, *Meroni*, EU:C:1958:8, p. 152.

regulate the delegation of powers "so as to exclude any arbitrary decisions and to render it possible to review [the procedure for the adoption of the measures]".[1761]

The centrality of this requirement is clearly restated in the *Short Selling* case, remaining as one of the few conditions retained by the Court from the *Meroni* doctrine. As remarked by the Advocate General Jääskinen, "the powers delegated must be sufficiently well defined so as to preclude the arbitrary exercise of power. In other words, the delegating act must supply sufficiently clear criteria so that the implementing power is amenable to judicial review".[1762] The need of a "sufficiently specific" enabling provision is expressly correlated, thus, to the possibility of effective judicial control of the use of those powers and, eventually, to the institutional balance.[1763] Accordingly, the Court in its judgment insists on the "detailed delineation of the powers of intervention" of ESMA, considering this an essential condition for the validity of the delegation of powers.[1764] Therefore, finding that the agency's powers are "precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority",[1765] it sanctions the compliance of the contested empowerment with the *Meroni* doctrine.

In general, the comparison of the case law on the delegation of powers to EU institutions with delegation of powers in relation to the EU agencies, thus, shows a remarkable homogeneity in relation to this requirement. It is significant, in this respect, that the only reference to the *Meroni* doctrine in a pre-Lisbon comitology judgment, i.e. *Alliance for Natural Health*, relates precisely to the need to "ensure that [the delegated] power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria".[1766]

However, the similarity of the wordings in the case law relating to the two phenomena does not necessarily imply that the degree of specificity required in the enabling act of the Commission or Council, on the one hand, and of an agency, on the other, corresponds. Indeed, it is noteworthy that, in the case *Heli-Flight*, the General Court remarked that the Regulation delegating powers to EASA on the approval of flight conditions for aircraft did not specify certain methods and criteria for the exercise of the delegated powers, confirming that the agency enjoyed broad discretion.[1767]

[1761] Cases 9/56 and 10/56, *Meroni*, EU:C:1958:8, p. 151.
[1762] Opinion of the Advocate General Jääskinen in Case C-270/12, *Short Selling*, EU:C:2013:562, para. 88.
[1763] Ibidem, para. 92.
[1764] Case C-270/12, *Short Selling*, EU:C:2014:18, para. 51.
[1765] Ibidem, para. 53.
[1766] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, para. 90. In this regard, the criticism of Chamon on the "confusion" of the Court between the Meroni and Köster cannot be shared: arguably, the point of the Court related not the essential elements doctrine, but to the specificity requirements and, in that sense, the reference to Meroni does not appear inopportune. See CHAMON Merijn, *op. cit.* (2016), p. 223.
[1767] Case T-102/13, *Heli-Flight v EASA*, EU:T:2014:1064, para. 90. See CHAMON Merijn, *op. cit.* (2016), p. 248, note 593.

Yet, this was not considered problematic for the empowerment of EASA and the legality of the measures adopted was also upheld in appeal.[1768] The degree of specificity required, thus, remains the most controversial aspect of this requirement, allowing different applications of the requirement according to the different "nature of the matter in question".[1769]

In this regard, it may be argued that, considering the "high degree of professional expertise" of the agencies,[1770] the delegation to agencies has relevant similarities with the empowering of the Commission in the complex and technical domains such as the agricultural sector. However, since the issue interrelates significantly with the intensity of the review exercised by the Court on the exercise of delegated powers, this aspect will be further discussed *infra*.[1771]

7. Further Elements Required in the Basic Act?

The analysis conducted has identified the minimum content in the essential elements doctrine and in the requirement of specificity which the basic act must present for a valid delegation of powers, which respects the democratic principles underpinning the EU legal system. However, this attempt to identify common minimum criteria for all the delegation systems should not overshadow the fact that the enabling act may (and in some cases must) contain further elements, going beyond the limits described.

On the one hand, it is important to recall that the legislator enjoys discretion as to the elements to regulate directly in the basic act or, conversely, to delegate its powers to other institutions or bodies. In this sense, as already remarked, the legislator is free in the choice on whether and to what extent to establish a delegation of powers.[1772] Therefore, nothing precludes the Parliament and Council (or the sole Council) from inserting further non-essential elements into the basic regulation, directive or decision. In this sense, considering its *ratio* of preserving the prerogatives of the legislator, the essential elements doctrine clearly represents the minimum content of the basic act and not its maximum content.

On the other hand, where the delegation has an express legal basis in the Treaties,[1773] the specific delegation system may require the introduction of further elements in the basic act, or a particular

[1768] Case C-61/15 P, *Heli-Flight v EASA*, EU:C:2016:59, paras. 101-109.
[1769] Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 52.
[1770] Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2014:18, para. 85.
[1771] See Chapter 6, para. 4.9.
[1772] See JACQUE Jean-Paul, "Pouvoir législatif et pouvoirs exécutif dans l'Union européenne", in AUBY Jean-Bernard and DUTHEIL DE LA ROCHÈRE Jacqueline (eds.), *Traité de droit administratif européen*, II ed. (Bruylant, 2014), p. 47.
[1773] The consideration applies also to the hypothetical case of binding interinstitutional agreements which limit the legislator discretion pursuant to Article 295 TFEU. See Conclusion, para. 5.1.

configuration of the elements identified in the case law. An example of the latter case is the requirements of the "objectives, content, scope and duration" for delegations under Article 290 TFEU, which, although a specification of the general requirement of specificity, provides clear indications as to the content of the basic act. Article 290 TFEU requires, moreover, that the basic act shall explicitly lay down the conditions to which the delegation is subject, listing the revocation and objection mechanisms on behalf of the Parliament and Council.[1774] Thus, the provisions regulating these mechanisms may be inserted in the legislative act, whose validity would be otherwise undermined. Considering that these mechanisms pertain more pertinently to the control on the delegation, their peculiar characteristics will be analysed *infra*.[1775] Conversely, in relation to Article 291 TFEU, the delegation of powers to the Council needs to be duly motivated by the legislator, thus the statement of the reasons must constitute a necessary content of the basic act. Therefore, it is clear that the different delegation systems may present further requirements which pertain specifically to that delegation system and affect the drafting and the legality of the basic act.

These requirements, in particular, play a relevant role in distinguishing the different delegation systems. Indeed, as it emerges from the case law on the difficult divide between delegated and implementing acts,[1776] although the EU legislature has discretion on the choice between Article 290 TFEU and 291(2) TFEU, and the judicial review on this is limited,[1777] when it decides to use a certain delegation system it must comply strictly with the criteria provided in the Treaties.[1778] In this regard, considering that only delegated acts can supplement the basic act,[1779] it is arguable that the basic act of an implementing act under Article 291(2) TFEU should present further elements than the essential elements since, in the Court's words, it must "lay down a complete legal framework".[1780] However, although such an indication of "completeness" may represent a further requirement for the basic act which goes beyond the specificity required in the other delegation systems, and may guide the distinction between implementing and delegated acts in the light of the basic act, it is important to highlight that the assessment of such a completeness

[1774] Article 290(2) TFEU.
[1775] Chapter 5, para. 2.5.
[1776] See Chapter 2, para. 2.11.
[1777] Case C-427/12, *European Commission v. European Parliament and Council (Biocides)*, EU:C:2014:170, para. 40.
[1778] See Case C-88/14, *Commission v Parliament and Council (Visa Requirement*), EU:C:2015:499; Case C-65/13, *Parliament v Commission (EURES*), EU:C:2014: 2289; Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility*), EU:C:2014: 170.
[1779] But on the difficulty to decide whether an act supplements a legislative act, see Case C-65/13, *Parliament v Commission (EURES*), EU:C:2014: 2289.
[1780] Case C-427/12, *European Commission v European Parliament and Council (Biocides*), EU:C:2014:170, para. 48.

appears in the end left to the legislator and subject to limited judicial review, thus frustrating the possibility of clearer guidance on the basis of the characteristics of the basic act.[1781]

8. Conclusion

The analysis of the characteristics of the basic act in the different delegation regimes has brought us to recognise remarkable commonalities, presenting a unitary picture of the legal framework applicable to enabling provisions beyond the peculiarities of the single phenomena. At the same time, this analysis has shed light on certain relevant issues concerning the legality of the delegation of powers, especially in relation to EU agencies, which appear highly problematic from a constitutional perspective.

Firstly, with regard to the formal requirements of the basic act, the legal basis for the enabling act has been considered, underlining the possibility to have a delegation of powers on the basis of different policy provisions in the Treaties. In this regard, however, the use of Article 114 TFEU as a legal basis for the basic act appeared particularly problematic, giving rise to controversial litigation before the Court both in relation to the delegation to the Commission and to EU agencies. Considering the specific objective of the provision and its requirement to result in measures of the approximation of national laws, the suitability of this legal basis was contested, especially with reference to the possibility of establishing a new structure of EU administration on this legal basis. However, the Court, sanctioning the practice of the last decades, has confirmed the validity of the delegation of powers to the Commission, in *Smoke Flavouring*, and to EU agencies, in *ENISA* and in *Short Selling*. Therefore, few doubts remain on the legality of a basic act adopted pursuant to Article 114 TFEU, although the remarkably permissive approach of the Court raises concerns from the perspective of the principle of conferral. Indeed, there is a risk of an EU executive competence creep since no clear criteria based on the specific *ratio* of the internal market competence seem to emerge to limit and guide the proliferation of agencies.

Moreover, still in relation to the legal basis of the enabling act, the need for a specific provision in primary law on the possibility of delegating powers has been pointed out. Recalling the doctrinal theories emerged in State legal systems, where the interference with the constitutional order of competences is considered lawful only where a specific *Delegationsnorm* at the highest level of the hierarchy of norms allows it, it has been remarked how in EU law such a requirement has been disregarded by the Court, considering that the possibility to delegate its powers is an inherent component of the powers attributed to a certain institution by the legal basis in the Treaties.

[1781] See Case C-427/12, *European Commission v European Parliament and Council (Biocides*), EU:C:2014:170, para. 48.

Therefore, the delegation of powers has been upheld not only where a specific *Delegationsnorm* is provided in primary law (such as in the case of the delegation to the Commission, to the Council and to the ECB) but also where there is no such a provision. Indeed, with the exception of EDA, Europol and Eurojust, the delegation of powers to EU agencies lacks a specific legal basis in the Treaties. The controversial institutional implications of the Court's approach have been analysed, highlighting its detrimental effects not only from the perspective of the legal certainty and the coherence of the system, but also for the institutional balance and the rule of law. Indeed, the constitutional neglect of this form of delegation of powers leaves EU agencies deprived of a clear constitutional role and misses the opportunity to frame and limit the agencification phenomenon in primary law. Even more remarkably, the Court's approach arguably contributes to undermining the recent efforts to reform the system of legal acts in EU law in the sense of a clearer separation of powers and hierarchy of norms, not fully endorsing a substantive concept of the principle of legality and an exhaustive system of legal sources. Therefore, the incomplete constitutionalisation of EU agencies appears to cast a shadow on the understanding of the EU as a legal system coherently based on the rule of law.

Secondly, the enquiry on the formal requirements has led us to consider the categorisation of the basic act, both from the perspective of the typology of acts introduced by the Lisbon Treaty and from the traditional distinction between legal instruments of EU law. Thus, on the one hand, with reference to the legal instrument, it emerges clearly from practice that that the basic act can be either a regulation, a directive or a decision. On the other hand, with reference to the categorisation of legal acts, while the basic act for the delegation to the Commission under Article 290 TFEU, to the ECB and to EU agencies (with the exception of executive agencies) requires the enactment of a legislative act, the delegation of powers under Article 291 TFEU may also be made pursuant to non-legislative acts. However, the peculiar legal and political issues raised by this cascade of delegation of powers suggests avoiding such an arrangement, making it an "institutional chimera" in the institutional practice.

Thirdly, focusing on the substantive requirements of the basic act, the case law of the Court has identified two requirements which constitute the minimum content of the legislative acts, i.e. the specificity and the essential elements. Thus, it is clear that the basic act must contain a "minimum level of legislative detail",[1782] the absence of which entails the invalidity of the delegation of powers. The enabling provisions must be drafted precisely, identifying the boundaries of the delegated powers so that an effective control of the exercise of the powers is possible. Indeed, as emerges particularly from the case law relating to EU agencies, the requirement of specificity is

[1782] To use the words of HOFMANN Herwig, *op. cit.* (2009), p. 489.

inherently linked with the possibility of the judicial review of the delegated powers, constituting the crucial yardstick against which the *ultra vires* assessment is conducted. However, a certain ambiguity remains on the degree of specificity required in the different delegation systems and in the different policy areas where the delegation operates, making it ultimately dependent on the nature of the matter concerned.

Fourthly, already in the first cases relating to the delegation of powers to the Commission under the comitology system, the Court elaborated a doctrine according to which the essential elements of a matter must be regulated in the basic act and cannot be the object of a delegation of powers. After having analysed the meaning of essential elements in the light of the recent case law, we have recognised that the essential elements identify an exclusive competence of the legislator, which shields the prerogatives of the EU institutions, in particular the Parliament, from the sliding of powers entailed by the delegation of powers. In this sense, its value for the maintenance of the institutional balance is evident. From the analysis of the case law relating to the reservation of powers and to the *sui generis* powers of Council, however, it emerged that the essential elements also play a significant role beyond the case of delegation of powers, representing a reserved domain of the legislature in the generality of the rule-making activities in EU law. Therefore, also in the light of the identification of the essential elements with political choices, and its link with the protection from certain interferences with the fundamental right, the significance of the essential elements doctrine goes directly to the core function of the legislature and the law according to the democratic principles.

However, the essential elements doctrine has been contrasted with the recent line of case law on the possibility to create secondary legal bases in EU law. Considering the restrictive approach of the Court on the adoption of acts according to legislative and implementing procedures, different from those provided in the Treaties, an inconsistency has also been remarked upon in the recent *Short Selling judgment,* where a delegation of implementing powers outside the system of Articles 291 and 290 TFEU was upheld. Trying to reconcile the emerging incoherence of the Court's approaches from an institutional-balance perspective, it seems that many issues remain open in relation to the system of legal acts, their hierarchy and the limits to the delegation in the post-Lisbon delegation regime. Some of these issues will re-emerge in the following chapters, where the relevant elements for the legality of the exercise of the delegated power will be addressed. In the light of such reflections, thus, a composite picture of a minimum regime applicable to the different delegation systems will emerge, guiding us on the assessment of the delegation of powers in EU law towards the fundamental requirements of the rule of law and the institutional balance.

Chapter 5

Limiting the Delegation of Powers: The Procedures

1. Introduction

The analysis in the previous chapter has shown how the enabling act plays a fundamental role in providing limits to the exercise of the powers received by delegation, establishing the scope and the precise content of the delegation in advance. In compliance with the rule of law and the institutional balance, the basic act thus provides the crucial boundaries of the empowerment of the delegate *ex ante*, determining the possibility of judicial review of the delegation in the light of the objectives established by the delegator. In the light of these results, the enquiry into the limits to the delegation of powers must focus now on the exercise of the powers by the delegated authority. In this phase of the delegation, the delegate is called to put into effect the powers which are provided in the enabling act by adopting the final acts. However, especially in this phase, there is the inherent risk of abuse or misuse of the delegated powers, and hence the delegate's action should be embedded in procedural constraints, assuring democratic oversight in relation to its decision-making activities. In other words, the control of the delegation cannot be limited to the *ex ante* requirements already described, but it needs to be supplemented with ongoing and *ex post* control mechanisms in order to ensure the legality of the delegation.[1783]

In particular, the procedures provide for the passage from the delegation of powers in the basic act, to the actual production of legal effects of the delegation, in the form of the adoption of the relative acts.[1784] Procedures play a key role in guaranteeing the legality of the exercise of public power, constituting a clear benchmark against which abuses in the exercise of power can be checked. Therefore, in their close connection with the judicial review, the procedural constraints have been identified as an essential vector of legitimacy, enhancing the legitimation of a certain power by observing the rules for the exercise of that power.[1785]

[1783] On the notion of control as comprising forms of *ex ante*, ongoing and *ex post* (or accountability) control see, *inter alia*, VOS Ellen, "European Agencies and the Composite EU Executive" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 34. *Contra* BUSUIOC Madalina and GROENLEER Martijn, "The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 184.

[1784] See, *inter alia*, CASETTA Elio, *Manuale di diritto amministrativo,* XI ed. (Giuffrè editore, 2009), p. 393.

[1785] LORD Christopher and MAGNETTE Paul, "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU", 42 *Journal of Common Market Studies* (2004), p. 184; STACK Kevin M., "The Irony of Oversight: Delegated Acts and the Political Economy of the European Union's Legislative Veto Under the Treaty of

However, in EU law the procedures are of paramount importance not only for the legality of the exercise of the powers, but also from an institutional balance perspective. By describing the modalities of the involvement of the different institutional actors in such an exercise, the procedures shape the role and the powers of the institutions by curbing the delegate's powers and, thus, determining the prerogatives and the reciprocal relationships between the institutional actors in this context. Moreover, in this dynamic sequence of activities, the principles of transparency and participation can find their application, thereby influencing the outcome of the delegation.

Therefore, following the principles of the rule of law and institutional balance as a *fil rouge* in the variety of the applicable rules, the procedures for the adoption of the acts in each of the different delegation regimes will be analysed, reflecting on the peculiarities of the single phenomena. Thus, firstly, the adoption of delegated acts by the Commission will be examined, pointing out the operation of the control mechanisms established in Article 290 TFEU and the controversial trends emerging in the practice. Secondly, the adoption of implementing acts by the same institution will be analysed, describing in detail the comitology procedures in force and the future perspectives of this system. Thirdly, the procedures for the exercise of implementing acts by the Council will be considered, as well as those established by the SSM Regulation for the exercise of the powers delegated to the ECB. Finally, a picture of the procedural constraints and accountability mechanisms in place for EU agencies will be provided, reflecting on the interplay between control and independence in relation to these bodies. With a view to tracing a legal framework for the delegation of powers as a legal mechanism in EU law, particular attention will be paid to common themes and converging tendencies across the different phenomena, trying to highlight the common principles underpinning the design and development of these procedures.

2. The Adoption of the Delegated Acts under Article 290 TFEU

2.1. A Brand New Procedure

As remarked by Advocate General Cruz Villalón in *Biocides*, "the novelty of Article 290 TFEU does not lie in its nature, but in the mechanisms for exercising the power that it lays down".[1786] Indeed, the innovation of the Lisbon Treaty lies precisely in establishing a new procedure for the adoption

Lisbon", *The Theory and Practice of Legislation* (2014), p. 81; SCHARPF Fritz, *Governing in Europe: Effective and Democratic?,* (Oxford University Press, 1999).

[1786] Opinion of Advocate General Cruz Villalón in Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2013:871, para. 33.

of these acts, getting away from the comitology system.[1787] Therefore, the adoption of delegated acts does not follow the rules previously applicable to similar acts, and in particular the RPS procedure, but it takes place according to a brand new procedure.

However, as remarked by the Commission in the aftermath of the entry into force of the Lisbon Treaty, the first paragraph of Article 290 TFEU gives precise indications to the legislator about the elements of the basic act and its limits, while the second paragraph concerns the control which can be exercised by the Parliament and the Council after the adoption of the delegated act by the Commission. As regards the procedure which takes place in-between these two stages of the delegation, the article is silent.[1788]

2.2. The Autonomy of the Commission

In relation to the concrete modalities for the exercise of these powers by the Commission, the Treaty does not contain a provision establishing, directly or indirectly, the procedural steps for the adoption of delegated acts. Unlike the previous Article 202 TEC or Article 291 TFEU, Article 290 TFEU does not need to adopt a framework measure laying down the rules and general principles applicable to this delegation of powers, not providing any legal basis for this purpose.[1789]

In the absence of procedural constraints in this phase, the Commission enjoys "a large measure of autonomy" in the exercise of the delegated powers.[1790] Clearly, the autonomy of the Commission in this matter is not absolute, having to abide by the general principles applicable to EU rule-making and to the normative standards which stem from Treaty provisions on democracy.[1791] Moreover, the institutions have entered into interinstitutional arrangements for the adoption of

[1787] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), p. 126. The author recognises that an argument could be made initially for the survival of comitology in relation to delegated acts but considers more in line with the literal and teleological interpretation of the Lisbon Treaty the demise of committees control in this matter. See also CRAIG Paul, *The Lisbon Treaty*, (Oxford University Press, 2010), pp. 58-59.
[1788] Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 4.1
[1789] Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 1. See also COSTATO Luigi, "La comitologia dopo Lisbona", *Rivista di Diritto Agrario* (2010), p. 134; MARTIN Jean-Christophe, "Le Contrôle du Parlement européen sur les actes délégués" in AUVRET-FINCK Josiane (ed.), *Le Parlement européen après l'entrée en vigueur du traité de Lisbonne*, (Bruxelles, Larcier, 2013), p. 33. *Contra,* BARATTA Roberto, "Sulle fonti delegate ed esecutive dell'Unione europea", *Il Diritto dell'Unione europea* (2011), p. 304.
[1790] Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 4.1. See also European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 86.
[1791] MENDES Joana, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design", 19 *European Law Journal* No. 1 (2013), pp. 26-27.

delegated acts.[1792] In this regard, it is important to highlight that significant institutional developments have progressively brought forward a remarkable "proceduralisation" of the adoption of delegated acts, eroding the initial broad autonomy of the Commission.[1793]

However, the gradual delineation of procedural arrangements for the exercise of delegated powers, following the adoption of unilateral and consensual instruments by the three institutions involved,[1794] appears to be more the result of the political pressure exercised by the Council, especially with regard to the consultation of national experts in the preparation of delegated acts,[1795] than of the need to address democratic demands.[1796] As it will be seen, this tendency has marked a shift in the institutional balance as originally conceived in relation to the delegated acts[1797] as well as a progressive convergence with the procedure for the adoption of implementing acts.[1798]

2.3. The Consultation of National Experts in the Preparation of Delegated Acts

In relation to the procedure under Article 290 TFEU, the most significant and controversial development is the reintroduction of the consultation of national experts in the preparation of delegated acts.[1799] As recognised by the Commission, this aspect represents "one of the most sensitive issues" related to these legal instruments.[1800] In this respect, it is important to recall that the Treaty reform aimed precisely at the demise of the comitology system in relation to these acts,

[1792] See Common Understanding between the European Parliament, the Council and the European Commission on Delegated Acts, Council document No. 8640/11 (Brussels, 4 April 2011); Common Understanding on Delegated Acts annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016.
[1793] TOVO Carlo, "Delegation of legislative powers in the EU: how EU institutions have eluded the Lisbon reform", 42 *European Law Review* No. 5 (2017), p. 689; MENDES Joana, *op. cit.* (2013), p. 40; CHRISTIANSEN Thomas and DOBBELS Mathias, "Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts", 19 *European Law Journal* No. 1 (2013) p. 53.
[1794] See European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final; European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, 2010/2021(INI); Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47–62; Common Understanding between the European Parliament, the Council and the European Commission on Delegated Acts, Council document No. 8640/11 (Brussels, 4 April 2011); Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, pp. 1-14.
[1795] See, for instance, European Council, Declaration on the Implementation of the Treaty of Lisbon. Article 290. Article 291, Council document No. 17477/09 (Brussels, 11 December 2009).
[1796] See MENDES Joana, *op. cit.* (2013), p. 40.
[1797] See TOVO Carlo, *op. cit.* (2017), p. 689.
[1798] CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, 2018), p. 736.
[1799] See CRAIG Paul, *op. cit*. (2018), p. 734.
[1800] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 22.

putting the Council and the Parliament on the same footing in the oversight of non-legislative acts. In the Lisbon Treaty, in accordance to the preference of the Member States and the Commission,[1801] an obligation to consult national experts was maintained only in the field of financial services, to preserve the operation of the committees of the Lamfalussy process.[1802] Conversely, in all the other areas the Commission had no obligation in this sense, remaining nonetheless free to hold consultations to gather expertise for the drafting of delegated acts.[1803]

2.2.1. The Initial Position of the Commission

In its Communication of 2009, the Commission already expressed its intention to "systematically consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted".[1804] For this purpose, the Commission was ready to form new expert groups, or use the existing ones, *i.e.* the comitology committees but with a different role.[1805] In the Commission's view, the consultation of experts was considered useful to take advantage of the technical expertise of the national experts[1806] and to establish "an effective partnership" at the technical and political level with experts in the national authorities, thus favouring a smooth implementation of the delegated acts.[1807] Moreover, they were seen an indispensable tool to obtain "a first political feedback" which could anticipate the

[1801] As reported by BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *Revue trimestrielle de droit européen* (2012), p. 90.
[1802] Declaration No. 39 on Article 290 TFEU annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon: "The Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice." In this regard, in its Resolution of 7 May 2009 (on Parliament's new role and responsibilities in implementing the Treaty of Lisbon, 2008/2063(INI)) the Parliament invited the Commission "to clarify how it intends to interpret Declaration 39 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, concerning the consultation of experts in the area of financial services, and how it intends to apply that interpretation, beyond the provisions on delegated acts contained in the TFEU."
[1803] KOTZUR Markus, "Article 290", in GEIGER Rudolf, KHAN Daniel-Erasmus and KOTZUR Markus (eds.), *European Union Treaties* (Hart, 2015), p. 949.
[1804] "The consultation will be carried out in plenty of time, to give experts an opportunity to make useful and effective contribution to the Commission", European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 7.
[1805] Ibidem. See also BIANCHI Daniele, *op. cit.* (2012), p. 92. The need to make very clear to the experts that their role in the procedure under Article 290 TFEU is different than in comitology is particularly stressed in the Commission's Guidelines of 2011 to its services: Although the meetings for delegated and implementing acts can be held on the same day and with the same composition, "the services must clearly distinguish between these two meetings: different agendas, different documents and different channels of information of the Council and the European Parliament". See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 94.
[1806] See European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 4.2. On the three advantages of the consultation, see See TOVO Carlo, *op. cit.* (2017), p. 690.
[1807] Ibidem. See also HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 237.

potential objections by the Council or the European Parliament.[1808] In this sense, especially for the Council, the consultation of experts represents an important tool for an early scrutiny of the exercise of the delegated powers.[1809]

However, in the same Communication, the Commission made it clear that resorting to national experts was limited to cases where "new expertise" was necessary and, in any case, these experts would have "a consultative rather than an institutional role in the decision-making procedure".[1810] In fact, these experts were not required to express a vote or a formal opinion on the matter.[1811] In its internal Guidelines, it was even more clear that the Commission felt no obligation to re-consult experts, leaving discretion to the Commission services to do that when "significant new elements are introduced in the internal process".[1812] At the end of the procedure, the Commission would just inform the experts of its conclusions and how it intended to proceed.[1813]

2.2.2. The Pressure of the Council

Finally realising the consequences of the demise of committees and their implications for the scrutiny of delegated acts,[1814] the Council reacted with decision. It made clear the importance it attributed to the consultation of experts and required the Commission to provide explanatory memoranda at least, setting out in detailed manner the grounds and the background of each delegated act.[1815] Thus, it was soon clear that the consultation of national experts was destined to become a crucial point in the interinstitutional discussion about the adoption of delegated acts, giving rise to significant tensions among the key institutional players.

[1808] See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 102.
[1809] See XHAFERRI Zamira, "Delegated Acts, Implementing Acts, and Institutional Balance Implication Post-Lisbon", 20 *Maastricht Journal of European and Comparative Law* 4 (2013), p. 570; TOVO Carlo, *op. cit*. (2017), p. 690.
[1810] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 7.
[1811] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 100. See also BIANCHI Daniele, *op. cit.* (2012), p. 92.
[1812] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 103.
[1813] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 7. See also CRAIG Paul, *op. cit.* (2018), p. 734.
[1814] CRAIG Paul, *op. cit*. (2018), p. 734.
[1815] Council of the European Union, Declaration on the Implementation of the Treaty of Lisbon. Article 290. Article 291, Council document No. 17477/09 (Brussels, 11 December 2009), Annex I. On the Council reaction, see also the document "Examination of the Omnibus I and II Commission proposals from the Commission by the Friends of the Presidency (Comitology) – Progress Report (Doc. 11146/14), cited in TOVO Carlo, *op. cit.* (2017), p. 690. The author links the decision of withdrawing the two proposals by the Commission to the missed agreement on the issue of consultation.

The issue was marginally addressed within the Common Understanding of 2011, where the Commission committed to "carry out appropriate and transparent consultations well in advance, including at expert level."[1816] The deletion of the word "national" from the reference to the experts was intended to mean that any expert, including those designated by the Parliament, could be consulted.[1817] The standard clauses annexed to the Common Understanding contained precise references to the importance of the consultation of experts,[1818] thus paving the way for a systematic insertion of this procedure in all legislative acts delegating powers to the Commission.[1819] However, the adopted solution did not innovate much in comparison to the established practice, representing more of a consolidation of the Commission's early position.[1820]

2.2.3. The Solution in the Interinstitutional Agreement of 2016

The scant reference to the consultation "at expert level" did not suffice, however, to allay the discontent of the Council, which consequently promoted a revision of the Common Understanding in order to strengthen the role of national experts in the preparation of delegated acts.[1821] Therefore, a revised version of the Common Understanding, with more stringent obligations in relation to consultation practices, was inserted into the annex to the Interinstitutional Agreement of 2016.[1822] While the Commission reiterates its commitment to gathering all necessary expertise prior to the adoption of delegated acts, specifying that this includes the consultation of Member States' experts and the use of expert groups,[1823] a right of systematic access to the meetings of these expert groups is granted to experts from the European Parliament and from the Council.[1824] This possibility, coupled with the possible invitation of the Commission to the meetings at the Council and the Parliament, is meant to enable these institutions to monitor the exercise of the delegated powers since the early stages of the drafting, thus anticipating the collection of information necessary for their control powers.

[1816] Common Understanding between the European Parliament, the Council and the European Commission on Delegated Acts, Council document No. 8640/11 (Brussels, 4 April 2011).
[1817] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit.* (2013) p. 50.
[1818] See Recital in Standard Clauses annexed to the Common Understanding between the European Parliament, the Council and the European Commission on Delegated Acts, Council document No. 8640/11 (Brussels, 4 April 2011): "In order to [objective], the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of [content and scope]. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council."
[1819] See CRAIG Paul, *op. cit.* (2018), p. 735.
[1820] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit*. (2013) p. 50.
[1821] CRAIG Paul, *op. cit.* (2018), p. 735.
[1822] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, pp. 1-14.
[1823] Ibidem, para. 28.
[1824] Ibidem, point 28. See also para. 11 of the Common Understanding annexed thereto.

Moreover, the Common Understanding makes clear that the consultation of national experts is required in the preparation of every delegated act, not only when new expertise is needed.[1825] Such consultation, therefore, has become an unavoidable step in the procedure for the adoption of delegated acts, eroding the autonomy of the Commission in this field. Furthermore, the Common Understanding introduces precise modalities for the consultation.[1826] In practice, an invitation is sent by the Commission to the Permanent Representations of all Member States, which decide autonomously which experts will participate in the meetings. At the end of these meetings, the Commission must lay down the conclusions from the discussion, stating "how they will take the experts views into consideration and how they intend to proceed."[1827] Compared to the previous practice, such requirements appear more stringent for the Commission, as also emerges from the need to re-consult the experts for any change to the material content of the draft delegated act.[1828]

2.2.4. Towards a Revamping of Comitology for Delegated Acts?

In the light of these developments, it is arguable that the preparation of delegated acts is increasingly embedded with procedural requirements, which have contributed to the proceduralisation of the exercise of the Commission's powers. Indeed, the *carte blanche* left to the Commission in the Treaties has now been filled not only with the obligation to consult national experts before the adoption, but also with specific provisions as to the manner and the consequences of such consultation.[1829] Although these experts groups do not have the same powers as the comitology committees, the resulting procedure presents significant similarities

[1825] See Common Understanding on Delegated Acts annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 4. See also TOVO Carlo, *op. cit.* (2017), p. 691.
[1826] In particular, the experts shall be provided with the text of the draft delegated act, the draft agenda and any relevant document in sufficient time to prepare, see Common Understanding on Delegated Acts annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 4.
[1827] A summary of these conclusions must be included in the explanatory memorandum accompanying the delegated act. See Common Understanding on Delegated Acts annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 5.
[1828] Common Understanding on Delegated Acts annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 7.
[1829] Specific rules for the deliberative process to be followed by the expert groups, including the possibility to express final opinions and to vote by simple majority in meetings are now defined also in Article 13 of Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups, COM(2016) 3301 final, article 13. See TOVO Carlo, *op. cit.* (2017), p. 691.

with the comitology procedures, thus resulting in a certain convergence between the two delegation systems.[1830]

The enhanced role of experts in the drafting of delegated acts has indeed been described as a form of "weak comitology"[1831] or "reinvented comitology",[1832] observing how this practice reintroduces from the back door what had been excluded from the front one in the Lisbon reform.[1833] Considering that the same experts can be part, on the very same day, both of a comitology committee and an expert group for delegated acts, the connection (and confusion) between the two systems of control is evident.

2.2.5. The Implications of the Enhanced Consultation of Experts

The admissibility of the introduction of this comitology-like procedure is disputed in literature.[1834] Indeed, the implications of the enhanced consultation of national experts in Article 290 TFEU do not amount only to a proceduralisation of a decision-making activity which was meant as exclusive responsibility of the Commission, but also to the blurring of the distinction between the procedures for the adoption of delegated and implementing acts.[1835] Also considering the difficult divide between the two categories of acts, the convergence between the two procedures puts into question the constitutional meaning of the distinction and, more in general, of the Lisbon reform.

At the same time, this development may be read as an unexpected involvement of the Member States among the key institutional players in the control of delegated acts. As it emerges from the Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups,[1836] these experts are not considered as independent experts but as agents of the

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[1830] As remarked by, *inter alia*, TOVO Carlo, *op. cit.* (2017), p. 691; RITLENG Dominique, "La nouvelle typologie des actes de l'Union. Un premier bilan critique de son application", 51 *Revue trimestrielle de droit européen* No. 1 (2015a), p. 17.
[1831] TOVO Carlo, *op. cit*. (2017), p. 693.
[1832] CHRISTIANSEN Thomas and DOBBELS Mathias, "Interinstitutional Tensions in the New System for Delegation of Powers", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 94. It was called also "*une comitologie déguisée*" by BIANCHI Daniele, *op. cit*. (2012), p. 90.
[1833] CRAIG Paul, *op. cit*. (2018), p. 734; RITLENG Dominique, "The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)*", 52 *Common Market Law Review* (2015), p. 255; BRADLEY Kieran St. C., "Delegation of Powers in the European Union. Political Problems, Legal Solutions?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 67 and 82-83.
[1834] *Contra* see, *inter alia*, KOTZUR Markus, *op. cit*. (2015), p. 949; admitting the use of advisory comitology committees, HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 237; CRAIG Paul, *op. cit*. (2010), p. 265.
[1835] RITLENG Dominique, *op. cit*. (2015a), p. 17; CRAIG Paul, *op. cit.* (2018), p. 736.
[1836] Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups, COM(2016) 3301 final. See TOVO Carlo, *op. cit.* (2017), p. 691.

Member States' authorities.[1837] Therefore, this represents an interesting dynamic from the perspective of institutional balance, especially in its Member-State-oriented interpretation.

Finally, such a development clearly favours the Council more than the Parliament. The emerging of communication channels between these experts and the national agents in the Council's Coreper or "working groups" meetings is very likely.[1838] Despite the formal equality between the Council and the Parliament, this would give a comparative advantage to the Council in the *ex ante* control of the delegated acts, whose draft text is carefully examined by national representatives, who can influence its content already in the preparatory phase. A similar involvement and influence on the Commission's proposal is structurally and procedurally difficult to achieve for the Parliament.[1839] This arguably leads to an asymmetry between the two legislators, shifting the actual balance to the benefit of the Council in the control of the exercise of delegated powers under Article 290 TFEU.[1840]

2.4. The Adoption and Transmission of Delegated Acts

Once the consultation phase is concluded, the competent Directorate General of the Commission finalises the text of the delegated act, verifying the correctness of all language versions.[1841] The delegated act is thus adopted by the College of Commissioners according to its internal rules of procedure. After the adoption, the delegated act is not published in the Official Journal of the European Union until the end of the period for objections or before the early notification of non-objection.[1842] The act, however, is published in the register of documents of the Commission, with a disclaimer on its entry into force being subject to not being opposed by the Parliament and Council.[1843]

Upon the adoption of the delegated act, the act is transmitted to the Parliament and the Council as soon as possible. This transmission of the notification letter in all the official language versions

[1837] Commission Decision establishing horizontal rules on the creation and operation of Commission expert groups, COM(2016) 3301 final, Articles 11 and 23. It is remarkable that also in the Register of expert groups they are indicated by the name of the country.
[1838] CRAIG Paul, *op. cit*. (2018), p. 738.
[1839] TOVO Carlo, *op. cit*. (2017), p. 698.
[1840] CRAIG Paul, *op. cit*. (2018), p. 737; TOVO Carlo, *op. cit.* (2017), p. 698.
[1841] See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, points 123-128: Minor linguistic modifications can also be made after the adoption by the college via a sub-delegation procedure, but since the Parliament and Council cannot undertake any linguistic revision the text must be correct before the notification.
[1842] See *infra* para. 2.4.6. European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, points 129-132.
[1843] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, points 133-134.

represents the starting point of the computation of the period for objection.[1844] The Common Understanding contains precise rules on the periods when the Commission shall refrain from transmitting any delegated act since - due to holidays or election recess - the two institutions would not be able to exercise their scrutiny fully over the exercise of the delegated powers by the Commission.[1845]

2.5. The "Conditions" Established in Article 290 TFEU

In relation to the control of the exercise of delegated powers, Article 290(2) TFEU specifies that the basic act must "explicitly lay down the conditions to which the delegation is subject", listing in particular the mechanisms of objection and revocation which can be used by the Parliament and the Council. In this regard, while the objection is a condition impeding the entry into force of the specific delegated act, thus representing a step in the procedure for the adoption, the revocation is a general withdrawal of the powers delegated to the Commission. Remarkably, the operation of these mechanisms is not automatic, but requires an express provision in the enabling act. The legislator is not obliged to impose both conditions cumulatively, since they may be independent of one another,[1846] nor to impose any condition, should it consider it appropriate.[1847]

2.4.1. An Exhaustive List of Conditions?

It is questionable whether the conditions in Article 290(2) TFEU represent an exhaustive list. According to some authors, this provision enumerates objections and revocations simply as examples.[1848] As remarked in the Parliament Resolution of 5 May 2010, the legislator is free to introduce different mechanisms of control in the basic act, such as an express approval by the Parliament and the Council of each delegated act or a possibility of repealing individual delegated acts already in force.[1849] This interpretation appears to be corroborated by the use of the

[1844] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 15.
[1845] In particular, the Commission shall not transmit any delegated act from 22 December to 6 January, and from 15 July to 20 August. Moreover, special arrangements are to be agreed for the notification of delegated act during election recess. See Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 14.
[1846] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 7.
[1847] See SCHUTZE Robert, *European Constitutional Law* (Cambridge University Press, 2012), p. 237.
[1848] See, *inter alia*, MARTIN Jean-Christophe, *op. cit.* (2013) p. 41; CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution,* (Oxford University Press, 2009), p. 123.
[1849] European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, (2010/2021(INI)), point 2. In the *travaux préparatoires* of the European Convention also the insertion of a sunset clause was listed among the control mechanisms of the Parliament and Council, see Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 341.

conditional "may" in Article 290(2) TFEU[1850] and by the need to guarantee flexibility in the development of EU law.[1851]

Other authors, however, see this article as a closed enumeration which, for teleological reasons, would not allow the introduction of other mechanisms of control.[1852] Indeed, the *ratio* of the introduction of Article 290 TFEU was deliberately to lay down in advance the applicable control mechanisms[1853] and to set aside comitology or comitology-like systems of control, which could be otherwise lawfully re-introduced in relation to delegated acts.[1854] In practice, reflecting the standard clauses agreed among the institutions, all the basic acts contain provisions only on these two conditions, not mentioning other control mechanisms.[1855]

2.4.2. A Control Mirroring the Chain of Delegation

It is important to underline that the conditions under Article 290 TFEU follow the chain of delegation, reflecting the roles of delegator and delegate in the control of the exercise of the delegated powers.[1856] Arguably, this correspondence between the delegator and the institution

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[1850] Most language versions may be interpreted in this sense (see English, French, Spanish, Italian, Polish, Czech, Lithuanian, Slovak, Bulgarian, Danish and Dutch language versions), while the German one ("wobei folgende Möglichkeiten bestehen") appears to refer to a limited choice of mechanisms. See HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), p. 493, note 52.

[1851] HOFMANN Herwig, *op. cit.* (2009), p. 493.

[1852] SCHUTZE Robert, *op. cit*. (2012), p. 237; KOTZUR Markus, *op. cit*. (2015), p. 949; DRIESSEN Bart, "Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU", 35 *European Law Review* No. 6 (2010), p. 847; HOFMANN Herwig, *op. cit.* (2009), p. 493. The latter author brings forward the following argument: "[T]here are reasons to argue that Article 290 FEU contains a closed enumeration. One of these arguments is the exceptional nature of the delegation of legislative powers to the executive body, the Commission. The delegation, being an exception, indicates the necessity of a narrow interpretation of the exception vis-à-vis the rule." However, it might be objected that the conditions of Article 290 TFEU act as limits to the delegation which is itself a derogation from the rule of parliamentary rule-making, being thus a sort of exception to the exception, which, therefore, should receive a wide interpretation. On this point, see also SCHUTZE Robert, *op. cit.* (2012), p. 237, note 78.

[1853] SCHUTZE Robert, *op. cit.* (2012), p. 237, note 76. The author observes that "To allow for a free choice beyond the control mechanisms expressly mentioned would be a serious constitutional retrogression. Ever since the Single European Act, the European legal order has insisted – in the pursuit of legal order and transparency – that the conditions imposed on delegated legislation be set *in advance* of the specific delegating act.[…] If we accept that these additional conditions would need to be (exhaustively) defined *in advance*, on what legal basis should the "Article 290 Comitology Regulation" be based? Article 291 TFEU? Article 352 TFEU appears to rule itself on procedural grounds, since it does not allow for co-decision, and Article 114 TFEU would seem to exclude itself on substantive grounds for it is confined to the internal market". Arguing for the adoption of a Comitology Regulation which comprises the procedures for both delegated and implementing acts, HOFMANN Herwig, *op. cit.* (2009), p. 500.

[1854] SCHUTZE Robert, *op. cit.* (2012), p. 237. The author further argues that the use of "may" in Article 290(2) TFEU should be understood not as indicating an open enumeration of the control mechanisms, but "the 'may' in Article 290 (2) should simply be seen as allowing for the constitutional option of using both mechanisms or none in a legislative act; or of excluding either the European Parliament or the Council […] as beneficiaries of these political safeguards."

[1855] MARTIN Jean-Christophe, *op. cit.* (2013) p. 42.

[1856] See Chapter 2, para. 2.10.

entrusted with the control rights stems not only from the application of the principle of *parallelisme de formes,* but also from a precise institutional design choice. Article 290 TFEU is considered to be deeply influenced by the dominant theory of the transmission belt[1857] or principal-agent model of delegation,[1858] according to which the delegator is the key player in ensuring post-delegation compliance.

Therefore, the rights of objection and revocation may be conferred equally on the Parliament and the Council where the basic act is adopted in accordance with the ordinary legislative procedure, whereas when it is adopted according to a special legislative procedure, these conditions operate in a different way.[1859] In particular, when the basic act is adopted by the Council with the consultation of the Parliament, the rights of objection and revocation are conferred exclusively on the Council.[1860] An example of this is the adoption of Council Regulation 973/2010.[1861] Although the Parliament is fully informed of the adoption, objection or revocation of the delegated acts,[1862] only the Council enjoys the right to object or revoke the delegation.[1863] Conversely, when the basic act is adopted by the Council with the consent of the Parliament, the Parliament has the power to block the adoption of the legislative act and accordingly should be conferred the power to hinder the entry into force of the delegated act. [1864] Therefore, in this case, the Parliament is granted the same rights of control over the exercise of the delegated powers as the Council, as exemplified by Council Regulation 2017/1939 establishing European Public Prosecutor's Office.[1865]

[1857] VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* no. 1 (2014), p. 54.
[1858] See, *inter alia*, THATCHER Mark and STONE SWEET Alec, "Theory and Practice of Delegation to Non-Majoritarian Institutions", 25 *West European Politics* (2002), pp. 1-22; POLLACK Mark A., *The Engines of European Integration* (Oxford University Press, 2003); DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2007), pp. 789–805. See Chapter 3, para. 4.4.2.
[1859] For a detailed description of the different cases, see European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, paras. 75-80.
[1860] See DRIESSEN Bart, *op. cit.* (2010), p. 843.
[1861] Council Regulation (EU) No. 973/2010 of 25 October 2010 temporarily suspending the autonomous Common Customs Tariff duties on imports of certain industrial products into the autonomous regions of the Azores and Madeira, OJ L 285, 30.10.2010, p. 4–8.
[1862] Article 10 of Council Regulation (EU) No. 973/2010.
[1863] Article 9 of Council Regulation (EU) No. 973/2010.
[1864] See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, para. 79.
[1865] See Article 115 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1–71.

2.4.5. The Acts and their Voting Rules

The act of objection, as well as the act of revocation, is a non-legislative act which takes the form of a decision of the Council or of the Parliament.[1866] To this end, the Parliament adopts a resolution according to the specific procedure set forth in its Rules of Procedure.[1867]

Article 290(2) TFEU specifies the voting rules for the two institutions: "The European Parliament shall act by a majority of its component members, and the Council by a qualified majority."[1868] In other words, to object or revoke a delegation, the Parliament is asked to gather an absolute majority - a number of votes higher than the ordinary requirement in first reading - thus making the exercise of its control rights more difficult than the adoption of the basic act.[1869] Conversely, the Council acts according to its normal rule of qualified majority voting, which means that, in the case of a basic act adopted under a unanimity vote, the objection or revocation of the delegation may be easier to adopt than the delegating act. Therefore, in this case the Council appears to be in a slightly more favourable position than the Parliament in the exercise of its prerogatives.[1870]

Interestingly, however, in comparison to the ordinary voting rule of the Council, the objection and the revocation represent a case of "reverse qualified majority". The act of the Commission enters into force unless a qualified majority opposes it.[1871] In this sense, the reverse qualified majority favours the adoption of the Commission's act, reducing the influence of the Parliament and the Council on its discretion.[1872] As it will be seen also in relation to Article 291 TFEU and the ECB, this twist in the Council voting rule has relevant institutional-balance implications, supporting the treaty-sanctioned autonomy of the Commission in the adoption of non-legislative acts .

2.4.6. The Revocation

The first condition expressly mentioned in Article 290(2) TFEU is the revocation, by which the legislator may call back the powers delegated to the Commission. The Council, as well as the Parliament, are thus empowered to unilaterally withdraw an enabling provision of the basic act,

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[1866] Although mentioned in the Register of delegated acts, the decisions of the Council are not public. On the form of the act, see HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 237.
[1867] See Article 105 of Rules of Procedure of the European Parliament. The Rules of Procedure of the Council have no equivalent provision on delegated acts.
[1868] Article 290(2) TFEU.
[1869] Cf. Article 231 TFEU: "Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast." However, also in the second reading of the ordinary legislative procedure the Parliament votes with a majority of its component members. See DRIESSEN Bart, *op. cit.* (2010), pp. 847.
[1870] SCHUTZE Robert, *op. cit*. (2012), p. 237; LENAERTS Koen and VERHOEVEN Amaryllis, "Towards a legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision", 37 *Common Market Law Review* (2000), p. 755.
[1871] As remarked by BARATTA Roberto, *op. cit.* (2011), p. 314.
[1872] BARATTA Roberto, *op. cit*. (2011), p. 314.

even when the act was jointly adopted.[1873] It represents a sort of "nuclear option",[1874] which puts an end to the competence of the Commission to adopt delegated acts on the basis of that specific basic act. In the light of its exceptional effects, this option has never been used so far.

2.4.6.1. The Conditions for the Revocation

Like the objection, Article 290(2) TFEU does not contain specific grounds on which the choice of revoking the delegated powers must be based[1875] but pursuant to Article 296(2) TFEU a decision to revoke must state the reasons underpinning such choice.[1876] Unlike an objection, however, the decision to revoke the delegated powers can be adopted at any time after the entry into force of the legislative act which contains the delegation. In this regard, it is noteworthy that the Parliament or the Council can initiate the procedure for revocation without the need for a Commission proposal.[1877] Therefore, being revocable irrespective of the Commission's will, the delegation of powers under Article 290 TFEU truly presents the precarious nature which characterises this legal institution in State legal systems, but which, for the peculiarity of the Commission's exclusive right of initiative, is absent in relation to delegation to the Commission under Article 291 TFEU.[1878] In this sense, the revocation represents a highly innovative element in the Lisbon reform.

According to the Commission, a partial revocation of the powers delegated in a legislative act is possible. Where the Council or the Parliament indicates specific powers to be revoked, only those powers cannot be exercised for the future, but the other powers, even if contained in the same basic act, are upheld.[1879] This possibility appears to be endorsed by the other institutions as the Interinstitutional Agreement limits the effect of revocation to the "power specified in that

[1873] MARTIN Jean-Christophe, *op. cit*. (2013) p. 42.
[1874] CRAIG Paul, *op. cit*. (2018), p. 721.
[1875] The initial proposal on delegated act at the European Convention, however, contained specific grounds for the use of the revocation: "au cas où l'habilitation serait outrepassée (ultra vires) ou quand il s'agit de questions de grande sensibilité politique ou avec des implications financières majeures", see Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 341.
[1876] See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 159.
[1877] HOFMANN Herwig, *op. cit*. (2009), p. 492.
[1878] See GAUTIER Yves, *La délégation en droit communautaire,* PhD thesis (Université de Strasbourg, 1995), p. 466; CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 233; HOFMANN Herwig, *op. cit.* (2009), p. 492.
[1879] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 8.

decision".[1880] Thus, the revocation allows the legislator to reduce the scope of the delegation *a posteriori*, serving as a tool for its subsequent adjustment.[1881]

2.4.6.2. The Effects of the Revocation

The decision to revoke a delegation of powers is published in the Official Journal, entering into force the following day.[1882] The effect of revocation is to withdraw the competence of the Commission to adopt new delegated acts on the basis of those empowerments, but the basic act may expressly lay down the consequences of the revocation.[1883] In this regard, it is important to underline that, according to the standard clauses agreed upon by the institutions, the revocation does not affect the validity of the delegated acts which are already in force.[1884] In other words, in relation to the delegation of powers, the revocation operates *ex nunc* and not *ex tunc*.

In such an extraordinary event as revocation, the interinstitutional dialogue between the Parliament, the Council and the Commission is particularly important. Indeed, ensuring that all institutions are fully aware of the possibility of revocation in good time is considered "a matter of transparency, courtesy and loyal cooperation between the institutions".[1885] For this reason, a mutual exchange of information is necessarily envisaged, requiring the institution which intends to initiate a procedure for revocation to inform the other two institutions "at the latest one month before taking the decision to revoke."[1886]

[1880] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, appendix.
[1881] MARTIN Jean-Christophe, *op. cit*. (2013) p. 44.
[1882] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 160.
[1883] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 8.
[1884] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, appendix: "It shall not affect the validity of any delegated acts already in force." As regards the acts which are already adopted but the period for objection is pending, the Commission considers that the revocation has the same effect of an objection, impeding the entry into force of those acts, see European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 162.
[1885] European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, (2010/2021(INI)), para. 12.
[1886] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 28. A particular attention on the exchange of information emerged also from European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 8; European Parliament, Resolution of 5 May 2010 on the power of legislative delegation, (2010/2021(INI)), para. 12.

2.4.7. The Objection

Within the framework thus delineated, the legislator may be empowered to object to a specific delegated act adopted by the Commission, exercising a sort of unilateral veto on the entry into force of the measure.[1887] The objection acts like a suspensive condition: "the entry into force of the delegated act adopted by the Commission would be suspended for a period specified by the legislative act, during which the legislator would have the right to lodge objections."[1888] In this sense, the objection represents a specific measure against an identified delegated act, which has the peculiar effect of impeding the entry into force of an act which is already adopted, but not yet published.

2.4.7.1. The Grounds for Objection

Article 290 TFEU does not specify the grounds on which the legislator may object to delegated acts. Therefore, the Parliament and the Council have discretion in their decision on whether object to a delegated act or not.[1889] For the Parliament, this represents a significant improvement from the powers granted under the comitology procedures since its scrutiny is not limited to the cases of *extra vires* exercise of the delegated powers or to the respect of the principles of proportionality and subsidiarity.[1890] The absence of a determined list of grounds for objections underlines the political value of this mechanism, which empowers the Council and the Parliament to exercise an unlimited scrutiny on the delegated powers.

However, the Commission has urged the Council and the Parliament, when objecting to a delegated act, to state the reasons for the objection, in compliance with the general principles of good administration.[1891] This suggestion was taken up in certain basic acts, where the duty to state the reasons for objection was expressly set forth.[1892] This may imply, however, that, where such a

[1887] See MARTIN Jean-Christophe, *op. cit*. (2013) p. 44.
[1888] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, p. 9.
[1889] For an early recognition of this discretion, see European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 5.3.2.
[1890] DRIESSEN Bart, *op. cit.* (2010), p. 847. For the powers of the Parliament in the comitology procedures, see Chapter 2, para. 2.4, 2.6. and 2.8.
[1891] See Article 41 of EU Fundamental Rights and Article 296(2) TFEU.
[1892] See, for instance, Article 58 of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010, OJ L 174, 1.7.2011, p. 1–73; Regulation (EU) No. 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC; OJ L 88, 4.4.2011, p. 5–43.

requirement is not stated, *a contrario* there is no need to motivate an objection to a delegated act.[1893]

2.4.7.2. The Period for Objection

The period granted to the legislator to lodge an objection is defined on a case-by-case basis in the basic act. In the Common Understanding, the institutions have agreed on setting in principle a period of at least two months from the date of transmission of the delegated act by the Commission.[1894] Thus, a longer period is conceivable, where justified.[1895] These two months may be extended by another two months for both institutions, at the request of either the Parliament or the Council.[1896] This extension is often invoked where the legislator needs more time to assess the measure and decide whether or not to object to it.[1897] Conversely, the delegated act can enter into force before the expiry of the two months, after the Parliament and the Council have informed the Commission that they will not object to that measure.[1898] This "early-approval" system, which was already used in the RPS procedures, requires a formal decision for the Council, and for the Parliament a letter from the President, after consulting the Conference of Committees Chairs, stating that the institution will not exercise its right of objection.[1899]

2.4.7.3. The Urgency Procedure

In certain exceptional cases, the need to respect the two months period for objection may be detrimental for the effect of particular measures, such as security and safety matters, the

[1893] MARTIN Jean-Christophe, *op. cit.* (2013) p. 45. In the standard clauses of the Common Understanding of 2016 there is no mention of the duty to state reasons in this respect.
[1894] See Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 18.
[1895] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 65.
[1896] Ibidem. The standard clause to this effect reads as follows: "A delegated act adopted pursuant to Article(s) … shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council."
[1897] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 139.
[1898] See Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 19.
[1899] European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 149. This mechanism appears to have had an exponential application: if in 2012 and 2013 it was applied only three times (data based on information from the European Parliament´s Unit for Reception and Referral of Official Documents), at least 11 early approvals were adopted only in November 2017 (data based from the Register of delegated acts).

protection of health and safety, or external relations and humanitarian crisis.[1900] In these cases, a shorter procedure for the adoption of delegated acts may be opportune. Therefore, already in 2009, the Commission suggested the creation of an "urgency procedure", which envisaged the entry into force of the delegated act immediately after the adoption, with the possibility of objection by the legislator during a certain period. In other words, instead of suspending the entry into force of the delegated act, the objection operates *ex post*, having the effect of repealing the measure.[1901]

Considering the positive application of this practice, the Common Understanding sanctions its utility, but it limits its use to exceptional cases and with procedural safeguards. In particular, the basic act must duly justify recourse to this procedure, and specify the cases in which it can be used.[1902] The duty to state reasons for the use of such a procedure is also imposed on the Commission,[1903] and the Council and the Parliament must be kept fully informed by the Commission even through informal means.[1904] The delegated act adopted according to the urgency procedure is applicable as long as no objection is lodged within the period established in the basic act. If the Parliament or the Council objects to the measure, it is repealed immediately by the Commission after the notification of the decision.[1905]

[1900] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 20.
[1901] European Commission, Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 TFEU, COM (2009)673 final, point 5.3.4.
[1902] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 20. The standard clause concerning the urgency procedure reads as follows: "1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure. 2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article [A](6). In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the European Parliament or by the Council."
[1903] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 23.
[1904] Ibidem, point 21.
[1905] Ibidem, point 22. For the practical arrangements, see European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 153.

2.4.7.4. The Actual Application

Since the entry into force of the Lisbon Treaty, ten objections to delegated acts can be counted.[1906] In this respect, the Parliament appears to be far more active than the Council,[1907] also considering that the bulk of motions for a resolution objecting to delegated acts were eventually rejected.[1908] Arguably, considering that the objections of the Council are concentrated in the early years of the system, the inactivity of this institution may be linked to the described development of the consultation practices.[1909] The establishment of communication channels with the national experts allows the Council to anticipate its position towards draft delegated acts and influence its content at an earlier stage.[1910]

[1906] There were: 1 objection in 2013 (Décision déléguée de la Commission concernant l'adoption des normes minimales communes visées dans la décision n° 1104/2011/UE du Parlement européen et du Conseil relative aux modalités d'accès au service public réglementé offert par le système mondial de radionavigation par satellite issu du programme Galileo); 2 objections 2014 (Commission Delegated Regulation (EU) No. …/.. amending Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards the definition of 'engineered nanomaterials; Commission Delegated Regulation (EU) No. …/.. on the transmission format for research and development expenditure data, as referred to in Regulation (EU) No. 549/2013 of the European Parliament and of the Council on the European System of national and regional accounts in the European Union); 2 objections in 2015 (Commission Delegated Directive ../…/EU amending, for the purposes of adapting to technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for cadmium in illumination and display lighting applications; Commission Delegated Regulation (EU) No. …/.. amending Regulation (EC) No. 376/2008 as regards the obligation to present a licence for imports of ethyl alcohol of agricultural origin and repealing Regulation (EC) No. 2336/2003 introducing certain detailed rules for applying Council Regulation (EC) No. 670/2003 laying down specific measures concerning the market in ethyl alcohol of agricultural origin); 2 objections in 2016 (Commission Delegated Regulation (EU) …/... supplementing Regulation (EU) No. 609/2013 of the European Parliament and of the Council as regards the specific compositional and information requirements for processed cereal-based food and baby food; Commission Delegated Regulation supplementing Regulation (EU) No. 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents); 3 objections in 2017 (Prevention of the use of the financial system for the purposes of money laundering or terrorist financing: transparency of financial transactions and of corporate entities (AMLD) 2016/0208 (COD); Commission Delegated Regulation (EU) …/... amending Commission Delegated Regulation (EU) 2016/1675 supplementing Directive (EU) 2015/849 by identifying high-risk third countries with strategic deficiencies; Commission Delegated Regulation (EU) …/... amending Delegated Regulation (EU) 2016/1675 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council, as regards deleting Guyana from the table in point I of the Annex and adding Ethiopia to that table). Data from the Register of delegated acts (last accessed 09.01.2018).

[1907] The Parliament adopted 8 resolutions for objection, while the Council adopted only 2 decisions in this sense. Data from the Register of delegated acts (last accessed 09.01.2018).

[1908] The motions for a resolution objecting to delegated acts have been 21, according to the data of the Legislative Observatory (available at www.europarl.europa.eu/oeil; last accessed on 09.01.2018).

[1909] On the link between the consultation of national experts and the right of objection, see *supra* para. 2.3.

[1910] As the dossier related to the Galileo project exemplifies, see CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit.* (2013) p. 52.

2.4.8. The Issue of "Bundles"

In comparison to other aspects of Article 290 TFEU, the operation of the objection mechanism appears relatively uncontroversial, although a certain tension among institutions was caused by the issue of the so-called "bundles". This issue relates to the practice of the Commission to adopt a single delegated act based on a plurality of articles or legislative acts which contain different delegations to the Commission. In the absence of an express prohibition in the Treaties in this respect, the Commission has made extensive use of the bundling technique in all areas of Union law,[1911] considering that it contributes to delivering clear and comprehensive measures according to the principles of better legislation. However, while in certain cases the exercise of different delegations for the adoption of a single act is justified by valid reasons of a close material link between the empowerments in question,[1912] this practice may be questionable from an institutional balance perspective. For this reason, certain basic acts expressly excluded this possibility, imposing the adoption of a single delegated act for each of the empowerments.[1913]

2.4.8.1. The Problematic Implications of the "Bundles"

According to the Council, where the bundles are not justified by objective reasons, this practice may lead to abuses on behalf of the Commission.[1914] When the Commission adopts such a "bundled" act, the legislator is put in an uncomfortable position. A literal interpretation of Article 290(2) TFEU suggests that the objection can be exercised only in relation to the delegated act in its entirety, regardless of whether it is based on one or multiple empowerments. No partial objection to a delegated act is conceivable, since this would affect the discretion and responsibility

[1911] See, for instance, Commission Delegated Regulation (EU) No. 480/2014 of 3 March 2014 supplementing Regulation (EU) No. 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, OJ L 138, 13.5.2014, p. 5–44; Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 12, 17.1.2015, p. 1–797.

[1912] Such as in the case of Commission Delegated Regulation (EU) No. 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 362, 31.12.2012, p. 1–111.

[1913] See, for instance, Article 28(4) of Regulation (EU) No. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 167, 27.6.2012, p. 1–123; Article 7(2) of Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

[1914] See in particular Council of the European Union, Opinion of the Legal Service, document No. 8574/14 (Brussels, 3 April 2014).

for the delegated acts of the Commission, ultimately allowing the Council or the Parliament to construct their objections in such a way to result in an amendment of the text.[1915]

Therefore, the Council and the Parliament are faced with a "take it or leave it" choice: they cannot control the exercise of the different powers separately, but they are required to express an objection to the delegated act as a whole. Where the delegated act joins controversial measures and measures whose entry into force is considered indispensable, the Commission may twist the legislator's hand, significantly undermining its control prerogatives.

2.4.8.2. The Controversial Solution of the Interinstitutional Agreement

The Interinstitutional Agreement of 2016 has finally tackled this issue, sanctioning the possibility to adopt a single delegated act from different empowerments under strict conditions. Clearly, it is not possible when the legislative act expressly prohibits it.[1916] Moreover, the practice is allowed only when the Commission "provides objective justifications based on the *substantive link* between two or more empowerments contained in a single legislative act",[1917] thus excluding the possibility of bundling empowerments from different basic acts.

What is more remarkable is that the Interinstitutional Agreement takes a controversial position on the legislator's power. The Council and the Parliament can lodge objections indicating clearly "to which empowerment it specifically relates".[1918] In other words, it sees the act literally as a bundle of separate delegated acts, and not as parts of a whole. Consequently, the Council and the Parliament can exercise their right to object in respect of each of these different acts, preserving the *effet utile* of Article 290(2) TFEU and the institutional balance enshrined therein.[1919]

However, although addressing important institutional balance concerns, the solution adopted by the Interinstitutional Agreement appears problematic from different perspectives. Firstly, it may be complex to dissect the measures adopted according to the different empowerments, and the meaning of "substantive link" is far from evident. The mechanism leaves to the Parliament and the Council the competence to draw this difficult line within the same act, to the detriment of the Commission's institutional autonomy in the adoption of delegated acts. Secondly, a partial

[1915] European Commission, Opinion of the Legal Service upon request of DG Fisma, not published (Brussels, 29 April 2015), p. 3.
[1916] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 31.
[1917] The consultation of national experts will provide indications on the empowerments to consider "substantively linked". Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 31.
[1918] Ibidem.
[1919] This solution was already suggested in Council of the European Union, Opinion of the Legal Service, document No. 8574/14 (Brussels, 3 April 2014), not entirely published.

objection leaves open the question as to its consequences in the cases where the Commission considers that, since it affects the content of the entire delegated act, a partial publication is not possible. Controversially, it may decide not to publish the delegated act and prepare a new one, or it may publish the act considering the objection invalid, paving the way for interinstitutional litigation. Thirdly, as already noted, the partial objection may transform the "right to object" to a "right to amend", since the legislator can articulate its objection in such a precise way as to exclude the undesired parts, leaving the rest of the act in force. The content of the delegated act would be thus distorted, and the Commission would be called to bear responsibility for an act whose content substantially differs from the original act.[1920]

2.6. Transparency and Participation in the Adoption of Delegated Acts

2.5.1. The Need for Transparency and Participation

The principles of transparency and participation, as complementary sources of input legitimacy,[1921] are important for the democratic legitimation of the delegation and are expressly endorsed in primary law.[1922] As also recently recognised by the Court, in a system based on the principle of democratic legitimacy, transparency, participation and access to rule-making procedures are of paramount importance in guaranteeing the democratic rights of the citizens.[1923]

In this regard, in the first years of the application of Article 290 TFEU, the preparatory activities carried out by the Commission were considered particularly lacking on this point,[1924] especially in comparison with the contemporary improvements of the comitology system.[1925] The entry into force of the Lisbon Treaty, in fact, had the effect of casting a shadow of opaqueness on the adoption of acts which, otherwise, would have benefited from the relative transparency of the comitology procedures.[1926] Greater transparency was thus needed to guarantee the legitimacy of the adoption of delegated acts.

[1920] See European Commission, Opinion of the Legal Service upon request of DG Fisma, not published (Brussels, 29 April 2015), p. 3

[1921] DYRBERG Peter, "Accountability and Legitimacy: What is the Contribution of Transparency?", in ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), p. 82.

[1922] Articles 10 and 11 TFEU.

[1923] See, inter alia, Case T-540/15, *Emilio De Capitani v Parliament*, EU:T:2018:167, esp. para. 98.

[1924] See, *in primis*, MENDES Joana, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design", 19 *European Law Journal* No. 1 (2013), pp. 22-41; MENDES Joana, "The Making of Delegated and Implementing Acts, Legitimacy beyond Institutional Balance.", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), pp. 233-253.

[1925] See *infra* para. 3.6.

[1926] CRAIG Paul, *op. cit*. (2018), p. 736.

2.5.2. The Innovations of the Interinstitutional Agreement

The revision of the Common Understanding in 2016 has brought about significant innovations in this respect. While the Common Understanding of 2011 merely ensured "a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council",[1927] the revised agreement of 2016 specified that the two institutions must receive all the documents at the same time as the Member States' experts and they must have systematic access to their meetings.[1928] Summaries of the consultations of experts are annexed in the explanatory memoranda accompanying each of the delegated acts, thus bringing some transparency to the consultation procedures.[1929]

Moreover, with regard to transparency towards the public, the Interinstitutional Agreement of 2016 urged the three institutions to set up, in close cooperation, a register "providing information in a well-structured and user-friendly way, in order to enhance transparency, facilitate planning and enable traceability of all the different stages in the lifecycle of a delegated act."[1930] The Interinstitutional Register of Delegated Acts was launched online in December 2017.[1931] This register replicates the functioning of the Comitology Register, but in comparison it appears more accessible to the layperson, enhancing the transparency of the decision-making procedures for delegated acts.

Finally, the preparation and drafting of delegated acts may also include consultations with stakeholders.[1932] In particular, the Interinstitutional Agreement of 2016 foresees the consultation of "targeted stakeholders" and, when appropriate, the exercise of public consultations by the Commission.[1933] However, how these stakeholders will be identified is unclear and, more in

[1927] Common Understanding between the European Parliament, the Council and the European Commission on Delegated Acts, Council document No. 8640/11 (Brussels, 4 April 2011), point 4. See also European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, point 104. Partially related to transparency and transmission issue is the obligation to notify technical regulations and conformity assessment procedure at a draft stage under the Agreement on Technical Barriers to Trade, and sanitary and phytosanitary measures under the Sanitary and Phytosanitary Agreement (both annex to WTO Agreement of 1994): When contained in delegated acts, the draft measure must be notified before the adoption by the Commission. See European Commission, Guidelines for the services of the Commission of 24 June 2011 on Delegated Acts, SEC(2011)855, points 110-122.

[1928] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 28.

[1929] CRAIG Paul, op. cit. (2018), p. 736.

[1930] Ibidem, para. 29.

[1931] The Register contains detailed information on the draft delegated acts, the stages of the procedure, the calendar of experts' meetings, the related documents and, through the link to the Register of Commission expert groups, its members. It is available at https://webgate.ec.europa.eu/regdel/#/home.

[1932] Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 6.

[1933] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 28.

general, little information is provided on this aspect, suggesting that there needs to be further developments in practice for granting an adequate participation and involvement of the civil society in the procedure.

3. The Adoption of Implementing Acts by the Commission

3.1. Article 291 TFEU and the Control of the Member States

Considering now the procedures for the adoption of implementing acts by the Commission, Article 291 TFEU establishes a highly idiosyncratic regime for the control of the adoption of implementing acts, which partially innovates compared to the previous regime. Indeed, as we have seen, while the pre-Lisbon comitology system was conceived as a form of control of the Council on the Commission's powers,[1934] Article 291 TFEU clearly confers the competence of controlling the Commission's exercise of implementing powers on the Member States.[1935] However, despite this major innovation, the application of the new system has shown a remarkable continuity with the previous practice.[1936]

Interestingly, unlike in the adoption of delegated acts, the control over this form of delegation is formally exercised not by the delegator, i.e. the Council and the Parliament, but by other institutional actors, which nonetheless are part of the institutional balance.[1937] Arguably, this misalignment between the control system and the delegation structure, which has already been remarked upon in other studies on the accountability of EU administration,[1938] is only apparently at odds with the legal interpretation of delegation. As emerged from the analysis of the development of this notion in State legal systems, the delegation of powers does not necessarily entail the establishment of a legal relationship between the delegator and the delegate, but the need to control the delegate's powers is rather dependent on the constitutional principles of the specific legal system.[1939] Hence, in a legal system based on the institutional balance (in particular

[1934] Article 202 EC referred to "certain requirements in respect of the exercise of these powers".
[1935] On the logic of "executive federalism" underpinning this institutional design, see Chapter 2, para. 2.10.
[1936] BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), p. 909; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit.* (2011), p. 237; GENCARELLI Fabio, "Il Trattato di Lisbona e la Nuova Comitologia", *Diritto comunitario e degli scambi internazionali* (2012), p. 6.
[1937] For a description of the Member-State oriented interpretation of the institutional balance, see Chapter 1, para. 13.3.
[1938] See, *inter alia*, BUSUIOC Madalina, *European Agencies: Law and Practices of Accountability*, (Oxford University Press, 2013), pp. 271-274; CURTIN Deirdre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", 13 *European Law Journal* No. 4 (2007), pp. 523-541.
[1939] See Chapter 1, para. 4.

in its Member-State-oriented interpretation), a control system involving a plurality of institutional actors is justifiable and meaningful from this perspective.[1940]

3.2. Article 291 TFEU and the Comitology Regulation

Article 291 TFEU does not directly regulate the procedure for the adoption of implementing acts, but it contains a legal basis for the adoption of regulations laying down "the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers."[1941] The definition of the procedural aspects of implementing acts is demanded, thus, to secondary law, to be adopted by the Parliament and the Council through the ordinary legislative procedure. In this sense, the article provides continuity with respect to the tradition of the comitology system, which represents a highly formalised mechanism where the decision-making is embedded in detailed procedures to ensure the control of Commission's activities.[1942]

Although, precisely for this continuity with the previous situation, the Council felt no need to amend the existing Comitology Decision,[1943] in 2011 the Parliament and the Council adopted Regulation 182/2011 (hereinafter the "Comitology Regulation") which represents the legal framework applicable to the exercise of the implementing powers delegated to the Commission.[1944] It contains specific procedures for the adoption of implementing acts, as well as horizontal rules governing the system. To address targeted shortcomings in the application of the Regulation and adapt it to the specific needs of certain policy areas (emerged especially in relation to GMO authorisations and in the controversial case of glyphosate), the Commission proposed an

[1940] See MAJONE Giandomenico, "Delegation of Regulatory Powers in a Mixed Polity", 8 *European Law Journal* No. 3 (2002), pp. 319-339.
[1941] Article 291(3) TFEU.
[1942] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit.* (2013) p. 47.
[1943] BIANCHI Daniele, "La comitologie est morte! Vive la comitologie!", 48 *Revue trimestrielle de droit européen* (2012), p. 97. For the interinstitutional positions before the adoption of the Regulation, see COSTATO Luigi, *op. cit.* (2010), p. 6.
[1944] Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ L 55, 28.2.2011, p. 13–18.* For a comment, see CRAIG Paul, "Delegated Acts, Implementing Acts and the New Comitology Regulation", 31 *European Law Review* No. 5 (2011), pp. 671-687; BLUMANN Claude, "Un nouveau depart pour la comitologie. Le règlement n° 182/2011 du 16 février 2011", *Cahiers de droit européen* (2011), pp. 23-52; BARATTA Roberto, "Introduzione alle nuove regole per l'adozione degli atti esecutivi dell'Unione*", Il Diritto dell'Unione europea* (2011a), pp. 565-583; GENCARELLI Fabio, *op. cit.* (2012), pp. 1-13; CORONA Daniela, "The Adoption of Secondary Legislation through Comitology in the EU: Some Reflections on the Regulation (EU) 182/2011 in Comparison with the Pre-Lisbon Reform", *The Theory and Practice of Legislation* (2014), pp. 85-107.

amendment of the Comitology Regulation in 2017, the adoption of which is under examination by the legislator.[1945]

3.1.1. The Scope of Application of the Regulation and the Acts not Subject to Comitology

The Regulation applies "where a legally binding Union act […] identifies the need for uniform conditions of implementation and requires that the adoption of implementing acts by the Commission be subject to the control of Member States."[1946] This article has been interpreted as recognising that not every implementing act must be subject to the comitology system. According to the Commission, it would be possible for the legislator to confer implementing powers outside these procedures, in particular where the implementing act does not need to be subject to such controls.[1947] Indeed, there are examples in certain policy areas, such as agriculture and fisheries.[1948]

Clearly, when the Commission exercises its powers on the basis of powers conferred directly by the Treaties, no control from the Member States is needed. In particular, the adoption of acts in the sphere of budgetary execution are not formally implementing acts, while the adoption of non-binding acts can be seen as the exercise of autonomous powers of the Commission.[1949] However, in relation to the latter case, the General Court has recently taken a different stance. As emerges from *Netherlands v Commission*,[1950] which concerned the adoption of non-binding acts establishing the methodological framework for the implementation of the Regulation on harmonised indices of consumer prices, the Court upheld the argument that any measure intended to provide further detail in relation to the content of a legislative act must be considered an implementing act.[1951] The fact that the measures are not binding does not exempt them from the application of the comitology procedures,[1952] so that, in relation to the application of EU

[1945] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85. See Procedure 2017/0035/COD in www.europarl.europa.eu/oeil (last accessed 22.01.2018).
[1946] Article 1 of Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18
[1947] See European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), paras. 6-8.
[1948] See, for instance, the Common Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.
[1949] See European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), para. 5.
[1950] Joined Cases T-261/13 and T-86-14, *Netherlands v Commission*, EU:T:2015:671.
[1951] Ibidem, para. 48.
[1952] Ibidem, para. 50.

legislation, the Commission is prevented from circumventing this system by adopting measures which are formally soft law, but in fact substantially shape the application of a legislative act.

3.1.2. A Single Framework for the Implementing Acts

Article 291(3) TFEU mentions a plurality of "regulations" laying down the applicable rules. The use of the plural form may be interpreted as meaning that the control procedures can be laid down on a case-by-case basis in different regulations. However, a proliferation of acts establishing rules and general principles concerning mechanisms for control would be contrary to the requirement to establish them "in advance",[1953] as well as to the principles of good governance and legal certainty.[1954] Indeed, although not expressly prohibited, the provision of *ad hoc* procedures of control would entail a fragmentation of the comitology system, weakening the already fragile mechanisms of accountability and transparency in this area.

For these reasons, in the Interinstitutional Agreement on Better Law-Making, the institutions committed "to refrain from adding, in Union legislation, procedural requirements which would alter the mechanisms for control set out" in the Comitology Regulation.[1955] In other words, this Regulation constitutes the comprehensive legal framework for the Commission's exercise of implementing powers and its control by the Member States. Therefore, any departure from the established procedures would require a previous amendment of the Comitology Regulation.[1956]

3.3. The Procedures for the Adoption of Implementing Acts

3.3.1. A Simplification of the Comitology System?

With the aim of simplifying and enhancing the transparency of the comitology system, the Regulation officially reduced the number of procedures from five to two, namely the advisory procedure and the examination procedure.[1957] Thus, the advisory procedure was retained, while the management and regulatory procedures were replaced by the examination procedure.

[1953] See Case C-378/00, *Commission v Parliament and Council*, EU:C:2003:42.
[1954] See BIANCHI Daniele, *op. cit.* (2012), p. 96. Also, the Commission argues that it is not legally possible to create any *ad hoc* procedure, although "pre-comitology" procedures (e.g. pre-consultations) can be acceptable. See European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), para. 12.
[1955] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 30.
[1956] JACQUE Jean Paul, *Droit institutionnel de l'Union européenne*, 7ème ed., (Dalloz, 2012), p. 482. From this, the author argues that the Comitology Regulation has "*un statut supra-législatif*". *Contra,* denying that the "quasi-constitutional nature" of this Regulation, BARATTA Roberto, *op. cit*. (2011), p. 295.
[1957] See Recital 8 of Comitology Regulation.

However, upon a closer examination, this simplification is more apparent than real.[1958] There are actually four possible procedures for the adoption of implementing acts.[1959] In addition to the advisory and examination procedures, the Regulation also provides for an urgency procedure for implementing acts whose application cannot be delayed.[1960] Moreover, the examination procedure presents two variants, in a certain sense mirroring the previous divide between the management and regulatory committees.[1961] Therefore, the simplification attempt of the legislator appears to be frustrated by the provision of alternative procedures, as well as by the existence of multiple exceptions and sector-specific qualifications within the procedures. This contributes to an impression of a general fragmentation of the Comitology Regulation.[1962]

3.3.2. The Choice of the Procedure

The choice of the procedure for the adoption of implementing acts is of crucial importance from an institutional balance perspective. As remarked by the Court in a pre-Lisbon case relating to the choice between the regulatory and management procedures, this choice "involves different decision-making procedures and a different division of powers" between the institutions, thus having substantial implications.[1963]

In the new Comitology Regulation, the choice between advisory and examination procedures in the basic act is governed by Article 2. Accordingly, the legislator has to take into account "the nature or the impact of the implementing act required".[1964] The advisory procedure is the default procedure, while the examination procedure should be used in listed cases. In particular, it should opt for the examination procedure for the adoption of (i) implementing acts of general scope; (ii) implementing acts relating to programmes with substantial implications; and (iii) implementing acts in the fields of CAP and common fisheries policy, the environment, security and safety, or protection of the health and safety of humans, animals and plants, the common commercial policy, and taxation.[1965] Conversely, the advisory procedure in principle applies to all the other cases.

Moreover, the advisory procedure may also apply "in duly justified cases".[1966] Although its concrete application raises certain procedural doubts,[1967] this provision grants a certain flexibility

[1958] GENCARELLI Fabio, *op. cit.* (2012), p. 10.
[1959] CRAIG Paul, *op. cit.* (2012), p. 130.
[1960] Article 8 of Regulation 182/2011.
[1961] For a correlation of the two variants and the previous regime, see CRAIG Paul, "Delegated Acts, Implementing Acts and the New Comitology Regulation", 31 *European Law Review* No. 5 (2011), p. 685.
[1962] See CORONA Daniela, *op. cit.* (2014), p. 106.
[1963] See C-417/93, *Parliament v Council (TACIS programme)*, EU:C:1995:127, paras. 24-25.
[1964] Article 2(1) of Comitology Regulation.
[1965] Article 2(2) of Comitology Regulation.
[1966] See Article 2(3) of Comitology Regulation.
[1967] See CRAIG Paul, *op. cit*. (2011), p. 678.

in the choice, allowing the use of the less cumbersome procedure for the adoption of certain acts. This is particularly relevant considering that the list of implementing acts to be adopted through the examination procedure is significantly broad. In particular, the scope of application of the examination procedure is susceptible to expanding depending on the interpretation of the "substantial implications" criterion. In this regard, the recitals of the Regulation specify that the examination procedure should be used for implementing acts "with a potential important impact" and "with substantial budgetary implications or directed to third countries".[1968] However, the assessment of the expected implications is left to the legislator, which may be eager to impose stricter scrutiny upon the Commission's exercise of the powers.

The result is that, although the advisory procedure is the default procedure, the examination procedure is applicable to a considerable range of implementing acts.[1969] In fact, in the period 2011-2014, the examination procedure was applied in the overwhelming majority of cases, while the opinions adopted by the advisory procedure represented only the 10% of the total.[1970] In general, in the post-Lisbon practice, the choice between the two procedures has proven uncontroversial in practice, with the exception of one case relating to the macro-financial assistance to Georgia.[1971]

3.3.3. The Common Provisions

In the interests of simplification, the Comitology Regulation contains common provisions applicable to all the comitology procedures for the adoption of implementing acts. They reflect the common practice before the Lisbon reform, but they were not provided for in legislation before.[1972]

In particular, Article 3 sets forth that the committees are to be composed of representatives of the Member States and are chaired by a representative of the Commission without voting rights.[1973] To adopt an implementing act, the chair submits the draft text to the committee at least 14 days

[1968] See Recitals 11 and 12 of Comitology Regulation.
[1969] CRAIG Paul, *op. cit.* (2011), p. 678.
[1970] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 7.
[1971] In this case, the choice of the procedure was a central point in the conciliation phase of the legislative procedure (Procedure 2010/0390/COD). The compromise reached applied the advisory committee procedure for macro-financial assistance under EUR 90 million and the examination procedure for amounts above, emblematically showing the flexibility of the criteria for the choice. See European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 7.
[1972] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 3.
[1973] Article 3(2) of Comitology Regulation.

before the meeting, except in "duly justified cases".[1974] During the meeting, the chair must try to obtain the largest support by the Member States' representatives and, to this end, it can amend the draft implementing act according to the suggestions and discussions in the committee.[1975] This provision allows the chair to maintain the control of proceedings, channelling the input received by committee members to amendments drafted by the Commission.[1976] Within the time limit established by the chair, which must be proportionate and permit an early and effective examination of the draft according to the urgency of the matter, the committee delivers an opinion, which is recorded in the minutes.[1977]

Also common to all the comitology procedures is the possibility to resort to the "written procedure" in duly justified cases.[1978] In these cases, the chair may decide to obtain the committee's opinion without a meeting, by sending the draft implementing acts to the representatives and setting a time limit for the delivery of their opinion. The Member States' representatives have to oppose or explicitly abstain from the proposal before the expiry of the time limit, otherwise they are considered to have tacitly agreed to the draft implementing act. However, unless the basic act provides otherwise, a meeting can always be convened by decision of the chair or by a request of a committee member, thus terminating the written procedure.[1979]

To provide further homogeneity and transparency in the operation of the comitology system, Article 9 of the Regulation required the Commission, after consultation with the Member States, to lay down "standard rules" of procedure, which could serve as a basis for adopting rules of procedure by each committee. Consequently, the Commission adopted the standard rules of procedure, which were published in the Official Journal on 12 July 2011.[1980] Each committee has, thus, adopted, or adapted, its own rules of procedure in conformity with this model, granting equal conditions regarding the agenda setting, representation and documentation to be submitted to the members of the committee.[1981]

[1974] Article 3(3) of Comitology Regulation.
[1975] Article 3(4) of Comitology Regulation.
[1976] See CRAIG Paul, op. cit. (2011), p. 679.
[1977] Article 3(3) and (6) of Comitology Regulation.
[1978] Article 3(5) of Comitology Regulation.
[1979] Ibidem. According to a recent report by the Commission, the use of the written procedure is widespread and efficient: For instance, in 2014 there were 893 written procedures and 773 committee meetings, see European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 3.
[1980] European Commission, Standard Rules of Procedure for Committees, OJ C 206, 12.7.2011, p. 11–13.
[1981] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 2.

3.3.4. The Advisory Procedure

With regard to the specific procedures applicable to the adoption of implementing acts, Article 4 of the Comitology Regulation regulates the operation of the advisory procedure. Accordingly, the committee is called to deliver an opinion on the draft implementing act "if necessary by taking a vote".[1982] The voting rule in this case is the simple majority of Member States' representatives. It is not possible to refer to the appeal committee under the advisory procedure.[1983]

The result of the vote is not binding on the Commission, which can decide to adopt the implementing act even in case of committee's negative opinion, although it has to provide a reasoned opinion in this case.[1984] In this sense, the "advisory" nature of the procedure is fully retained, leaving full discretion to the Commission in the adoption of the measure.[1985] However, the Commission is under the obligation to strive for solutions which have the widest support,[1986] and it shall "take the utmost account of the conclusions drawn from the discussions and of the opinion delivered."[1987]

3.3.5. The Examination Procedure

In comparison to the advisory procedure, the examination procedure, which gives the committee an actual veto power on the adoption of implementing acts, presents more complexities and qualifications.[1988]

3.3.5.1. The Voting Rules

In this procedure, the committee delivers its vote by qualified majority voting, according to the ponderation set forth in the Treaties for the adoption of legislative acts by the Council.[1989] In this respect, an interesting parallel can be drawn with the voting rules on delegated acts. Also in this case, a "reverse qualified majority" of Member States is required to hinder the entry into force of acts of the Commission. Considering that the examination procedure is used particularly for the

[1982] Article 4(1) of Comitology Regulation.
[1983] See European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), para. 43.
[1984] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit.* (2013) p. 48.
[1985] CRAIG Paul, *op. cit*. (2011), p. 679.
[1986] Article 3(4) of Comitology Regulation.
[1987] Article 4(2) of Comitology Regulation. It is interesting to note that, in this, the advisory procedure differs from the consultation of the national experts for the adoption of delegated acts: Albeit the common advisory function, in relation to Article 290 TFEU the Commission has strongly opposed to the insertion of a provision to "take into account" their opinion, despite that this does not have substantial implications on its discretion in the exercise of the powers.
[1988] See CRAIG Paul, *op. cit*. (2011), p. 680.
[1989] Article 5(1) of Comitology Regulation. Therefore, since 1 April 2017, the qualified majority is composed by the 55% of the Member States, which comprise at least 15 of them, and which represent the 65% of the population in EU. See Article 16(4) and (5) TEU.

adoption of implementing acts of general application, the voting rules shows a significant similarity between the two delegation regimes, since it represents a common mechanism which, without depriving the Commission of its autonomy,[1990] allows a systematic control over the delegated powers.[1991]

After the submission and discussion of the draft implementing act according to the procedures established in the Comitology Regulation and the committee's rules of procedure, the committee votes on the measure. In the absence of opposition, the chair may establish that the committee has delivered a positive opinion by consensus without a formal vote.[1992] The outcome determines the following steps in the procedure, depending on whether the committee delivers a positive opinion, a negative opinion or no opinion.

3.3.5.2. The Consequences of a Positive Opinion

Where the outcome is a positive opinion, i.e. the qualified majority of Member States' representatives has approved the draft measure, the Commission is under an obligation to adopt it.[1993] However, as specified in an interinstitutional statement on the adoption of the Comitology Regulation, "this provision does not preclude that the Commission may, as is the current practice, in very exceptional cases, take into consideration new circumstances that have arisen after the vote and decide not to adopt a draft implementing act, after having duly informed the committee and the legislator."[1994] Therefore, although obliged to adopt the draft implementing act, the Commission enjoys exceptionally a certain margin of discretion where new circumstances arise after the vote. Positive opinions represent the most common outcome of the procedure since, as in the past, the comitology system remains a highly consensual exercise.[1995]

[1990] In this sense, this mechanism is significative of the fact that this is a true delegation of powers (see the definition in Chapter 1, para. 17) rather than that the Commission exercises its powers directly on the basis of the Treaties, as seems to argue BARATTA Roberto, *op. cit.* (2011), p. 315.

[1991] BARATTA Roberto, "La maggioranza qualificata inversa nella recente prassi dell'UE", in CORTESE Bernardo (ed.), *Studi in onore di Laura Picchio Forlati*, (Giappichelli, 2014); BARATTA Roberto, *op. cit.* (2011), p. 315.

[1992] European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), para. 44. Interestingly, there are no quorum requirements in the comitology system, so that when at the meeting of the representatives there are not enough to reach the qualified majority neither for a positive nor for a negative vote, the chair declares a no opinion outcome.

[1993] Article 5(2) of Comitology Regulation.

[1994] Statement by the European Parliament, the Council and the Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 19.

[1995] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 2. To quantify the statement, suffice to recall that in 2011 there were 1789 positive opinions out of 1868; in 2012 1845 out of 1923; in 2013 1845 out of 1916; in 2014 1838 out of 1889 (data from the annual reports on the functioning of the committees, reported also in the cited Commission's Report of 2016.

3.3.5.3. The Consequences of a Negative Opinion

Where the outcome is a negative opinion, i.e. the qualified majority of Member States' representatives has opposed the draft text, the Commission is precluded from adopting the implementing act.[1996] The Commission is hence confronted with three alternatives: either to drop the act, to amend it, or to refer it to the appeal committee. Thus, if it considers that it is not necessary to continue the procedure, it can let the implementing act fall, remaining free to submit a new draft later and initiate the procedure again. Conversely, if it considers that an implementing act as necessary, it can submit an amended version to the same committee within two months. Otherwise, it can decide to submit the same draft implementing act to the appeal committee within one month from the negative opinion. In the latter case, the procedure continues according to the rules established for the appeal committee. Pursuant to Article 7 of Comitology Regulation, a derogation from these rules applies when there is the risk of a significant disruption of the agricultural markets, or a risk for the financial interests of the Union, allowing the Commission to adopt the implementing act immediately and refer the matter subsequently to the appeal committee.[1997]

3.3.5.4. The Consequences of No Opinion

When the outcome is no opinion, i.e. the committee did not reach a qualified majority neither in favour nor against the draft implementing measure, the Commission "may adopt the draft implementing act."[1998] In practice, the Commission has discretion as to whether to adopt the measure, to drop it or to submit an amended version to the committee, should it consider it more appropriate. This discretion of the Commission in the case of no opinion represents a significant innovation in comparison to the previous regime, which enables the Commission to balance the situation and reconsider the draft implementing act, taking into account the positions of the Member States in the committee.[1999] In practice, however, this possibility of not adopting the act

[1996] Article 5(3) of Comitology Regulation.
[1997] Article 7 of Comitology Regulation: "By way of derogation from Article 5(3) and the second subparagraph of Article 5(4), the Commission may adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU. In such a case, the Commission shall immediately submit the adopted implementing act to the appeal committee. Where the appeal committee delivers a negative opinion on the adopted implementing act, the Commission shall repeal that act immediately. Where the appeal committee delivers a positive opinion or no opinion is delivered, the implementing act shall remain in force." The derogation was never applied in practice so far, see European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 9.
[1998] Article 5(4) of Comitology Regulation.
[1999] See European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM(2017) 85 final.

has rarely been used,[2000] although it is generally considered a useful tool for the effective and consensual operation of the comitology system.[2001]

This flexibility is qualified by a number of exceptions listed in Article 5(4) of the Comitology Regulation. Indeed, the Commission cannot adopt the draft implementing act in case of no opinion if (i) the act concerns specific policy areas;[2002] (ii) the basic act establishes that the measure may not be adopted when no opinion is delivered;[2003] or (iii) a simple majority of the committee's members opposes to the draft implementing act.[2004] However, also in these cases, when the implementing act is considered necessary, the Commission can submit an amended version of the measure to the same committee within two months, or submit the same draft to the appeal committee within one month.[2005] The options for the Commission, thus, correspond to those applicable in the case of a negative opinion. Special rules apply in the fields of antidumping and countervailing measures,[2006] as well as in case of risk of disruption of the agricultural markets or for the financial interests of the Union.[2007]

3.3.6. The Urgency Procedure

The analysis of the Comitology Regulation shows that a third procedure can be identified with the new comitology system.[2008] Pursuant to Article 8 of the Comitology Regulation, the urgency procedure permits the Commission to adopt an implementing act without the prior consultation of a committee. The use of this procedure must be duly justified by "imperative grounds of urgency" and the implementing act thus adopted is immediately applicable.[2009] It can remain in force for maximum six months, unless the basic act provides for a different time limit. However, this absence of a prior consultation must be compensated by the subsequent submission to a

[2000] For instance, in 2011 the Commission did not adopt the act in 4 cases out of 67 no opinions; in 2012, 3 out of 73; in 2013, 2 out of 49; in 2014, 3 out of 45 (data extracted from the Comitology Register, reported also in the cited Report of the Commission).
[2001] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 6.
[2002] Namely taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures. See Article 5(4) (a) of Comitology Regulation.
[2003] In relation to the fact that the legislator can establish in the basic act that the Commission cannot adopt the draft implementing measure in case of no opinion, according to the Commission this needs to be duly justified by the legislator, and the absence of proper justifications in this sense has caused interinstitutional tensions during the adoption of certain legislative acts. On this point, the Commission has made statements in 30 cases. See European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 6.
[2004] Article 5(4) second subparagraph of Comitology Regulation.
[2005] Article 5(4) third subparagraph of Comitology Regulation.
[2006] Article 5(5) of Comitology Regulation.
[2007] Article 7 of Comitology Regulation.
[2008] CRAIG Paul, *op. cit.* (2011), p. 681.
[2009] Article 8(1) and (2) of Comitology Regulation.

committee within 14 days after its adoption.[2010] Therefore, albeit *ex post*, a committee procedure is in any case undertaken, ensuring the control of the Member States on the exercise of the implementing powers by the Commission.

These procedures follow the same rules as the advisory or examination procedures. What differs is that in the examination procedure, where the committee delivers a negative opinion, the Commission is bound to repeal the implementing act adopted immediately.[2011] Where the outcome is a positive opinion or no opinion, the act remains in force in principle for maximum six months. Therefore, the measure is provisional in any case, although the Commission can replace it by launching an examination procedure immediately for the adoption of a definitive act with the same content.[2012] Special rules apply to trade defence,[2013] which is also the field in which the urgency procedure is mostly applied.[2014]

3.3.7. The Appeal Committee

The introduction of the appeal committee represents one of the major innovations of the Comitology Regulation.[2015] It replaced the Council in the role of the second layer of the procedure, constituting the forum in which the most problematic issues are addressed.[2016] Not foreseen in the original Commission's proposal, the insertion of such a committee was due to pressures from the Parliament and the definition of its precise functioning rules has been the object of interinstitutional battles, especially with regard to its composition.[2017]

3.3.7.1. The Composition of the Appeal Committee

The appeal committee is composed of Member States' representatives who meet "at the appropriate level" of representation.[2018] The Regulation contains a certain ambiguity, leaving the provision open to different interpretations.[2019] In this regard, the Commission must consult the Member States[2020] and they may "indicate the level of representation that they consider

[2010] Article 8(3) of the Comitology Regulation.
[2011] Article 8(4) of Comitology Regulation.
[2012] See European Commission, Guidelines for the Services of the Commission on Implementing Acts, SEC(2012) 617 Brussels, 25 October 2012), para. 69.
[2013] Article 8(5) of Comitology Regulation. For a detailed examination of the special rules applicable to antidumping and the peculiarities related to the commercial policy, see BARATTA Roberto, *op. cit*. (2011a), p. 580; GENCARELLI Fabio, *op. cit*. (2012), pp. 8-9.
[2014] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 9.
[2015] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit*. (2013) p. 48.
[2016] CORONA Daniela, *op. cit*. (2014), p. 99.
[2017] CRAIG Paul, *op. cit*. (2011), p. 681.
[2018] Recital 7 and Article 3(7) last subparagraph of Comitology Regulation.
[2019] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit.* (2013) p. 49 and 54.
[2020] Article 3(7) last subparagraph of Comitology Regulation.

appropriate which should be of a sufficiently high and horizontal nature, including at Ministerial level",[2021] as well as "as homogenous as possible".[2022]

The underlying idea is that the representatives in the appeal committee should have "the necessary authority to decide on highly sensitive issues", taking a clear stance on the matter and not leaving discretion to the Commission to decide.[2023] Thus, in high-profile political dossiers, the appeal committee can be composed of Ministers of the Member States (precisely like the composition of the Council), making the innovation of the Comitology Regulation merely nominal.[2024] In the prevailing practice, however, the appeal committee is generally composed of members of the Permanent Representation,[2025] who were initially the deputy permanent representatives (thus mirroring the composition of the Coreper I) and, more recently, attachés at a lower level.[2026]

Due also to the progressive lowering of the level of representation, the original aim to compose controversial issues in the appeal committee appears not to be achieved in practice.[2027] In the overwhelming majority of cases, the appeal committee just confirms the outcomes of the examination committee.[2028] However, this trend might be reversed if the recent proposal of the Commission to amend the Comitology Regulation is adopted. Indeed, the proposal contains the provision of a further meeting, after the no opinion outcome, with the committee at ministerial level, considering this the most appropriate committee composition to engage Member States' responsibility and settle controversial matters.[2029]

3.3.7.2. The Procedure before the Appeal Committee

In the case of a negative opinion or in certain cases of no opinion, the Commission may refer the draft implementing act to the appeal committee. This referral initiates a new phase in the procedure, governed by specific rules. According to Article 3(7) of the Comitology Regulation, the

[2021] Article 1(5) of the Rules of Procedures of the Appeal Committee, OJ C 183 of 24.6.2011 p. 13-16.
[2022] Article 5(1) of the Rules of Procedures of the Appeal Committee, OJ C 183 of 24.6.2011 p. 13-16. It continues: "As a general rule, representation should not be below the level of members of the committee of Permanent Representatives of the governments of the Member States".
[2023] CORONA Daniela, *op. cit*. (2014), p. 100.
[2024] BAST Jürgen, *op. cit*. (2012), p. 913. See also GENCARELLI Fabio, *op. cit*. (2012), p. 12.
[2025] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 5.
[2026] CHRISTIANSEN Thomas and DOBBELS Mathias, *op. cit*. (2013) p. 49.
[2027] CORONA Daniela, *op. cit.* (2014), p. 100.
[2028] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 5.
[2029] See Article 1 of Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85.

appeal committee adopts its own rules of procedure by simple majority,[2030] and it is chaired by a representative of the Commission. The chair should fix the date of the meeting "in close cooperation with the members of the committee",[2031] which entails carrying out consultations with the Member States before convening the meeting, often opening an informal channel of dialogue on the matter. The voting rules in the appeal committee follow those established for the examination procedure and, similarly, the chair may introduce amendments to the draft implementing act upon the suggestions of the committee members.[2032] In any case, the chair must inform the committee of how it takes into account the discussions and suggestions from its members, especially when they were largely supported within the committee.

Also in the case of the appeal committee, the possible outcomes of the vote are threefold as are its consequences. Firstly, when the appeal committee delivers a positive opinion, the Commission must adopt the draft implementing measure. Secondly, when the appeal committee delivers a negative opinion, the Commission cannot adopt the measure.[2033] Thirdly, when no opinion is delivered, the Commission has discretion as to whether to adopt or not to adopt the draft implementing measure.[2034] Considering that the discretion of the Commission is not limited by the exceptions and derogations illustrated in relation to the preceding phase,[2035] it may be strategically useful for the Commission to refer the matter to the committee in case of no opinion when it expects the same outcome in appeal.

3.3.7.3. The Problematic Application in Some Risk Regulation Cases

The majority of cases tackled by the appeal committee related to the controversial area of genetically modified food and feed and to plant protection products.[2036] In relation to these policy areas, the Commission is often under an obligation to take a decision which cannot be delayed,

[2030] The appeal committee adopted its Rules of Procedure on 29 March 2011, and the Commission reviewed them in 2013. See European Commission, Annual Report on the working of committees during 2013, COM(2014)0572 final.
[2031] Article 3(7) fifth subparagraph of Comitology Regulation. When the matter is referred to it, the appeal committee must ordinarily meet between fourteen days and six weeks from the date of the referral, and it must deliver its opinion within two months.
[2032] Article 6 of Comitology Regulation.
[2033] This provision is considered problematic since, differently from the previous regime, it entails a definitive stop of the procedure without a clear decision on the matter. In BLAUMANN's words, "là où le Counseil disposait d'un pouvoir de decision, le comité d'appel n'a qu'un pouvoir de veto", see BLUMANN Claude, *op. cit.* (2011), p. 18; BIANCHI Daniele, "La comitologie dans le droit agroalimentaire: Une procedure complexe au service d'impératifs de participation democratique et de controle etatique", in MERTEN-LENTZ Katia and MAHIEU Stéphanie (eds.), *Sécurité alimentaire. Nouveaux enjeux et perspectives,* (Larcier, 2013), p. 204.
[2034] Article 6(3) of the Comitology Regulation. However, Article 6(4) specifies that, in case of no opinion,
[2035] The only derogation to the flexibility of this article is the prohibition of adopting the implementing act when definitive multilateral safeguard measures are at stake, see Article 6(4) of Comitology Regulation.
[2036] European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 6.

such as in the case of requests for authorisations of the placing on the market of products or substances. This decision needs to be taken within a reasonable time by the Commission also in case of no opinion outcomes, as also sanctioned by the case law.[2037] In these cases, the flexibility granted to the Commission is increasingly perceived as problematic since it pushes the Commission to act in politically sensitive matters having a direct impact on citizens and business, without a clear backing of the Member States.[2038] Arguably, the Member States appear to use this mechanism strategically to abstain from assuming responsibility for controversial decisions before the electorate.

For these reasons, significant amendments to the comitology system were proposed recently by the Commission to tackle this issue.[2039] In particular, to avoid the no opinion outcome in the appeal committee, modifications of the voting rules were proposed,[2040] as well as the possibility to hold a further meeting at the ministerial level after the no-opinion result in the appeal committee.[2041] Moreover, a third layer of the procedure, which foresees the direct input of the Council on the matter, is envisaged in order to give further direction to the Commission in the light of the institutional, legal, political, and international implications of its decision.[2042] Should these

[2037] Case T-164/10, *Pioneer Hi-Bred International, Inc. v European Commission*, EU:T:2013:503.
[2038] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85, p. 3.
[2039] See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85. In relation to GMO, see also Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory, COM (2015) 177; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Reviewing the decision-making process on genetically modified organisms (GMOs), COM(2015) 176 final.
[2040] Article 1 of the Proposal: "Article 6 is amended as follows: (a) in paragraph 1, the following second subparagraph is added: "However, only members of the appeal committee who are present or represented at the time of the vote, and do not abstain from voting, shall be considered as participating members of the appeal committee. The majority referred to in Article 5(1) shall be the qualified majority referred to in Article 238(3) (a) TFEU. A vote shall only be considered to be valid if a simple majority of the Member States are participating members."
[2041] Article 1 of the Proposal: "(1) in Article 3(7), the following sixth subparagraph is added: "Where no opinion is delivered in the appeal committee pursuant to the second subparagraph of Article 6(3), the chair may decide that the appeal committee shall hold a further meeting, at ministerial level. In such cases the appeal committee shall deliver its opinion within 3 months of the initial date of referral. "
[2042] Article 1 of the Proposal: "(b) the following paragraph 3a is inserted:"3a. Where no opinion is delivered in the appeal committee, the Commission may refer the matter to the Council for an opinion indicating its views and orientation on the wider implications of the absence of opinion, including the institutional, legal, political and international implications. The Commission shall take account of any position expressed by the Council within 3 months after the referral. In duly justified cases, the Commission may indicate a shorter deadline in the referral."

amendments be adopted by the Parliament and the Council, the rules applicable in the case of no opinion, and the correlated institutional balance, would be altered significantly.[2043]

3.4. The Transitional Regime

The new procedures regulated in the Comitology Regulation substitute the previous regime, providing a comprehensive legal framework for the exercise of the powers delegated to the Commission under Article 291 TFEU. The enabling provisions, which are enacted after the entry into force of the Regulation, hence, refer to this legal framework for the procedural aspects of the delegation. However, the delegations contained in legislative acts enacted before 1st March 2011, but still in force, are subject to a transitional regime set forth in Article 13 of the Regulation.

3.4.1. The Automatic Alignment of the Comitology Procedures

Article 13 provides for an automatic alignment of the previous enabling clauses with the new procedures. In particular, when the basic act refers to the "advisory procedure" under Decision 1999/486/EC, the new advisory procedure applies, whereas the reference to the "safeguard procedure" in that Decision must be interpreted as a reference to the urgency procedure regulated in Article 8 of the Regulation.

Likewise, where it refers to the management or regulatory procedures, the implementing act must be adopted through the new examination procedure. However, in these cases, a distinction must be made in the automatic transposition as the transitional provisions provide that, where the basic act refers to the regulatory procedure, it must be considered that, in the case of no opinion, the Commission cannot adopt the draft implementing act.[2044] This confirms, incidentally, that the two tracks of the examination procedure mirror the divide between the management and regulatory procedures.[2045]

3.4.2. The Problematic Alignment of the RPS Procedure

The automatic alignment with the new procedures has a relevant exception in the RPS procedure. In this case, there is no automatic transformation of the RPS procedure in the examination procedure, but the Commission committed to reviewing the related provisions in order to adapt them according to the criteria laid down in the Lisbon Treaty.[2046] Considering that most of the

[2043] See the discussion *infra* para. 3.5.3.
[2044] Article 13(1)(c) of Comitology Regulation.
[2045] CRAIG Paul, *op. cit.* (2011), p. 685.
[2046] Statement of the European Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 20. In this context, the European Parliament and the Council were entitled to signal basic acts they consider important to adapt as a matter of priority and were to be kept informed.

measures adopted under the RPS procedure now fall within the scope of Article 290 TFEU and they are, thus, outside the comitology system,[2047] the Commission undertook the task to examine each of them, eventually introducing proposals for amendment of the basic acts.

Clearly, the adaptation of the existing provisions to the post-Lisbon categories of legal acts was not an easy endeavour and a number of issues arose.[2048] Among the issues is the fact that it cannot be uncritically assumed that the divide between the RPS procedure and other comitology procedures corresponds to the distinction between Article 290 and 291 TFEU, being the scope of application of the two regimes not necessarily correlated.[2049] Nonetheless, the Commission proposed three horizontal legislative acts in 2013, which converted most of the references to the RPS procedure into conferral of power to adopt delegated acts.[2050] However, these "omnibus proposals" were rejected by the other institutions,[2051] in particular the Council which was reluctant to lose its control over the exercise of Commission's powers in the absence of increased consultation practices.[2052] In fact, in comparison with the objection right enjoyed under Article 290 TFEU (but also with the new procedures of Comitology Regulation), the RPS procedure granted the Council more incisive powers of control in relation to the exercise of the Commission's powers.[2053] Faced with this institutional impasse, the Commission decided to withdraw its proposals in 2015.[2054]

[2047] CRAIG Paul, *op. cit.* (2018), p. 733.

[2048] Incisively summarised as the "transitional classification problem", see CRAIG Paul, *op. cit.* (2011), pp. 675-677.

[2049] Considering that the scope of Article 290 TFEU comprises, but it is broader than the RPS, see European Parliament, Resolution of 23 September 2008 with recommendations to the Commission on the alignment of legal acts to the new Comitology Decision, (2008/2096(INI)), recitals K and L; CRAIG Paul, *op. cit.* (2011), p. 676. Considering that the scope of the RPS is not entirely contained in Article 290 TFEU, see Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*, EU:T:2015:671; CHAMON Merijn, "Dealing with a Zombie in EU Law. The Regulatory Procedure with Scrutiny: Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*, EU:T:2015:671.", 23 *Maastricht Journal of European and Comparative Law* No. 4 (2016b), p. 714.

[2050] Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny, COM(2013) 451 final; Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts in the area of Justice providing for the use of the regulatory procedure with scrutiny, COM(2013) 452 final; Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny, COM(2013) 751 final.

[2051] See European Parliament, Legislative Resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council adapting to Article 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny, OJ C 285, 29.8.2017, p. 169–189.

[2052] The failure to adopt these horizontal acts must be seen in the context of the interinstitutional tensions related to the role of national experts in the 290 TFEU procedure, see CRAIG Paul, *op. cit.* (2018), p. 733. See also CHAMON Merijn, *op. cit.* (2016b), p. 715.

[2053] CHAMON Merijn, *op. cit.* (2016b), p. 721.

[2054] European Commission, Withdrawal of Commission proposals, OJ C 80, 7.3.2015, p. 17–23. See also Annex II to the Commission Work Programme 2015, pp. 11-12.

In the Interinstitutional Agreement on better law-making, the three institutions recognised the need of completing the alignment of all existing legislation and that the priority should be given to the basic acts which still refer to the RPS procedure, urging the Commission to introduce a proposal for this purpose by the end of 2016.[2055] A proposal was indeed tabled by the Commission in December 2016[2056] and it is currently under examination by the legislator.[2057]

3.4.3. The Die Hard RPS Procedure

Pending the alignment process, the RPS procedure continues to apply to the adoption of implementing acts based on existing legislative acts. Although in the new proposals for a substantive amendment or a recast of existing legislation the Commission systematically updates the legislative text to the new reality of the TFEU,[2058] the number of basic acts still referring to the RPS procedure is significant.[2059] After almost a decade after the Lisbon Treaty, cases concerning the RPS procedure continue to be settled by the Court of Justice, which tends to apply concepts elaborated in the context of the Lisbon classification to this outdated form of control of the Commission's powers.[2060]

Arguably, this delay in the update of the RPS procedure to the post-Lisbon reality is at odds not only with the commitment to "promote simplicity, clarity and consistency in the drafting of Union legislation",[2061] but also with a full implementation of the innovation brought by the Lisbon Treaty,[2062] revealing again the signs of an unfulfilled reform.

[2055] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 27. See also JUNKER Jean-Claude, *State of the Union. Letter of Intent to President Martin Schulz and to Prime Minister Robert Fico*, 14 September 2016, p. 31.

[2056] European Commission, Proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, COM(2016) 799 final.

[2057] See Procedure 2016/0400(COD) at www.europarl.europa.eu/oeil (last accessed 19.01.2018).

[2058] See European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 9.

[2059] See CHAMON Merijn, *op. cit.* (2016b), p. 721.

[2060] Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*, EU:T:2015:671. For a comment, see CHAMON Merijn, *op. cit*. (2016b), pp. 714-724.

[2061] See Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 2.

[2062] CHAMON Merijn, *op. cit.* (2016b), p. 724.

3.5. The Role of the Parliament and the Council

The conferral on the Member States of the competence in relation to the control mechanisms formally represented a radical change in the comitology system,[2063] which, according to the Commission, implied that neither the Council nor the Parliament could exercise a direct role in the control of the implementing powers of the Commission.[2064] In its view, the legislator had to be excluded from the new comitology system and, more in general, from the implementation domain, thus fully realising a separation between legislative and executive powers in EU law.[2065]

This position, however, was soon discarded in the legislative procedure for the adoption of the Comitology Regulation, not only because of the political pressure of the key institutional actors, but also for reasons related to the maintenance of the institutional balance. Indeed, this principle, which motivated the increasing role of the Parliament in the pre-Lisbon comitology system,[2066] lies at the heart of the recognition of certain rights of oversight for the Council and the Parliament, whose prerogatives in rule-making risk to being impaired by the Commission's exercise of implementing powers.

3.5.1. The Formal Equality between the Parliament and the Council

The Lisbon reform endorses the idea (put forward by the Parliament and the Commission since the Maastricht Treaty)[2067] that the Council can no longer claim to be the sole delegator of the implementing powers to the Commission, thus justifying a monopoly on their control.[2068] With the establishment of the co-decision procedure as the ordinary legislative procedure, the Parliament is in the position to demand parity with the Council in relation to the implementation of EU law.

Moreover, Article 291(3) TFEU requires the Council and the Parliament to lay down in advance the rules and general principles concerning the control mechanisms "acting by means of

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[2063] SCHUTZE Robert, *op. cit.* (2012), p. 241; CRAIG Paul, "The Role of the European Parliament under the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?,* (Springer, 2008), p. 123.

[2064] European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM(2010) 83, p. 3.

[2065] BLUMANN Claude, *op. cit*. (2011), p. 35.

[2066] Ibidem, p. 37. Remarkably, the author underlines that precisely in this development of the Parliament powers in comitology that the difference between the principles of separation of powers and the institutional balance is most remarkable. While the former would hinder the involvement of the Parliament, the latter fosters and justifies it.

[2067] See Rapport de M. De Giovanni, *Rapport de la commission institiutionnelle sur les problèmes de comitologie liés à la perspective de l'entrée en vigueur du traité de Maastricht*, A3. 0417/93, 6 December 1993; endorsed by European Parliament Resolution of 16 December 1993, OJ 1994 C 20/179.

[2068] BAST Jürgen, *op. cit.* (2012), p. 913; PONZANO Paolo, "Executive and delegated acts: The situation after Lisbon", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?,* (Springer, 2008), pp. 135-141.

regulations in accordance with the ordinary legislative procedure".[2069] Thus, unlike the previous regime, the Parliament enjoys a role of co-legislator in the adoption of the act constituting the legal framework for the comitology system, which made it able to influence the content of the Comitology Regulation in a sense favourable to its position.

Accordingly, in the text of the Comitology Regulation, the Parliament is now on equal footing with the Council in relation to the right of access to documents and information,[2070] as well to the right of scrutiny on the Commission's exercise of implementing powers. Moreover, the Commission is required to present a report to the European Parliament and the Council on the implementation of the Comitology Regulation.[2071]

3.5.2. The Right of Scrutiny of the Parliament and the Council

Pursuant to Article 11 of the Regulation, when the basic act is adopted under the ordinary legislative procedure, the Parliament and Council have a right of scrutiny ("*droit de regard*") in relation to the exercise of implementing powers by the Commission. This consists of the possibility to indicate at any time that "a draft implementing act exceeds the implementing powers provided for in the basic act."[2072] In other words, the Council and the Parliament can react when they consider that the exercise of the powers is *ultra vires*, going beyond the scope of the empowerment and, thus, seizing the legislator's prerogatives. The use of this mechanism is rather exceptional.[2073] In this sense, while the comitology system was portrayed as a "police patrol" control mechanism, the right of scrutiny represents a sort of "fire alarm" system, activated only in exceptional circumstances.[2074]

Remarkably, the right of scrutiny is limited to the case of basic acts adopted pursuant to the ordinary legislative procedure, although Recital 18 of the Comitology Regulation does not mention this limitation of the scope of application, but rather insists on the legislator's rights relating to the review of the legality of Union acts.[2075] It, thus, appears to be an unwarranted exclusion of the special legislative procedures from the right of scrutiny.

[2069] Article 291 TFEU.
[2070] Article 10 of Comitology Regulation.
[2071] Article 15 of Comitology Regulation.
[2072] Article 11 of Comitology Regulation.
[2073] By the end of January 2016, the right of scrutiny was never used by the Council, while the Parliament used it only four times. See European Commission, Report to the European Parliament and the Council on the Implementation of Regulation (EU) 182/2011, COM(2016) 92 final, p. 8.
[2074] See MCCUBBINS Mathew and SCHWARTZ Thomas, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', 28 *American Journal of Political Science* (1984), pp. 165–79; BUSUIOC Madalina, *op. cit.* (2013), p. 133.
[2075] Recital N° 18 of the Comitology Regulation. See BLUMANN Claude, *op. cit.* (2011), p. 34.

The consequence of the exercise of the right of scrutiny, in any case, is limited. The Commission is bound to "review the draft implementing act, taking account of the positions expressed".[2076] Hence, it remains free to maintain, amend or withdraw the measure, duly informing the Parliament and the Council of its decision. Therefore, the right of scrutiny does not result in an actual right of veto. Should the Commission insist on the adoption of the implementing act allegedly considered to be *ultra vires*, the Council or the Parliament could react only by bringing an action before the Court of Justice to annul the measure.[2077]

In comparison to the previous regime, the right of scrutiny corresponds to the power granted to the Parliament in the comitology procedures other than the RPS procedure.[2078] However, in comparison to the RPS procedure, its powers now appear rather "toothless",[2079] calling into question whether the equality enjoyed under Article 291(3) TFEU did actually result in an enhanced position for the Parliament.[2080]

More in general, in relation to the control of the Parliament and the Council, it is important to remark on the peculiarity of the delegation of implementing powers to the Commission. Indeed, the peculiar role of the Commission in the legislative procedure entails that, having the quasi-monopoly of the legislative initiative, a proposal of the Commission is a *condicio sine qua* non for the adoption of legislative acts, including the acts which would amend or repeal the enabling act. Different from the other delegation regimes and the constitutional traditions of State legal systems, this form of delegation requires the consent of the delegate for its revocation.[2081]

3.5.3. Increasing Asymmetry between Parliament and Council

It is noteworthy that, although the Parliament is formally granted equal powers, the conferral of control powers to the Member States *de facto* favours the position of the Council, since channels

[2076] Article 11 of Comitology Regulation.
[2077] BAST Jürgen, *op. cit*. (2012), p. 913; BLUMANN Claude, *op. cit.* (2011), p. 34.
[2078] CORONA Daniela, *op. cit.* (2014), p. 100; BAST Jürgen, *op. cit*. (2012), p. 913; BLUMANN Claude, *op. cit.* (2011), p. 38.
[2079] CORONA Daniela, *op. cit*. (2014), p. 100. Although this right can now be exercised "at any time" and no fixed scrutiny period applies (the right of scrutiny no longer requires an automatic suspension of the Commission's internal procedures for adopting the implementing act for three months as Article 5a of the Second Comitology Decision), the Parliament no more enjoys a real veto power over implementing acts. Transitionally, as a consequence of the delays in the alignment of the RPS procedure to the post-Lisbon regime, the Parliament is still in the position of exercising its veto powers over certain implementing acts which are not yet subject to the new regime.
[2080] BAST Jürgen, *op. cit.* (2012), p. 913.
[2081] See GAUTIER Yves, *La délégation en droit communautaire,* PhD thesis (Université de Strasbourg, 1995), p. 466; CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 233. For a discussion on the precarious nature of delegation, see SCHINDLER Peter, *Delegation von Zuständigkeiten in der Europäischen Gemeinschaft*, (Nomos Verlagsgesellschaft, 1972), p. 178.

of communication are easily created between the Member States' representatives in the committees and the Council.[2082] This is even more apparent considering that, often, the composition of the appeal committee may *de facto* correspond to that of the Council or the Coreper I.[2083]

Furthermore, should the 2017 proposal of the Commission be adopted, the parity between the Parliament and the Council introduced by the post-Lisbon system would be further impaired. Indeed, the proposal sets forth that, in case of no opinion of the appeal committee, the Commission may refer the matter to the Council *qua* Council "for an opinion indicating its views and orientation on the wider implications of the absence of opinion, including the institutional, legal, political and international implications."[2084]

Arguably, the institutional implications of such a proposal are highly problematic.[2085] Firstly, the shift in the attitude of the Commission is remarkable, since for decades it has struggled to obtain more discretion in the exercise of implementing powers and now it seeks to shift the responsibility of highly controversial decisions to the Member States. This appears at odds with the aspirations of this institution to become "the principle executive authority or government of the Union"[2086] and to acquire autonomous executive competence.[2087] Secondly, the idea of bringing back the Council in the comitology system, but with a sort of advisory role, is equally remarkable. Although in this curious role, the reintroduction of the Council in comitology would constitute a distortion of the Lisbon conceptualisation of implementation, which confers on the Member States the responsibility of control over the Commission's implementation and makes the Council and the Parliament's rights equal. In re-proposing pre-Lisbon delegation schemes, this development, thus, corroborates the impression that, in spite of the intentions of innovation, the following practice tends to downsize the significance of the reform and, in the light of the parallel

[2082] See CRAIG Paul, *op. cit*. (2011), pp. 686-687.
[2083] GENCARELLI Fabio, *op. cit*. (2012), p. 12.
[2084] See Article 1 of Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85.
[2085] For an early comment on the constitutional implications of the proposal, see CHAMON Merijn, "The proposed Amendment of Comitology Regulation – A Constitutional Perspective", *VerfBlog,* 2017/2/19, http://verfassungsblog.de/the-proposed-amendment-of-the-2/3 (last accessed 25.2.2017).
[2086] European Parliament, Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, (2014/2248(INI), point 47. See also JUNKER Jean-Claude, *State of the Union 2015: Time for Honesty, Unity and Solidarity,* 9 September 2015, p. 1, cited also by CHAMON Merijn, *op. cit.* (2017), p. 2.
[2087] See European Commission, Communication on the Institutional Architecture. For the European Union Peace, Freedom, Solidarity, COM (2002) 728 final/2.

evolution of the application of Article 290 TFEU,[2088] to progressively blur the line between the two delegation regimes.

3.6. Transparency and Participation in the Comitology Procedures

The comitology system was severely criticised for its lack of transparency regarding the creation of committees, their composition and their activities.[2089] Favouring the progressive emerging of this obscure system to the light of the day, the Comitology Regulation contains precise obligations for the Commission in this regard.

In addition to the obligation to publish an annual report on the work of the committees,[2090] Article 10 of the Regulation establishes the maintenance of "a register of committee proceedings", listing the data which must be published therein.[2091] The Council and the Parliament have, thus, access to all this information without limitations, and they are informed of the availability of the documents at the same time as they are sent to the committee members.[2092] The information contained in the Comitology Register, however, is not equally accessible to the public. Pursuant to Article 10(5), only the references to certain data are made public in the register.[2093]

Thus, despite the apparent improvements, the limited access to the register for citizens and stakeholders casts a shadow on the transparency of comitology.[2094] To overcome the persistent shortcomings, the Commission committed to enhancing the transparency and participation in the procedures for the adoption of implementing acts,[2095] which it reiterated in the recent

[2088] See para. 2.2.
[2089] See, *inter alia*, JOERGES Christian and VOS Ellen, *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, 1999); BERGSTRÖM Carl Friedrik*, Comitology. Delegation of Powers in the European Union and the Comitology System*, (Oxford University Press, 2005).
[2090] Article 10(2) of the Comitology Regulation.
[2091] Article 10(1) of Comitology Regulation. In particular, the register must contain: "(a) a list of committees; (b) the agendas of committee meetings; (c) the summary records, together with the lists of the authorities and organisations to which the persons designated by the Member States to represent them belong; (d) the draft implementing acts on which the committees are asked to deliver an opinion; (e) the voting results; (f) the final draft implementing acts following delivery of the opinion of the committees; (g) information concerning the adoption of the final draft implementing acts by the Commission; and (h) statistical data on the work of the committees."
[2092] Article 10(3) and (4) of Comitology Regulation.
[2093] The Register can be accessed online at http://ec.europa.eu/transparency/regcomitology/index.cfm (last accessed 19.01.2018). It contains the references to the documents listed in Article 10(1) from (a) to (g), and full access to the statistical data.
[2094] For a critical assessment of the actual functionality of the Register, see BRANDSMA Gijs Jan, CURTIN Deirdre and MEIJER Albert, "How Transparent Are EU "Comitology" Committees in Practice?", 14 *European Law Journal* No. 6 (2008), pp. 819-838.
[2095] In particular, in its 2015 Communication the Commission promised to increase the transparency and the participation in the drafting of implementing acts, in particular making public for four weeks the draft text of "important implementing acts" which are subject to committee opinion and permitting to the stakeholders to submit comments before the starting of the relevant procedures. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and

Interinstitutional Agreement, ensuring that it would carry out public consultations, when appropriate, and consult the stakeholders, although only "targeted" stakeholders.[2096]

Finally, a contribution to the transparency of committee deliberations comes from the recent proposal for an amendment of the Comitology Regulation, which foresee the publication of "the voting results including, in the case of the appeal committee, the votes expressed by the representative of each Member State".[2097] Should the proposal be adopted, this would certainly shed light on the positions of the Member States in politically sensitive matters (such as GMOs or glyphosate authorisation) within the committees, pushing them to take responsibility for their votes before the public.

4. The Adoption of Implementing Powers by the Council

4.1. The Absence of Specific Procedural Constraints for the Council's Implementing Acts

In comparison to the highly formalised procedures for the adoption of implementing acts by the Commission, the exercise of implementing powers by the Council stands out due to the absence of a specific procedure to this end. Indeed, while Article 291(3) TFEU requires the Parliament and the Council to adopt rules and principles concerning the control mechanisms for "the Commission's exercise of implementing powers",[2098] there is no corresponding provision in relation to the Council. Clearly, the enabling act may establish specific procedures or conditions for the adoption of implementing acts by the Council. However, provisions of this kind are rarely introduced in the basic acts.

4.1.1. The Applicable Rules

In the absence of a specific applicable regime, the rules which govern the ordinary functioning of this institution are deemed to apply. Thus, the relevant procedural rules are to be found in the

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the Committee of the Regions Better regulation for better results - An EU agenda, COM(2015) 215 final, p. 5.

[2096] Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, point 28.

[2097] See Article 1 of Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85: "(3) Article 10 is amended as follows: (a) in paragraph 1, point (e) is replaced by the following: "(e) the voting results including, in the case of the appeal committee, the votes expressed by the representative of each Member State; "; (b) paragraph 5 is replaced by the following: "5. The references of all documents referred to in points (a) to (d), (f) and (g) of paragraph 1 as well as the information referred to in points (e) and (h) of that paragraph shall be made public in the register."

[2098] Article 291(3) TFEU.

Treaty provisions regarding the voting rules and the preparatory work of the Council,[2099] and in the Rules of Procedure of the Council.[2100] Not specifically identified as a separate procedure to be distinguished from the legislative procedure and the exercise of powers directly conferred by the Treaties, the fact that these powers derive from a peculiar legal mechanism such as the delegation of powers appears to have no bearing from a procedural perspective. Therefore, the procedure for the adoption of implementing acts corresponds to the procedure applicable to the decision-making activities of the Council in general.[2101]

4.1.2. The Absence of a Role for the Parliament

The absence of a specific procedure for the adoption of Council implementing acts appears highly controversial from an institutional balance perspective. While the structural composition of the Council inherently ensures a role for the Member States in the control of this form of delegation,[2102] the position of the Parliament is arguably more problematic. Clearly, the absence of a specific procedure is less controversial in the case of the reservation of powers,[2103] where the Council is the holder of the decision-making powers pursuant to primary law.[2104] However, in the cases constituting a true delegation of powers, the absence of a role for the Parliament, which has neither a right of veto nor a right of scrutiny in the procedure for the adoption of Council's implementing acts, raises significant concerns, especially in the light of the inherent risk of "sliding of powers" which the delegation to the Council entails.[2105]

[2099] Articles 237-243 TFEU.

[2100] Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325, 11.12.2009, p. 35–35. The original Decision was frequently amended, lastly by Council Decision 2016/2353 of 8 December 2016, OJ L 348, 21.12.2016, p. 27. The Rules of Procedure bind the Council in the exercise of its powers even where the majority of Member States is in favour of a derogation. In that case, it is necessary firstly to modify the Rules of Procedure, and only subsequently a measure can be adopted according to a derogatory procedure. A disregard of the Rules of Procedure may result in the annulment of the measure by the Court, as the UK obtained in the *Hormones* case. See Case 68/86, *UK v Council (Hormones)*, EU:C:1988:85, paras 48-49. See also JACQUE Jean Paul, *op. cit.* (2012), p. 316.

[2101] For a description of the Council's procedures, see WESTLAKE Martin and GALLOWAY David, *The Council of the European Union,* (John Harper Publishing, 2004); JACQUE Jean Paul, *op. cit.* (2012), pp. 292-366; CRAIG Paul and DE BURCA Grainne, *EU Law. Text, Cases and Materials*, 5th ed., (Oxford University Press, 2011), pp. 41-47; TESAURO Giuseppe, *Diritto dell'Unione europea,* VI ed. (Cedam, 2011), pp. 34-41; CURTIN Deirdre, *op. cit*. (2009), pp. 81-91.

[2102] On the nature of the Council as "a unique blend of the intergovernmental and the supranational", see the interesting reflections of PETERSON John and SCHACKLETON Michael (eds.), *The Institutions of the European Union,* (Oxford University Press, 2006); CHRISTIANSEN Thomas, "The Council of Ministers, Facilitating Interactions and Developping Actorness in the EU", in RICHARDSON (ed.), *European Union, Power and Policy-Making*, (Routledge, 2006).

[2103] For the cases of reservation of powers, see Chapter 3, para. 3.4.

[2104] However, on the need to respect the institutional balance and the Treaty-based procedures also in this case, see Chapter 4, paras. 2.7 and 5.6.

[2105] See Chapter 2, para. 3.2.

Where the basic act is adopted by ordinary legislative procedure, the powers delegated were originally shared with the Parliament, which is a co-legislator and, thus, a co-delegator of the powers. Although the delegation of powers does not *per se* entail a legal relationship between the delegator and the delegate, the institutional balance principle requires the possibility of control in the *ultra vires* exercise of the delegated powers (although modulated according to the nature of the powers). This is even more evident considering that the Council is not subject to accountability obligations towards the Parliament, unlike the Commission which is politically responsible before the Parliament. In case of an abuse of delegated powers, the only possible reaction for the Parliament is to bring an action before the Court of Justice for the annulment of the contested measure, giving rise to interinstitutional litigation.[2106]

4.2. The Transparency of the Procedure

It is questionable whether the absence of specific procedural constraints for the adoption of the Council's implementing acts is compensated by enhanced transparency in the procedure, providing a complementary source of legitimacy for the exercise of these decision-making powers. In this regard, however, it is important to recall that, according to Article 16(8) TEU, the Council shall meet in public only "when it deliberates and votes on a draft legislative act".[2107] Thus, while in a legislative procedure the opening to the public of Council meetings is mandatory,[2108] other decision-making procedures, including the adoption of implementing acts, are not required to be public under primary law.

However, Article 8 of the Rules of Procedure provides that the Council's first deliberation on important new non-legislative proposals must be open to the public.[2109] Moreover, according to Article 9, the results of the votes, their explanations, the statements in the Council and the items in the minutes are also made public where the Council adopts non-legislative acts.[2110] Therefore, the publicity and transparency of the procedures for the adoption of non-legislative acts, including implementing acts, are guaranteed by this provision, which supplements the more limited rule in

[2106] Examples of such actions are abundant, see, *inter alia*, Case C-133/06, *Parliament v Council*, EU:C:2008:257; Case C-363/14, *Parliament v Council*, EU:C:2015:579; Case C-355/10, *Parliament v Council*, EU:C:2012:516.
[2107] Article 16(8) TEU.
[2108] It is carried out through audio-visual means and through the publication of the minutes containing the results of the votes and members' statements, see Article 7 of the Council's Rules of Procedure.
[2109] Article 8 of the Council's Rules of Procedure. The provision applies "with the exception of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)".
[2110] Article 9 of the Council's Rules of Procedure.

primary law,[2111] but arguably it does not sooth the relevant concerns on the legitimacy of this form of delegation.

5. The Exercise of the Delegated Powers by the ECB

5.1. The Procedures for the Exercise of ECB's Powers

5.1.1. The Applicable Rules

Turning now to consider the delegation of powers to the ECB, it is noteworthy that Article 127(6) TFEU does not mention procedural constraints for the exercise of the delegated powers by the ECB. In this regard, however, the SSM Regulation contains detailed rules on the procedure to be followed, which, pursuant to Article 26(12), are to be supplemented by internal rules of procedures of the Governing Council[2112] and the Supervisory Board.[2113] It is clarified, moreover, that in its decision-making procedures the ECB "should be bound by Union rules and general principles on due process and transparency".[2114]

Furthermore, the concrete functioning of the SSM, and of the related exercise of delegated powers by the ECB, was progressively regulated by interinstitutional instruments which aim at assuring the accountability of the ECB in relation to its tasks,[2115] as well as by a number of ECB measures meant to organise the decision-making activities efficiently in the context of the banking supervision.[2116]

[2111] See JACQUE Jean Paul, *op. cit.* (2012), p. 344.

[2112] See Decision of the ECB of 22 January 2014 amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the ECB (ECB/2014/1), OJ L 95, 29.3.2014, p. 56. See also Decision of the ECB of 6 February 2014 on the appointment of representatives of the ECB to the Supervisory Board (ECB/2014/4), OJ L 196, 3.7.2014, p. 38.

[2113] See Rules of Procedure of the Supervisory Board of the ECB, OJ L 182, 21.6.2014, p. 56; Amendment 1/2014 of 15 December 2014 to the Rules of Procedure of the Supervisory Board of the ECB, OJ L 68, 13.3.2015, p. 88.

[2114] Recital 54 of the SSM Regulation.

[2115] Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism OJ L 320, 30.11.2013, p. 2; Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) 11.12.2013.

[2116] See, *inter alia*, Regulation of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), OJ L 141, 14.5.2014, p. 1; Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5), OJ L 198, 5.7.2014, p. 7; Decision of the ECB of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the ECB (ECB/2014/39), OJ L 300, 18.10.2014, p. 57; Regulation (EU) No. 1163/2014 of the ECB of 22 October 2014 on supervisory fees (ECB/2014/41), OJ L 311, 31.10.2014, p. 23; Code of conduct for the members of the Supervisory Board of the ECB OJ C 93, 20.3.2015, p. 2; Guideline

5.1.2. The Procedures for the Adoption of the Acts

The procedure for the exercise of the delegated powers by the ECB can be distinguished in two phases which are undertaken by different institutional actors within the ECB. While the preparatory work is carried out by the Supervisory Board, the Governing Council takes the final decision with legal effects vis-à-vis third parties.

5.1.2.1. The Procedure within the Supervisory Board

Pursuant to Article 26 of the SSM Regulation, the planning and execution of the tasks conferred on the ECB in relation to banking supervision must be "fully undertaken" by the Supervisory Board, an internal body of the institution.[2117] The Supervisory Board carries out preparatory works regarding the supervisory tasks conferred on the ECB and adopts a draft decision.[2118] To this end, the Board votes by single majority of its members, with a quorum of two thirds of the members.[2119] After the vote, this body proposes a draft decision to the Governing Council of the ECB, which must be complete and ready to be adopted. The draft decision is transmitted together with explanatory notes outlining the background and the main reasons underlying the draft decision.[2120] At the same time, the draft decision is transmitted to the national competent authorities of the Member States concerned by the decision.[2121]

Remarkably, the adoption of measures in the form of regulations, as binding legal instruments of general application, is subject to additional constraints which, on the one hand, limit the adoption of these instruments, and, on the other hand, aim to guarantee more transparency and proportionality in the exercise of the powers by the ECB. Thus, it can adopt regulations "only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it",[2122] and, should it be appropriate, it must conduct open public consultations and

(EU) 2015/856 of the ECB of 12 March 2015 laying down the principles of an Ethics Framework for the Single Supervisory Mechanism (ECB/2015/12), OJ L 135, 2.6.2015, p. 29; Decision (EU) 2017/933 of the ECB of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40), OJ L 141, 1.6.2017, p. 14; Decision (EU) 2017/934 of the ECB of 16 November 2016 on the delegation of decisions on the significance of supervised entities (ECB/2016/41), OJ L 141, 1.6.2017, p. 18; Decision (EU) 2017/935 of the ECB of 16 November 2016 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42), OJ L 141, 1.6.2017, p. 21.

[2117] Article 26(1) of the Regulation. On the composition of the Supervisory Board, see Chapter 3, para. 5.3.5.

[2118] The organisation of the meetings, the transmission of documents and the possibility of internal delegation are regulated in detail by the Rules of Procedure of the Supervisory Board.

[2119] Article 6 of the Rules of Procedure of the Supervisory Board, OJ L 182, 21.6.2014, pp. 56-60. Each Member has one vote, and in case of draw, the Chair has the casting vote, see Article 26(6) of the Regulation.

[2120] Article 13g of the Rules of Procedure of the ECB.

[2121] Article 26(8) of the Regulation.

[2122] Article 4(3), second paragraph, of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.

a careful cost-benefit analysis before adopting the regulation.[2123] Moreover, the Supervisory Board decides on the adoption of regulations on the basis of a qualified majority of its members.[2124]

5.1.2.2. The Procedure within the Governing Council

The transmission of the draft decision by the Supervisory Board initiates the phase before the Governing Council of the ECB. The Governing Council is the main decision-making body of the ECB, consisting of six members of the Executive Board of the ECB, plus the governors of the national central banks of the 19 euro-area countries.[2125] The coordination between the Supervisory Board and the Governing Council is assured by the secretariat of the two bodies, and additional substructures of a temporary nature, such as working groups and task forces, can be created to assist the work regarding the supervisory tasks.[2126]

Being vested with the power to adopt the final decision, the Governing Council receives the draft decision, which is sent to all the members at least eight days before the meeting with the relevant documents.[2127] For these purposes, the Governing Council meets separately from regular Governing Council meetings, assuring a separation between the monetary policy and the supervisory tasks.[2128]

Pursuant to Article 26(8) of the SSM Regulation, the draft decision must be deemed adopted unless the Governing Council objects within a period of ten working days.[2129] In emergencies, the period may be reduced by the Supervisory Board. If the Governing Council decides to object to a

[2123] Article 4(3), third paragraph, of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.
[2124] Article 26(7) of the Regulation. In particular, "decisions shall be deemed adopted when at least 55 % of the Supervisory Board members representing at least 65 % of the total population, cast a vote in favour. A blocking minority must include at least the minimum number of Supervisory Board members representing 35 % of the total population, plus one member, failing which the qualified majority shall be deemed attained.", see Article 13c of the Rules of procedure of the ECB.
[2125] Article 283 TFEU.
[2126] Article 13m of the Rules of Procedure of the ECB.
[2127] Incidentally, it is noteworthy that the ECB makes extensive use of intra-institutional delegations. Motivated by the high number of decisions to be taken per year (for instance, in 2015 1.500 decisions were taken), the tasks of the Governing Council are often delegated to heads of work units of the ECB. See Decision (EU) 2017/933 of the ECB of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40), OJ L 141, 1.6.2017, p. 14.
[2128] Articles 13k and 13l of the Rules of Procedure of the ECB. See also Article 25 of the SSM Regulation. In this regard, although the efforts to separate these two fields of action of the ECB, the interplay between the two is still perceived as problematic in the overall understanding of the ECB role in the EU institutional architecture. See ALEXANDER Kern, "The ECB and Banking Supervision: Building Effective Prudential Supervision?" 33 *Yearbook of European Law* No. 1 (2014), p. 430. See also the discussion in Chapter 3, para. 5.3.
[2129] Article 26(8) of the SSM Regulation. See also Article 13g.2 of the Rules of Procedure of the ECB.

draft decision, it is required to state the reasons for doing so in writing, explaining in particular the aspects related to the monetary policy.[2130]

5.1.2.3. Reverse Majority Voting

The SSM Regulation does not specify the voting rules applicable to this phase of the procedure. Therefore, it can be assumed that the vote is governed by the general rule laid down in Article 10(2) of the Statute of the ESCB and ECB.[2131] Accordingly, following complex rules of rotation of voting rights,[2132] the Governing Council acts by a simple majority of the members having a voting right and a quorum of two-thirds of the members having a voting right applies. Therefore, to block the draft decision proposed by the Supervisory Board from entering into force, a majority of members has to vote for raising an objection to the draft decision. In fact, the result is a reversion of the majority voting which is required for the adoption of other ECB measures.[2133]

Considering the issue of the "reverse majority voting" more specifically in the framework of the delegation of powers, however, an interesting parallel may be drawn with the voting rules requested for the objection to delegated acts and implementing acts under the examination procedure.[2134] Indeed, also in those cases a qualified majority in the Council or a qualified majority of Member States' representatives in the committee has to vote against the measure in order to hinder its entry into force. However, while the "reverse majority voting" appears in line the institutional role enjoyed by the Commission under Articles 290 and 291 TFEU,[2135] here this mechanism confers an autonomy to the Supervisory Board which makes it the real beneficiary of the delegation of powers.

[2130] Article 26(8) of the SSM Regulation.

[2131] Protocol (No. 4) on the Statute of the European System of Central Banks and of the ECB OJ C 202, 7.6.2016, p. 230.

[2132] See Article 10(2) of the Statute: "Each member of the Governing Council shall have one vote. As from the date on which the number of members of the Governing Council exceeds 21, each member of the Executive Board shall have one vote and the number of governors with a voting right shall be 15. The latter voting rights shall be assigned and shall rotate as follows: as from the date on which the number of governors exceeds 15, until it reaches 22, the governors shall be allocated to two groups, according to a ranking of the size of the share of their national central bank's Member State in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions of the Member States whose currency is the euro. The shares in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions shall be assigned weights of 5/6 and 1/6, respectively. The first group shall be composed of five governors and the second group of the remaining governors. The frequency of voting rights of the governors allocated to the first group shall not be lower than the frequency of voting rights of those of the second group. Subject to the previous sentence, the first group shall be assigned four voting rights and the second group eleven voting rights, […]"

[2133] See WEISSMANN Paul, "The European Central Bank (ECB) under the Single Supervisory Mechanism. Its Functioning and its Limits", *TARN Working Paper* 1/2017 (2017), p. 13.

[2134] BARATTA Roberto, *op. cit*. (2014), p. 268.

[2135] BARATTA Roberto, *op. cit*. (2014), p. 269.

Moreover, in this case the reverse majority voting is not required to veto another institution's measure, but instead, since the Supervisory Board does not represent a separate entity, to adopt it as a measure of the ECB. This has the effect of derogating from the voting rules established in the Statute of the ECB, which, being a Protocol to the Lisbon Treaty, has the same hierarchical position as the latter.[2136] Considering that "the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal […] of the institutions",[2137] the weakened majority requirements ultimately might amount to a breach of primary law, which reasons of efficiency hardly justify.[2138]

5.1.2.4. Due Process and the Administrative Board

In adopting its decisions, the ECB is bound to comply with the principles of due process and transparency, giving to the persons who are subject to the proceedings the opportunity to be heard. Therefore, except in cases of urgency, the ECB must set up a procedure guaranteeing a right of defence and access to information.[2139]

Moreover, an Administrative Board of Review is set up to review the decisions taken by the ECB in the exercise of its powers in banking supervision, "acting independently and in the public interest".[2140] Therefore, any natural or legal person, directly and individually concerned, may request a review of the procedural and substantive conformity of a decision of the ECB with the Regulation. Should the Administrative Board find a violation, the Supervisory Board is bound to prepare a new draft decision, taking into account the opinion expressed.[2141]

5.2. Controlling the Exercise of the ECB's Delegated Powers

5.2.1. The Independence of the ECB and its Accountability

The analysis of the procedure for the exercise of the powers delegated in the SSM Regulation shows that it is carried out internally in the ECB, without the involvement of other institutional actors. In line with the position of the ECB in the institutional balance established in the

[2136] The same distortion was noted in relation to the "Six-Pack", the "Two-Pack" and on the Treaty on Stability, Coordination and Governance. See PALMSTORFER Rainer, "The reverse majority voting under the "six pack": a bad turn for the Union?", 20 *European Law Journal* No. 2 (2014), pp. 186-203; VAN AKEN Wim and ARTIGE Lionel, "Reverse Majority Voting in Comparative Perspective: Implications for Fiscal Governance in the EU", in DE WITTE Bruno, HERITIER Adrienne and TRECHSEL Alexander H., *The Euro Crisis and the State of European Democracy*, (European University Institute, 2013), p. 129. See also BARATTA Roberto, *op. cit*. (2014), pp. 267-271.
[2137] Case 68/86, *UK v Council*, EU:C:1988:85, para. 38.
[2138] See WEISSMANN Paul, *op. cit.* (2017), p. 14. See also BARATTA Roberto, *op. cit.* (2014), p. 270.
[2139] Article 22 of the SSM Regulation.
[2140] Article 24 of the SSM Regulation.
[2141] Article 24(7) of the SSM Regulation.

Treaties,[2142] the ECB is called to "exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence".[2143]

While the specificity of this independence may justify the absence of direct control mechanisms in the adoption of the relevant acts, it does not prevent the ECB from being accountable for the exercise of its powers.[2144] Hence, it seems that, in relation to this institution, the control over the exercise of the delegation of powers does not take the form of an ongoing control over its activities, but primarily the form of *ex post* mechanisms of accountability,[2145] which aim to ensure the democratic legitimacy and oversight on the ECB's activities. Therefore, the SSM Regulation sets forth specific rules aimed at holding this institution to account for the exercise of its tasks,[2146] supplemented by interinstitutional instruments.[2147]

5.2.2. The Role of the Parliament and the Council

Entrusting the ECB with new and different tasks, the delegation of significant powers in the field of banking supervision arguably requires stricter control and stronger democratic legitimacy.[2148] In this regard, the Commission recognised as a specific point to address (also in view of a potential treaty change) "to strengthen democratic accountability over the ECB insofar as it acts as a banking supervisor."[2149] In line with Article 10 TEU, the SSM Regulation refers to the Parliament

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[2142] See Article 130 TFEU, Article 282(3) TFEU, Article 7 ESCB Statute. On ECB's independence, see Chapter 4, para. 5.1 and literature cited therein.

[2143] Recital 75 of the SSM Regulation. See also ZILIOLI Chiara, "The Independence of the European Central Bank and its New Banking Supervisory Competences", in RITLENG Dominique (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, (Oxford University Press, 2016), pp. 125-179.

[2144] FROMAGE Diane and IBRIDO Renato, "The "Banking Dialogue" as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?", 49 *Journal of European Integration* No. 3 (forthcoming). See also ZILIOLI Chiara, "Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank", in VANDERSANDEN Georges and DE WALSCHE Aline (eds.), *Mélanges en hommage à Jean-Victor Louis,* vol. II (Editions de l'Université de Bruxelles, 2003), pp. 399-422; ALEXANDER Kern, "The ECB and Banking Supervision: Building Effective Prudential Supervision?" 33 *Yearbook of European Law* No. 1 (2014), p. 428. On the relation between independence and accountability in general, see *inter alia* SCHOLTEN Miroslava, "Independence vs. Accountability: Proving the Negative Correlation", 21 *Maastricht Journal of European and Comparative Law* No.1 (2014) pp. 197-204; BUSUIOC Madalina, "Accountability, Control and Independence: The Case of European Agencies", 15 *European Law Journal* No. 5 (2009), pp. 599 - 615.

[2145] For a definition of ongoing control and *ex post* control (or accountability, see VOS Ellen, *op. cit. (*2014), p. 34.

[2146] See Article 20 and Recital 66 of the SSM Regulation.

[2147] Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism OJ L 320, 30.11.2013, p. 2; Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) 11.12.2013.

[2148] WOLFERS Benedikt and VOLAND Thomas, "Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank", 51 *Common Market Law Review* (2014), p. 1487.

[2149] Recital 85 of the SSM Regulation and Communication from the Commission, *A Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate*, COM(2012) 777, p. 39.

and the Council as the two "democratically legitimised institutions representing the citizens of the Union and of the Member States",[2150] which should thus exercise this control over the ECB's activities.

5.2.2.1. The Appointment Powers

Considering the specific accountability mechanisms in place, it is important to highlight that the Parliament and the Council have a key role in the appointment and removal of the Chair and the Vice Chair of the Supervisory Board. On the one hand, pursuant to Article 26(4) of the SSM Regulation, the candidate proposed by the ECB for the appointment of the Chair and the Vice-Chair needs the approval of the Parliament and an implementing decision of the Council.[2151] On the other hand, in specified cases,[2152] the removal from office of the Chair and the Vice Chair is decided with an implementing act of the Council, upon the proposal of the ECB and after the approval of the Parliament.[2153] Therefore, in this context, the Parliament enjoys a more significant power than under Treaties' provisions on monetary policy.[2154]

The practical arrangements for the exercise of these rights and further guarantees of transparency and information in the procedure are established in two interinstitutional agreements between the ECB and, respectively, the Parliament and the Council signed in 2013.[2155] In particular, the interinstitutional agreement with the Parliament provides for a public hearing of the proposed Chair and Vice Chair in the competent committee,[2156] thus also enhancing the transparency of the procedure in favour of citizens and stakeholders.

5.2.2.2. Hearings and Reporting Obligations

Article 20(2) of the SSM Regulation requires the ECB to submit a report to the Parliament, to the Council, to the Commission and to the Eurogroup every year on the execution of the tasks

[2150] Recital 55 of the SSM Regulation.
[2151] The Council votes by qualified majority without taking into account the vote of the non participating Member States. The Parliament and Council shall be kept duly informed during the procedure. See Article 26(3) of the SSM Regulation.
[2152] In particular, if the Chair no longer fulfils the conditions required for the performance of his/her duties or has been guilty of serious misconduct, or the Vice-Chair was subject to a compulsory retirement. See Article 26(4) of the SSM Regulation.
[2153] Article 26(4) of the SSM Regulation.
[2154] FROMAGE Diane and IBRIDO Renato, *op. cit*. (forthcoming).
[2155] Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, p. 2-6; Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) 11.12.2013.
[2156] Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, p. 5.

conferred on it.[2157] The abovementioned interinstitutional agreements contain a list of the elements to be inserted in the annual report and regulate the transmission by the ECB.[2158] The annual report is presented by the Chair of the Supervisory Board in public to the Parliament and to the Eurogroup.[2159] In this, it does not significantly differ from the obligations incumbent upon the ECB in relation to monetary policy.[2160]

Moreover, the Chair may be requested by the Parliament or by the Eurogroup "to be heard on the execution of its supervisory tasks"[2161] and to answer questions orally or in writing put by the two institutions.[2162] Potentially concerning highly sensitive information capable of affecting the financial stability of the banking sector in the EU, detailed rules aimed at assuring the confidentiality of discussions and transmission of data apply.[2163] In this regard, empirical research has shown that, although these hearings take place regularly, their effectiveness may be impaired by the high levels of secrecy characterising banking supervision.[2164] Finally, in relation to the right of investigation granted to the Parliament by Article 226 TFEU, specific arrangements are provided in order to ensure the sincere cooperation of the ECB and their effectiveness.[2165]

5.2.2.3. Enhancing the Role of the Parliament

Although the accountability mechanisms described are applicable to the Parliament and the Council on equal footing, this should not conceal that the role of the Parliament towards the

[2157] Article 20(2) of the SSM Regulation.
[2158] According to the Interinstitutional Agreement with the Parliament, the report must contain: "i. execution of supervisory tasks, ii. sharing of tasks with the national supervisory authorities, iii. cooperation with other national or Union relevant authorities, iv. separation between monetary policy and supervisory tasks, v. evolution of supervisory structure and staffing, including the number and the national composition of Seconded National Experts, vi. implementation of the Code of Conduct, vii. method of calculation and amount of supervisory fees, viii. budget for supervisory tasks, ix. experience with reporting on the basis of Article 23 of Regulation (EU) No. 1024/2013 (Reporting of violations)." The Memorandum of Understanding with the Council, though, requires also the transmission of an annex listing the legal instruments adopted by the ECB pursuant to Article 4(3) of the SSM Regulation.
[2159] In the latter case, representatives of the Member States whose currency is not the euro must be present, see Article 20(3) of the SSM Regulation.
[2160] See Article 15 of the ECB Statute. WOLFERS Benedikt and VOLAND Thomas, *op. cit.* (2014), p. 1489.
[2161] Article 20(4) and (5) of the SSM Regulation.
[2162] Article 20(6) of the SSM Regulation.
[2163] See Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, pp. 3-4; Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) 11.12.2013, p. 3.
[2164] See CURTIN Deirdre, "Accountable Independence of the European Central Bank: Seeing the Logics of Transparency", 23 *European Law Journal* (2017), pp. 28-44; FROMAGE Diane and IBRIDO Renato, *op. cit.* (forthcoming).
[2165] Article 20(9) of the SSM Regulation. See also Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, pp. 5-6.

delegation of powers to the ECB presents certain shortcomings. Firstly, pursuant to Article 127(6) TFEU, the SSM Regulation was adopted according to a special legislative procedure which limits the role of the Parliament to mere consultation. Secondly, unlike the case of the Commission and EU agencies, the Parliament enjoys no budgetary control over the activities of the ECB, thus being deprived of a relevant instrument for the control of this institution. To enhance the parliamentary control over the ECB, the Commission proposed to address these shortcomings in its 2012 Communication, launching a debate on the democratic accountability of the SSM system, and of the EMU in general.[2166] Such a debate appears even more necessary in the light of the problematic interplay between monetary policy and banking supervision, which asks the ECB to balance between the potentially conflicting interests, putting into question how adequate the control mechanisms in place are.

5.2.3. The Role of the Member States and Other Institutional Actors

The delegation of powers to the ECB takes place in a domain which has for a long time remained the responsibility of the national authorities.[2167] This vertical shift of banking supervision has underpinned the idea that "the conferral of powers to the Union level should be balanced by appropriate accountability requirements" including the national level.[2168] Therefore, particular mechanisms are recognised to ensure the involvement of the Member States in the procedure for the exercise of the delegated powers.

Firstly, the involvement of the Member States can be recognised structurally in the composition of the decision-making bodies of the ECB. Indeed, while the Supervisory Board is mostly composed of the representatives of the national competent authorities, the Governing Council encompasses the governors of the national central banks of the 19 euro-area countries. The presence of its governor in the Governing Council is recognised as conferring on the Member State benefits and safeguards which, conversely, the Member States which do not have the euro as their currency but participate in the SSM do not enjoy.[2169] To compensate this limitation, additional safeguards are provided to them. In particular, a participating Member State whose currency is not the euro may oppose the adoption of draft decisions of the Supervisory Board, informing the Governing Council of its reasoned disagreement within five days.[2170] After the assessment on the

[2166] Communication from the Commission, *A Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate*, COM(2012) 777, p. 39.
[2167] FROMAGE Diane and IBRIDO Renato, *op. cit.* (forthcoming).
[2168] Interinstitutional Agreement between the European Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, Recital D.
[2169] See Recital 43 of the SSM Regulation.
[2170] Article 26(8) and Article 7(8) of the SSM Regulation.

matter of the Governing Council, the Member State may request the ECB to terminate the close cooperation with immediate effect and it will not abide by the decision.[2171] Thus, the consequence is momentous, removing the Member State from the SSM.

Secondly, considering "the potential impact that supervisory measures may have on public finances, credit institutions, their consumers and employees, and the markets in the participating Member States",[2172] Article 21 of the SSM Regulation sets forth a particular mechanism involving the national parliaments in the accountability of the ECB. Indeed, within the framework of the "Banking Dialogue",[2173] the ECB is bound to forward the annual report directly to the national parliaments, which can submit reasoned observations and questions and even invite members of the Supervisory Board to an exchange of views.[2174] Although not often exploited, this mechanism establishes an unprecedented relationship between the delegate and national parliaments, opening new scenarios in the accountability of EU institutions whose implications for the institutional balance would need further examination.[2175]

Finally, it is noteworthy that the exercise of the delegated powers by the ECB is characterised by several cooperation obligations with other institutional actors. In this regard, the ECB is bound to cooperate closely not only with the national competent authorities in banking supervision, but also with EBA, ESMA, EIOPA and the ESRB, the EFSF, and the ESM without prejudice to their reciprocal competences.[2176] While this complex web of accountability and cooperation relationships contributes to curb the ECB's discretion in different procedural constrains, it is questionable whether, in the end, this contributes to an effective control of its powers in line with the requirements of the delegation of powers.[2177]

6. The Exercise of the Delegated Powers by EU Agencies

6.1. The Need to Supervise the Delegated Powers in the Plurality of Agencies' Procedures

In relation to the delegation of powers to EU agencies, it is important to underline that, in the case law, the need for control and supervision on the exercise of the delegated powers is expressed

[2171] Ibidem.
[2172] Recital 56 of the SSM Regulation. In this regard, however, it is questionable whether such consequences are peculiar to the SSM or similar consequences may be recognised also in other forms of delegation of powers.
[2173] FROMAGE Diane and IBRIDO Renato, *op. cit*. (forthcoming).
[2174] Article 21 of the SSM Regulation.
[2175] FROMAGE Diane and IBRIDO Renato, *op. cit*. (forthcoming).
[2176] Article 3 of the SSM Regulation.
[2177] See the discussion *infra*, para. 6.3.4.

with more emphasis on this phenomenon than on the other forms of delegation. As emerged already in *Meroni,* a condition for a lawful delegation of powers is that "the use of [the delegated powers] must be entirely subject to the supervision" of the delegator.[2178] In this sense, the existence of "legal procedures which will guarantee the observance of the law in the activities of the [delegate],"[2179] together with judicial remedies to ensure individuals' effective judicial protection, is considered a crucial element for the legality of the delegation of powers.

Albeit less evident, the principle re-emerged in the reasoning of the *Short Selling* case where it was underlined that the ESMA is subject to consultation and notification obligations in the exercise of the powers under examination, as well as to periodically review the measures adopted.[2180] In the Court's view, these procedural requirements contributed to circumscribe ESMA's margin of discretion, constituting an important element of the detailed framework embedding the delegation of powers to this body.[2181] Interestingly, however, the reasoning of the Court refers to these procedural requirements in illustrative terms, leaving room for different "criteria and conditions" depending on the operating design of the agency in question.[2182]

This is particularly pertinent considering the plurality of the procedures applicable to the exercise of the agencies' powers. Indeed, such procedures are set forth in the regulations establishing each agency and, also due to the haphazard development of the agencification phenomenon, they may vary significantly from each other, escaping the recognition of common rules within procedures regulated autonomously and separately.[2183] Thus, for instance, while EASA basic regulation contains precise procedural rules to be applied in all the procedures for the exercise of its powers,[2184] other founding regulations are more laconic on this aspect. This absence of a homogeneous regime for the exercise of the powers delegated to EU agencies, in particular, was

[2178] Joined Cases 9/56 and 10/56, *Meroni*, EU:C:1958:4, p. 152. See also Opinion of Advocate General Roemer in the same case, p. 190.
[2179] Opinion 1/*76 (Inland waterway vessels),* EU:C:1977:63, para. 21.
[2180] Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling),* EU:C:2014:18, para. 50.
[2181] See, *inter alia*, SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The ESMA-Short Selling Case. Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants", 41 Legal Issues of Economic Integration No. 4 (2014), p. 401; BONICHOT Jean-Claude, "A propos de l'attribution du pouvoir réglementaire à l'Autorité européenne des marches financiers", 30 *Revue français de droit administratif* No. 2 (2014), p. 329; CLEMENT-WILZ Laure, "Les agences de l'Union européenne dans l'entre-duex constitutionnel", *RTDeur* (2015), p. 241.
[2182] Widening the reasoning to the frameworks in Articles 290 and 291 TFEU, BERGSTROM Carl Fredrik, "Shaping the New System for Delegation of Powers to EU Agencies: *United Kingdom v European Parliament and Council (Short Selling)*", 52 *Common Market Law Review* (2015), p. 240.
[2183] CHITI Edoardo, "European Agencies' Rulemaking: Powers, Procedures and Assessment", 19 *European Law Journal* No. 1 (2013), p. 100; TOVO Carlo, *Le agenzie decentrate dell'Unione europea*, (Editoriale Scientifica, 2016), p. 268.
[2184] Articles 33, 52, 53 and 58 of Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ L 79, 19.3.2008, p. 1–49. They are supplemented by EASA Management Board Decision 18-2015. See CHITI Edoardo, *op. cit.* (2013), p. 102.

not addressed by the Common Approach on decentralised agencies signed in 2012, which rather focused on the creation, organisation and accountability of these bodies.[2185]

6.2. EU Agencies between Control and Independence

The difficulties in designing common procedural constraints and control mechanisms in relation to the exercise of delegated powers are arguably related to the issue of the independence of EU agencies. Created to ensure credible policy commitments in controversial fields, and sometimes precisely as a reaction to credibility failures of EU institutions,[2186] EU agencies are meant to operate "at arm's length from politics and political control".[2187] As recognised by the Commission, "the independence of their technical and/or scientific assessments is […] their real *raison d'être"*[2188] Indeed, the delegation of powers to the EU agencies, as non-majoritarian, efficiency-oriented bodies, was often justified - and promoted - on the ground that it could assure scientifically and technically sound decisions free from political bias.[2189]

With the growth of agencification in quantitative and qualitative terms, however, the independence of these bodies was increasingly perceived as problematic, raising concerns that EU agencies might become "uncontrollable centres of arbitrary powers".[2190] For this reason, proposals to strengthen the oversight of the Parliament, the Council or the Commission on the exercise of the delegated powers by EU agencies were put forward, both in the literature[2191] and in official documents.[2192] However, these efforts did not result in direct control mechanisms towards the agencies' acts,[2193] such as the veto rights accorded to the legislator or the Member States under Article 290 or the Comitology Regulation, but rather in an intriguing mix of control mechanisms which stems from the institutional design and the accountability obligations of these bodies.[2194]

[2185] Cf. European Commission, Proposal for Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM(2005) 59 final.
[2186] See Chapter 3, para. 4.2.
[2187] BUSUIOC Madalina, *op. cit*. (2013), p. 114.
[2188] European Commission, Communication from the Commission. The Operating Framework for the European Regulatory Agencies, COM(2002) 718, p. 5.
[2189] GRILLER Stefan and ORATOR Andreas, "Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine", 35 *European Law Review No.* 1 (2010), pp. 21-22, referring to the theory of MAJONE Giandomenico (ed.), *Regulating Europe,* (Routledge, 1996).
[2190] EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), p. 183.
[2191] See, *inter alia*, GRILLER Stefan and ORATOR Andreas, *op. cit. (*2010), pp. 27-29.
[2192] See, *inter alia*, European Parliament, Resolution on the typology of acts and the hierarchy of legislation in the European Union, OJ C 31E/126 of 2002, point 17. The Parliament proposed, in particular, to introduce a scrutiny mechanism allowing the Commission, the Council and the Parliament to repeal agencies' acts.
[2193] With the exception of the peculiar alert/warning system, which will be discussed *infra* para. 6.3.5.
[2194] There is abundant literature regarding the accountability of EU agencies and its limits. For the purposes of this study, however, it is sufficient to mention the mechanisms specifically related to, or specifically

6.3. Controlling the Exercise of Agencies' Delegated Powers

6.3.1. The Manifold Control in the Management Boards

While executive agencies operate under the strict supervision of the Commission,[2195] the decentralised agencies are subject to a plurality of control and accountability mechanisms, which involve different institutional actors according the different founding regulations. Such manifold control emerges, in particular, from the composition of the Management Boards of EU agencies.

In this regard, it is noteworthy that, in spite of the variety of founding regulations, the organisational structure of these bodies is generally similar, being composed of a Management Board,[2196] scientific or advisory committees, an executive director, a secretariat and different networks.[2197] While the preparatory work requiring technical expertise is generally carried out by the scientific committees or by other internal panels composed of experts in the field,[2198] the responsibility for the management and representation of the agency lies with the director, according to the rules established in the basic regulations.[2199] In this context, the Management Boards operate as the steering bodies of EU agencies, *inter alia* adopting the agencies' work programme and budget, and appointing and dismissing the director.[2200]

Reflecting the plurality of the institutional actors involved in the control of the agencies, the Management Board is composed of one representative from each Member State,[2201] one or two

affecting, the powers exercised pursuant to a true delegation. See, *inter alia*, BUSUIOC Madalina, *op. cit.* (2013); CURTIN Deirdre, *op. cit.* (2007), pp. 523-541; ARNULL Anthony and WINCOTT Daniel, *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002); BUSUIOC Madalina and GROENLEER Martijn, *op. cit.* (2014), pp. 175-200; BUESS Micheal, "European Union Agencies' Vertical Relationships with the Member States: Domestic Sources of Accountability?", 36 *Journal of European Integration* No. 5 (2014), pp. 509-524; BUSUIOC Madalina, *op. cit.* (2009), pp. 599-625; SCHOLTEN Miroslava, "Independence v. Accountability: Proving the Negative Correlation", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014), pp. 197-204.

[2195] See Council Regulation (EC) No. 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.1.2003, p. 1–8. See Chapter 3, para. 3.3.

[2196] This body may be called also Governing or Administrative Board, College or Supervisory Board, as in the case of ESAs. See BUSUIOC Madalina, *op. cit.* (2013), p. 76.

[2197] VOS Ellen, *op. cit.* (2014), p. 25.

[2198] See, for instance, Committee for Medicinal Products for Human Use in EMA (Article 5 of Regulation (EC) No. 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, p. 1–33) or the Committees for risk assessment and for socio-economic analysis in ECHA (Article 64 of Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 396, 30.12.2006, p. 1–849).

[2199] See Common Approach on decentralised agencies, paras. 14-19.

[2200] VOS Ellen, *op. cit.* (2014), p. 25.

[2201] With the exceptions of the EFSA (14 independent representatives appointed by the Council), ACER (5 representatives appointed by the Council, 2 by the Parliament and 2 by the Commission, but the structure

representatives of the Commission,[2202] one or two representatives designated by the Parliament[2203] and, when appropriate, representatives of stakeholders organisations.[2204] The inclusion of Member States representatives in the Management Board has been the subject of debates between the institutions.[2205] While the Council favoured the involvement of all Member States, the Commission pleaded for smaller Management Boards both for reasons of efficiency, as it was demonstrated that large boards performed poor control,[2206] and for systematic reasons, aiming to enhance the supranational, "Community-minded" character of EU agencies and EU executive in general.[2207]

The institutional design of the Management Board, however, is considered to stem from the demand to ensure an intergovernmental control over agencies' activities, maintaining an influence of the Member States on these bodies.[2208] From an institutional balance perspective, hence, this composition is in line with the conceptual understanding of the composite[2209] or shared character of the EU executive,[2210] which is constituted by an integrated administration in principle relying on the Member States for the implementation of EU policies.[2211] In this sense, it is an expression of the described Member-State-oriented institutional balance in the distribution of powers, thus representing a practically valid and conceptually sound design for EU agencies as "in betweeners" and "interesting hybrids" of the composite EU executive.[2212]

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comprises a board of regulators composed by national authorities) and EIGE (18 representatives of the Member States on rotating basis). See BUSUIOC Madalina, *op. cit.* (2013), p. 77.

[2202] They can have voting rights (like in the case of EMEA) or not (like in the case of Europol).

[2203] For instance, in the case of EEA the Parliament has the right to designate, as members of the Management Board, "two scientific personalities particularly qualified in the field of environmental protection". See Article 8 of Regulation (EC) No. 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126, 21.5.2009, p. 13–22. The Common Approach, however, codifies that "where appropriate, one member [is] designated by the European Parliament".

[2204] See Common Approach on decentralised agencies, para. 10. See also VOS Ellen, *op. cit.* (2014), p. 25.

[2205] See VOS Ellen, *op. cit.* (2014), p. 26.

[2206] See BUSUIOC Madalina, *op. cit*. (2013), pp. 108-113. To address this particular issue, the Common Approach suggests a "two-level governance structure" with a small-sized Executive Board within the Management Board, see para. 10(4).

[2207] See Report drafted by the working group "establishing a framework for decision-making regulatory agencies in preparation of the White Paper on Governance, SEC(2001) 340, p. 9; Communication from the Commission. The operating framework for the European Regulatory Agencies, COM(2002) 718, pp. 8-9.

[2208] See, *inter alia*, KELEMEN Daniel R., "The Politics of 'Eurocratic' Structure and the New European Agencies", 25 *West European Politics* No. 4 (2002), pp. 93-118. See also BUESS Micheal, *op. cit.* (2014), pp. 509-524. In relation to the Boards of supervisors of the ESAs, it was remarked that, although they are called to act independently and objectively in the sole interest of the Union, their composition is "structurally intergovernmental", and it follows the voting rules of the Council. See MOLONEY Niamh, "The European Securities and Market Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-making', 12 *European Business Organization Law Review* (2011), p. 82.

[2209] See, *inter alia*, DELLA CANANEA Giacinto, *L'Unione europea. Un ordinamento composito,* (Laterza, 2003).

[2210] CURTIN Deirdre, *op. cit.* (2009); HOFMANN Herwig and TURK Alexander, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration,* (Edward Elgar, 2009).

[2211] VOS Ellen, *op. cit*. (2014), p. 27.

[2212] VOS Ellen, *op. cit.* (2014), p. 28.

6.3.2. The Role of the Parliament

6.3.2.1. Increasing Powers of the Democratically-Elected Institution

Focusing now on the control the Parliament exercises on the operation of EU agencies, it is noteworthy that the involvement of the Parliament with the activities of the agencies has progressively increased with the evolution of agencification.[2213] While references to the Parliament were almost non-existent in the founding regulations of the first agencies, this institution has been given more and more control over these bodies, especially those created by means of what is now the ordinary legislative procedure.[2214]

The conferral of formal control rights on the Parliament was seen as key for improving agency accountability and democratic legitimacy.[2215] Therefore, in addition to its budgetary and discharge powers, which, as it was seen, were often used by the Parliament as leverage to influence the development of EU agencies particularly after the third wave of agencification, this institution was conferred new powers, in particular relating to appointment and reporting.

6.3.2.2. Appointment Rights

With regard to the appointment rights, the Parliament appears to have gained an increased role in the appointment process of leadership positions within EU agencies.[2216] In particular, contrasted to the right to nominate one or two members of the Management Board, in some cases the Parliament was given a role in the appointment process of the agency's director, who must appear before the Parliament before being formally appointed.[2217] Albeit rarely, the two mechanisms can be foreseen together in the basic regulations.[2218] Moreover, the power of the Parliament can be extended to the re-appointment of Directors or other officeholders,[2219] as well as to their dismissal.[2220]

[2213] JACOBS Francis, "EU Agencies and the European Parliament" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 202.
[2214] JACOBS Francis, *op. cit.* (2014), p. 202.
[2215] See, *inter alia*, Communication from the Commission. The Operating Framework for the European Regulatory Agencies, COM(2002) 718. In this regard, the Parliament observed that "The establishment of parliamentary control over the structure and the work of the regulatory agencies is consistent with the classic democratic principle requiring political responsibility of any body wielding executive power. The possibility of the European Parliament assigning political responsibility to the agencies concerned touches on a core principle of representative democracy, which consists in examining the legality and expediency of the choices made by the executive power." See European Parliament, Report on a strategy for the future settlement of the institutional aspects of Regulatory Agencies. Explanatory Statement, (2008/2103(INI)), p. 11.
[2216] JACOBS Francis, *op. cit.* (2014), p. 203.
[2217] See, for instance, in the case of EFSA and ENISA.
[2218] See, for instance the EMEA Regulation and the ECDC Regulation.
[2219] See Article 15 of FRA Regulation.
[2220] The most relevant case is the basic regulation of the ESAs, see for instance Article 48 of EBA Regulation.

The insertion of these provisions in the basic regulations of the different agencies is remarkably uneven,[2221] and, although the requirement of the approval of the Parliament of the director of an agency was expressly debated in the negotiations,[2222] no provision was inserted in this respect in the Common Approach.

6.3.2.3. Hearing and Reporting Obligations

With regard to the reporting obligations, the founding regulations of all agencies require them to submit reports to the Parliament in the form of an annual report and, in some cases, a work programme.[2223] The Common Approach codifies this practice, requiring the agencies to submit the annual report to the Parliament and to consult it on the multiannual work programmes of agencies.[2224] It is clarified, however, that "the purpose of the consultations is an exchange of views and the outcome is not binding on the agency."[2225]

Moreover, EU agencies' representatives may be obliged to attend hearings before the Parliament, which may take place before the budgetary committees or the policy-specific committees of this institution.[2226] In particular, the former committees carry out a financial and budgetary control over the agencies, and for this reason only the agencies funded by the EU budget take part in these hearings.[2227] On the other hand, the agencies' directors may be required to appear before the Parliament before the appointment or to report on the carrying out of his/her tasks.[2228] Empirical research, however, has shown that, due to information asymmetries and volatile political interest in this accountability exercise, there is a relevant underuse of these mechanisms, resulting in inadequacies in ensuring a comprehensive and systematic scrutiny of the agencies' activities.[2229]

6.3.3. The Role of the Council

While the control of the Parliament has been the result of a progressive increase in the democratic accountability of EU agencies, the control of the Council was well established from the very beginning of agencification, also encompassing agencies which escaped the control of the

[2221] JACOBS Francis, *op. cit.* (2014), p. 218.
[2222] JACOBS Francis, *op. cit.* (2014), p. 218.
[2223] BUSUIOC Madalina, *op. cit.* (2013), p. 118.
[2224] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, paras 49 and 58.
[2225] Ibidem, para. 29.
[2226] BUSUIOC Madalina, *op. cit*. (2013), p. 121.
[2227] It is important to remark that agencies which are self-funded, such as the OHIM or the CPVO, are not subject to financial or budgetary obligations towards the Parliament, thus lacking an important form of accountability. See BUSUIOC Madalina, *op. cit.* (2013), p. 158.
[2228] See, for instance, Article 38(2) of EASA Regulation.
[2229] BUSUIOC Madalina, *op. cit.* (2013), p. 138.

Parliament.[2230] In particular, the Council represented the only institution to which the so-called "Council agencies" were bound to submit reports and work programmes, even though with the amendment of the Europol Regulation the position of the Parliament has improved considerably.[2231]

Moreover, the Council is associated with the Parliament in the *ex post* control of the other agencies. Hence, according to the annual budgetary procedure, the Council and the Parliament are competent of the discharge of the agencies' budget, for which the director is accountable for the use of the EU contribution.[2232] In particular, according to the Common Approach, the Council's recommendations on the discharge are to be taken into consideration fully.[2233] The described reporting obligations of EU agencies, including fully self-financed agencies, are also applicable in relation to the Council,[2234] as well as the provisions on the multiannual work plan.

Finally, the Council may have a more direct role in agencies' activities, thus intervening in the adoption of the acts. For instance, in the case of ESAs, the Council may be granted a right to determine the preconditions for the exercise of the powers delegated to these bodies, triggering the action of the agencies in emergency situations.[2235] Such an intervention may be so incisive to exclude a true delegation of the powers, such as in relation to the external action of certain EU agencies.[2236]

6.3.4. Accountable, Yet Not Procedurally Constrained?

Despite the multiplicity of control mechanisms and the plurality of the institutional actors involved, the control over EU agencies still presents relevant shortcomings, raising critical doubts regarding the conclusion that the delegation to EU agencies is really "under control".[2237] Firstly, being crucially dependent on the framing of the founding regulations, the control mechanisms may vary consistently from agency to agency.[2238] A certain patchiness in the introduction and application of the control mechanisms can be recognised in spite of the improvements of the

[2230] BUSUIOC Madalina, *op. cit.* (2013), p. 139.
[2231] See Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.
[2232] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, para. 15.
[2233] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, para. 57.
[2234] Ibidem, para. 58.
[2235] See Article 18 of EBA Regulation.
[2236] See Chapter 3, para. 4.2.1.
[2237] Referring to the phrase "nobody controls the independent agency, yet the agency is under control" used by MAJONE Giandomenico (ed.), *op. cit*. (1996), p. 39.
[2238] GRILLER Stefan and ORATOR Andreas, *op. cit.* (2010), p. 24.

Common Approach,[2239] putting into question the effectiveness and the adequateness of the existing system.

Secondly, these mechanisms are meant to control the activities of the agencies in general and irrespective of whether the agency exercises genuine decision-making powers or not or whether it results in acts of individual or general application. In this regard, the specificity of the fact that the particular agency acts pursuant to a true delegation of powers does not appear to be taken into account, although the founding regulation may introduce specific requirements, such as in the case of the ESAs.[2240] However, in the light of the increasing delegated powers and the escalating empowerment of EU agencies in complex and politically sensitive domains, this appears highly problematic. Considering the peculiar issues raised by the delegation of powers, the mechanisms described may appear suitable to bring agencies to account, but arguably they fail to embed the exercise of delegated powers systematically into precise procedural constraints, apt to control the single *ultra vires* measures. As emerged in *Short Selling*, such procedural guarantees must be sought in the specific legal framework governing the relevant empowerment, thus require a case-by-case assessment and lack a systematic regime for this form of delegation, such as those established for delegated and implementing acts.

6.3.5. The Alert/Warning System

It is questionable whether this gap in systematic procedural controls over the exercise of the delegated powers by EU agencies can be considered to be filled by the new mechanism introduced by the Common Approach, the so-called alert/warning system.[2241]

This innovative mechanism allows the Commission to react when it has "serious reasons of concern" related to certain Management Board's decisions.[2242] In this case, the Commission "will

[2239] BUSUIOC Madalina, *op. cit*. (2013), p. 152.

[2240] For instance, in developing draft implementing technical standards these agencies must conduct open public consultations and analyse the potential related costs and benefits, where appropriate (see Article 15 of EBA Regulation), while the exercise of intervention powers is subordinate to a decision of the Council on the existence of an emergency situation and to the obligation to duly inform the Parliament and the Commission (see Article 18 of EBA Regulation).

[2241] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, para. 59, reads: "An alert/warning system will be activated by the Commission if it has serious reasons for concern that an agency's Management Board is about to take decisions which may not comply with the mandate of the agency, may violate EU law or be in manifest contradiction with EU policy objectives. In these cases, the Commission will raise formally the question in the Management Board and request it to refrain from adopting the relevant decision. Should the Management Board set aside the request, the Commission will formally inform the European Parliament and the Council, with a view to allow the three institutions to react quickly. The Commission may request the Management Board to refrain from implementing the contentious decision while the representatives of the three institutions are still discussing the issue."

[2242] The limitation of this power to the cases where the measures is adopted by the Management Board appears problematic. While the use of such a system would be pleonastic in relation to measures to be formally adopted by the Commission, in the variety of agencies' procedures there might be cases of

raise formally the question in the Management Board", requesting it to suspend the adoption or the implementation of the contested measure.[2243] Remarkably, this mechanism gives the Commission the power to react before the adoption of an unlawful measure by the agency, thus intervening *during* the exercise of the delegated powers and not just *ex post*. Should the request be ignored, the Commission will formally inform the Parliament and the Council. In particular, the system can be activated when the Board is about to adopt measures which are (i) non-compliant with the mandate of the agency; (ii) in violation of EU law; or (iii) in manifest contradiction with EU policy objectives.[2244] This mechanism, in other words, operates as a sort of "fire alarm" in the exceptional cases of *ultra vires* or *contra legem* exercise of the delegated powers.

In this sense, it may be compared interestingly to the "right of scrutiny" enjoyed by the Parliament and the Council under the comitology system. Also in that case, the legislator is allowed to react formally to the abuse in the exercise of the delegated powers, but not to impose a veto on the measure. Indeed, the consequences of the alert/warning system are principally political, as it does not entail the power to withdraw a decision taken by the Board.[2245] In other words, the mechanism is intended to give the Commission the power to bring the attention of the Parliament and the Council to certain decisions of the Board which it considers problematic, preventing the adoption of such decisions behind the institutions' back.[2246] However, unlike in the case of delegation to the Commission, it may have severe consequences, since the key institutional players might ultimately resort to the "nuclear weapon" of amending the basic act in order to reduce or revoke the delegation.

Although interestingly involving the three institutions in an inter-institutional dialogue on the delegation,[2247] the application of the alert/warning system appears problematic.[2248] The wording of the Common Approach seems to entail an obligation for the Commission to trigger the mechanism, posing the question on who bears the political responsibility for those acts. Indeed, it is questionable whether this means that, if the Commission does not raise the alarm, it agrees with it and, thus, assumes a sort of "ministerial responsibility" for agencies acts.[2249] Clearly, in the

controversial measures adopted by other internal bodies. See, for instance, Article 35 of Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, p. 1–30.

[2243] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, para. 59.

[2244] Ibidem.

[2245] This understanding emerges from the European Commission, Progress report on the implementation of the Common Approach on EU decentralised agencies, COM(2015) 179 final.

[2246] See VOS Ellen, *op. cit.* (2013), p. 22. The trigger to introduce this system was the scandal which was caused by a report on anti-Semitism of the Management Board of the Fundamental Rights Agency (at the time, European Monitoring Centre on Racism and Xenophobia).

[2247] JACOBS Francis, *op. cit.* (2014), p. 219.

[2248] See VOS Ellen, *op. cit.* (2014), p. 32.

[2249] VOS Ellen, *op. cit.* (2014), p. 33.

absence of systematic information for the legislator on the agencies' acts, and for its expertise in the policy field, the Commission is the institution best placed to track the agencies' activities, but this mechanism puts it in an uncomfortable position, the institutional implications of which, especially in relation to the independence of EU agencies, need further consideration.[2250]

6.3.6 Specific Issues in the Delegation of Powers to the ESAs

The ESAs present remarkable peculiarities in the procedures and in the effects of the exercise of their powers, which highlight interesting implications arising in relation to this case of delegation of powers from an institutional balance perspective. As it was seen, ESMA, EBA and EIOPA are delegated far-reaching powers. On the one hand, they are empowered to take action in emergency situations,[2251] adopting individual decisions towards the competent authorities and, should the competent authority refrain from complying with these decisions, directly towards financial institutions, without the need of endorsement by the Commission or the Council.[2252] Thus, with a sort of "knight's move" in chess,[2253] the ESAs can substitute the national authorities in the exercise of binding powers towards the financial institutions. On the other hand, the founding regulations confer to these bodies the power to adopt draft regulatory technical standards[2254] and draft implementing technical standards,[2255] which are to be formally adopted by the Commission as, respectively, delegated acts and implementing acts. Since the Commission can amend the draft "in very restricted and extraordinary circumstances",[2256] they are hence entrusted with significant *de facto* rule-making powers.[2257]

The role of the ESAs in the preparation of these measures has relevant implications for the autonomy of the Commission. Indeed, where exceptionally the Commission does not endorse the agency's draft measure, it must state its reasons and it may be forced to present its position in a

[2250] VOS Ellen, *op. cit.* (2014), p. 33.
[2251] More precisely, "in the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union". See, for instance, Article 17 of EBA Regulation. See also Article 28 of Short Selling Regulation.
[2252] Article 18 of ESMA Regulation; Article 18 of EIOPA Regulation; Article 18 of EBA Regulation; Article 29 of Short Selling Regulation.
[2253] GRUNDMANN-VAN DE KROL C.M., "Een nieuw Europees toezichtkader", *Ondernemingsrecht* (2010), p. 622, cited in OTTOW Annetje, "The New European Supervisory Architecture of the Financial Markets" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 139.
[2254] Article 10 of ESMA Regulation; Article 10 of EBA Regulation; Article 10 of EIOPA Regulation.
[2255] Article 15 of EIOPA Regulation; Article 15 of EBA Regulation; Article 15 of ESMA Regulation.
[2256] Recital 23 of ESMA Regulation.
[2257] Which may have have policy implications, as remarked by MOLONEY Niamh, "The European Securities and Market Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-making', 12 *European Business Organization Law Review* (2011), p. 63. However, Article 10 of EBA Regulation specifies that the draft regulatory technical standards must be "technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based".

meeting with representatives of the Council, the Parliament and the agency.[2258] In the light of the limited room of manoeuvre left to the Commission, it has been argued that this procedure "places the ESA rather the Commission in the driving seat in drafting the implementing [or delegated] acts".[2259] Considering that the Board of Supervisors, which adopts the draft regulatory technical standards and the draft implementing technical standards, is composed of the heads of the relevant competent authorities in each Member State,[2260] as a result the discretion of the Commission is subject to a double intergovernmental control: earlier, through the preparatory works of the ESAs and, later, through the control exercised by the national experts for delegated acts, or through the comitology committees for implementing acts. Consequently, the prerogatives of the Commission appear severely compressed by this interplay between delegation systems, arguably affecting the institutional balance and even the "constitutional architecture"[2261] established in the relevant provisions of the Lisbon Treaty. Moreover, similarly to the dynamics underlined in relation to the exercise of the delegated powers under Article 290 TFEU, the role of Member States' representatives in the Board of Supervisors arguably affects the formal parity between the Parliament and the Council, *de facto* favouring the latter.[2262]

6.4. Transparency and Participation in the Exercise of Agencies' Powers

Also in relation to the delegation of powers to EU agencies, the principles of transparency and participation may provide a valuable complementary source of democratic legitimacy, bringing the exercise of these powers closer to citizens.[2263] Thus, the Common Approach insists on the need to provide information, including financial information, to the public through the agencies'

[2258] Articles 10-15 of EBA Regulation. More precisely, the Commission can endorse the draft measure in full or in part, or with amendments. Should it partially endorse it or amend it, the Commission sends back the draft to the ESAs, stating the reasons and waiting six weeks for a re-submission. Where the agency does not submit an amended draft measure within this time limit, the Commission can adopt autonomously the measure. However, as a rule, "the Commission shall not change the content of a draft implementing technical standard prepared by the Authority without prior coordination" with it.
[2259] CRAIG Paul, *op. cit.* (2018), p. 744.
[2260] Article 40 of EBA Regulation. Although according to Article 42 of EBA Regulation they are called to act independently and objectively in the sole interest of the Union, the composition of the Board is "structurally intergovernmental" and it follows the voting rules of the Council. See MOLONEY Niamh, "The European Securities and Market Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-making', 12 *European Business Organization Law Review* (2011), p. 82; CRAIG Paul, *op. cit*. (2018), p. 742.
[2261] CRAIG Paul, *op. cit.* (2018), p. 742.
[2262] Ibidem.
[2263] See, *inter alia*, the recent Case T-729/15, *MSD Animal Health Innovation and others v EMA*, EU:T:2018:67, para. 44.

websites[2264] and to involve the interested stakeholders in the agencies' internal bodies and working groups, where appropriate.[2265]

In this regard, it is remarkable that the progressive inclusion of these principles in the operation of EU agencies has determined "a process of gradual convergence […] in most cases […] accompanied by a process of proceduralisation" of the procedures followed by EU agencies in the exercise of their powers.[2266] Indeed, in spite of the plurality of sources and of procedures, most agencies appear to develop certain mechanisms which are inspired by the same principles of administrative action, namely those of participation and transparency. However, this proceduralisation is often limited to basic provisions, which, different from the Comitology Regulation, do not go "into the details of the different phases of rule-making".[2267] Moreover, a certain asymmetry in this tendency is visible between genuine decision-making agencies and agencies exercising *de facto* delegated powers.[2268] Yet, building from these principles and taking certain agencies' basic regulations as a model, the overall result is interestingly the converging of the different procedures on a specific procedural pattern, which is characterised by an increased attention for consultation practices.[2269]

7. Conclusion

The discussion has shown how the procedures for the exercise of the delegated powers and, consequently, the control exercised through these procedural constraints vary significantly across the different forms of delegation of powers under examination. In particular, it emerged clearly that, with the exception of delegated acts, the chain of control exercised through the procedures does not necessarily correspond to the chain of delegation as identified in the previous chapters. Therefore, in the different procedural steps a plurality of institutional actors is involved according to their respective roles within the institutional balance, often differing significantly among the delegation regimes.

Thus, while the Parliament and Council may exercise relevant leverage in the procedure for the adoption of delegated acts through the rights of objection and revocation conferred in Article 290

[2264] Common Approach, para. 64.
[2265] Common Approach, para. 65. It recommends also that "agencies' relations with stakeholders should be coherent with their mandate, the institutional division of tasks in international relations, EU policies and priorities and Commission's actions. Agencies should exercise their functions in coordination with the different actors charged with the definition and implementation of the given policy. Agencies should also clarify the sharing of roles between them and their national counterparts."
[2266] CHITI Edoardo, *op. cit.* (2013), p. 101.
[2267] CHITI Edoardo, *op. cit.* (2013), p. 101.
[2268] Ibidem, p. 105.
[2269] Ibidem.

TFEU, they generally enjoy a more limited role in relation to the exercise of implementing powers.[2270] The legislator is conferred a right of scrutiny in relation to implementing acts and, despite the rather diverse procedures, the delegation of powers to the ECB and EU agencies is generally associated with accountability mechanisms on the overall activities of these bodies. An interesting exception is the alert/warning system, which allows the Commission and, subsequently, the Parliament and the Council to react *ex ante* vis-à-vis specific measures of agencies' management boards. Its application, however, is far from being unproblematic. Considering the weaknesses noted in empirical studies on the application of these accountability mechanisms, designed to hold the ECB and the agencies to account while respecting the independence of these bodies, it is questionable whether they constitute adequate procedural constraints in the sense indicated by the Court, *inter alia*, in *Short Selling*.

Moreover, a significant role of the Member States in the control of the exercise of the delegated powers has emerged not only in relation to the implementing acts, where Article 291 TFEU clearly confers this competence on them expressly, but also in the composition of the key decision-making bodies of the ECB and of the agencies. In this sense, the involvement of the Member States in the control of these forms of delegation is an expression of the Member-States-oriented institutional balance, which arguably reflects the shared or composite character of the EU executive.[2271]

In this variety of modalities and degrees of oversight, certain common trends and mechanisms may be tentatively recognised. Firstly, a certain *de facto* shift of the institutional balance in favour of the Council has emerged, being an element of continuity from the pre-Lisbon situation, like in the case of EU agencies or implementing acts, or the result of recent dynamics like in the case of the delegated acts. In the latter, in particular, the pressure of the Council has determined the introduction of systematic consultations of national experts, which appear to reduce the Commission's autonomy through a proceduralisation of the decision-making, and to reintroduce through the backdoor comitology-like procedures excluded by the Lisbon Treaty. Arguably, this convergence between the procedures for the adoption of delegated and implementing acts appears highly problematic for the implementation of the Lisbon reform, contributing to watering down the significance of the divide between Article 290 and 291 TFEU.

Secondly, a more intense control can be perhaps be recognised in relation to acts of general application in comparison to the acts of individual application, as emerged not only from the

[2270] For the discussion of the powers delegated on ECB and agencies, see Chapter 3, paras. 4.3 and 5.3.1.
[2271] See, *inter alia*, CURTIN Deirdre, *op. cit.* (2009); HOFMANN Herwig and TURK Alexander, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration,* (Edward Elgar, 2009); DELLA CANANEA Giacinto, *L'Unione europea. Un ordinamento composito,* (Laterza, 2003); VOS Ellen, *op. cit.* (2014), p. 27.

specific regime applicable to delegated acts, but also from the provision of stricter procedural requirements applicable in case of implementing acts of general application and of regulations by the ECB. This differentiation arguably reflects the more problematic nature of the delegation of rule-making or regulatory powers to non-majoritarian bodies, also observed in State legal systems.[2272] Thirdly, a common mechanism of reverse majority voting has been noted, underling its implications for the institutional balance. However, while in the objection right and in the examination procedure its meaning is to respect the Commission's autonomy in the adoption of delegated acts and implementing acts, its application in the context of the delegation of powers to the ECB appears highly problematic, also in relation to primary law.

Fourthly, the need to enhance the transparency and participation in the procedures emerged as a common theme across the different delegation regimes since the implementation of these fundamental principles is patchy and inconsistent in many delegation regimes. In particular, the transparency of the procedures plays a crucial role in the effectiveness of "fire alarm" mechanisms, such as the right of scrutiny for implementing acts and the alarm/warning system for agencies' measures, whose operation is very different from the systematic control or "police-patrol" mechanisms, exercised for instance through the comitology system.[2273]

In this complex picture of the procedures and controls applicable to the different delegation regimes, the absence of a specific procedure for the adoption of implementing acts by the Council stands out, being at odds with the highly proceduralised systems constraining the exercise of the delegated powers, especially the powers of the Commission. In this regard, considering the importance of the procedural constraints not only for the principle of legality and for the judicial review, but also for the institutional balance established in the Treaties, this lacuna appears particularly problematic, casting a shadow on the democratic legitimacy of this form of delegation.

[2272] See Chapter 1, para. 6.
[2273] See, *inter alia*, MCCUBBINS Mathew and SCHWARTZ Thomas, *op. cit.*, pp. 177-179; BUSUIOC Madalina, *op. cit.* (2013).

Chapter 6

The Acts of the Delegate and Their Judicial Review

1. Introduction

In the analysis of the limits on the exercise of the delegated powers, attention should be now paid to the acts resulting from the delegation process. Indeed, the exercise of the delegated powers according to the procedures described in the preceding chapter results in the adoption of legal measures, since the modification of the legal situation through the adoption of acts is inherent in the notion of competence and power.[2274] In this sense, the legal act is considered the expression of the competence and, as such, it mirrors the powers conferred on the institutional actors.[2275]

Therefore, the form of the acts, and their classification according to the different categories of legal instruments of EU law, reflects the powers conferred through the delegation of powers, thus sheddding light on the competences at issue.[2276] At the same time, the modification of the existing legal situation caused by the adoption of these acts by the delegate depends on the position of its provisions within the hierarchy of norms. Hence, the effects and normative force of these acts in the hierarchy of norms deserves careful consideration since it represents a crucial element not only for the analysis of the powers involved in the delegation of powers, but also for the judicial review of the relating acts. In this regard, it is important to underline that the limits identified in relation to the enabling act and to the exercise of the delegated powers find their recognition and enforcement in the judicial review of the acts adopted pursuant to a delegation of powers.

In the light of this, in this chapter, firstly, the formal aspects of the acts issued according to the delegation regimes under examination will be analysed, reflecting on the categories and legal instruments which are adopted by the delegate. Secondly, the position of these acts in the hierarchy of norms will be considered, testing the three-tiered conceptualisation of legal categories introduced by the Lisbon Treaty in the light of the actual application of the Treaties provisions. Finally, the reviewability of these acts and, more in general, of the delegation of powers will be approached, underling the remaining issues related to the judicial review of this delicate legal mechanism.

[2274] COSTANTINESCO Vlad, *Compétences et pouvoirs dans les Communautés européennes* (Librairie générale de droit et de jurisprudence, 1974), p. 78.
[2275] Ibidem.
[2276] TOVO Carlo, *Le agenzie decentrate dell'Unione europea*, (Editoriale Scientifica, 2016), p. 73.

2. The Form of the Acts of the Delegate

2.1. The Acts Adopted pursuant to Article 290 TFEU

According to Article 290 TFEU, the acts resulting from a delegation of powers to the Commission are non-legislative acts, which must be expressly labelled as "delegated" acts in their title.[2277] The insertion of this formal element in the title of the delegated act, thus, makes it immediately evident which category the act belongs to, clarifying its position and the procedure for adoption at first sight. In this sense, this requirement represents a positive innovation of the Lisbon Treaty, bringing transparency and legal certainty in comparison to the pre-Lisbon fuzziness.[2278]

Interestingly, in *Connecting Europe*, the Court clarified that "for reasons of regulatory clarity and transparency of the legislative process", when the Commission is empowered to "supplement", it cannot add an element to the text of the legislative act, but it must necessarily adopt a separate act in the form of a delegated act.[2279]

Considering the different legal instruments which can be adopted by the EU institutions, it is clear that the delegated acts can take the form of delegated regulations,[2280] delegated directives[2281] or delegated decisions.[2282] Therefore, there are actually three "versions" of the acts enacted pursuant to a delegation of powers under Article 290 TFEU.[2283] Among them, the Commission has thus the possibility to choose the legal instrument most suitable for the case as the enabling provisions generally empower it to adopt "delegated acts", without specifying the precise legal instrument to be adopted.[2284]

[2277] Article 290(3) TFEU.
[2278] DE WITTE Bruno, "Legal Instruments and Law-Making in the Lisbon Treaty", in GRILLER Stefan and ZILLER Jacques, *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?,* (Springer, 2008), p. 95; KOTZUR Markus, "Article 290", in GEIGER Rudolf, KHAN Daniel-Erasmus and KOTZUR Markus (eds.), *European Union Treaties* (Hart, 2015), p. 949.
[2279] Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183, para. 53.
[2280] See, for instance, Commission Delegated Regulation (EU) 2017/40 of 3 November 2016 supplementing Regulation (EU) No. 1308/2013 of the European Parliament and of the Council with regard to Union aid for the supply of fruit and vegetables, bananas and milk in educational establishments and amending Commission Delegated Regulation (EU) No. 907/2014, OJ L 5, 10.1.2017, p. 11–19.
[2281] See, for instance, Commission Delegated Directive (EU) 2015/863 of 31 March 2015 amending Annex II to Directive 2011/65/EU of the European Parliament and of the Council as regards the list of restricted substances, OJ L 137, 4.6.2015, p. 10–12.
[2282] See, for instance, Commission Delegated Decision of 10 March 2014 setting out criteria and conditions that European Reference Networks and healthcare providers wishing to join a European Reference Network must fulfil, OJ L 147, 17.5.2014, p. 71–78.
[2283] DE WITTE Bruno, *op. cit.* (2008), p. 94; ZILLER Jacques, *Il nuovo Trattato europeo* (Il Mulino, 2007), p. 133.
[2284] See Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123/1.

2.2. The Acts Adopted pursuant to Article 291 TFEU

With the same aim of clarity and simplification, Article 291 TFEU provides that the acts resulting from a delegation under Article 291 TFEU shall be indicated as "implementing acts" in their title.[2285] Thus, from a formal perspective, the implementing acts can be distinguished from the delegated acts and legislative acts by simply looking at the title of the measure.

Like the delegated acts, implementing acts can also take the form of the different legal instruments of EU law, being implementing regulations,[2286] implementing directives[2287] or implementing decisions.[2288] These considerations apply both in case of the delegation of powers to the Commission and to the Council,[2289] although curiously no Council implementing directive has been enacted so far.

2.3. The Acts Adopted pursuant to a Delegation to the ECB

Considering now the delegation of powers to the ECB, it is important to recall that the ECB, such as any other EU institution, "shall adopt regulations, directives, decisions, recommendations and opinions."[2290] Therefore, the acts adopted by this institution in one of these forms represent typical acts of the ECB. In this respect, Article 127 TFEU does not impose particular formal requirements on acts adopted pursuant to a delegation of powers, which could identify them among the acts adopted by the ECB directly on the basis of the Treaties. Thus, similar to the pre-Lisbon situation, there is no evident distinction between the acts adopted pursuant to a delegation of powers and the acts issued directly on the basis of primary law.

[2285] Article 291(4) TFEU. See also Annex IV of the Council's Rules of Procedure.
[2286] See, for instance, Commission Implementing Regulation (EU) 2015/378 of 2 March 2015 laying down rules for the application of Regulation (EU) No. 514/2014 of the European Parliament and of the Council with regard to the implementation of the annual clearance of accounts procedure and the implementation of the conformity clearance, OJ L 64, 7.3.2015, p. 30–32.
[2287]See, for instance, Commission Implementing Directive 2014/97/EU of 15 October 2014 implementing Council Directive 2008/90/EC as regards the registration of suppliers and of varieties and the common list of varieties, OJ L 298, 16.10.2014, p. 16–21.
[2288] See, for instance, Commission Implementing Decision (EU) 2017/2448 of 21 December 2017 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean 305423 × 40-3-2 (DP-3Ø5423-1 × MON-Ø4Ø32-6) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council on genetically modified food and feed, OJ L 346, 28.12.2017, p. 6–11.
[2289] See, for instance, Council Implementing Regulation (EU) 2017/2064 of 13 November 2017 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and amending Implementing Regulation (EU) 2017/1420, OJ L 295, 14.11.2017, p. 38–39; Council Implementing Decision of 13 November 2012 amending Decision 2009/791/EC and Implementing Decision 2009/1013/EU authorising Germany and Austria respectively to continue to apply a measure derogating from Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 319, 16.11.2012, p. 8–9.
[2290] Article 288(1) TFEU.

In this regard, the enabling provision in the SSM Regulation provides precise requirements as to the kind of acts the ECB can adopt to carry out these tasks. Indeed, according to Article 4(3) of the Regulation, the ECB can adopt guidelines and recommendations, as well as decisions and regulations in order to fulfil the tasks delegated to it.[2291] However, the use of regulations by the ECB is particularly constrained by certain procedural requirements, which limit the discretion of the ECB in exercising the delegated powers through this legal instrument.

Moreover, the Regulation specifies that, to organise the cooperation within the authorities composing the SSM, the ECB can issue regulations, guidelines or general instructions to the competent national authorities which exercise the supervision over less significant credit institutions.[2292] In particular, the ECB may require by way of instructions to the national authority that they carry out their supervisory powers according to the Regulation. Conversely, when the ECB exercises its powers of supervision directly on certain credit institutions, the legal instrument used is a decision addressed to the relevant entities.[2293] In the light of these provisions, the form of the acts issued pursuant to the delegation of powers to the ECB contained in the SSM Regulation may be either a typical act, such as decisions or regulations, or an atypical act, such as guidelines and instructions, as not listed in Article 288 TFEU.

In relation to the delegation of powers to the ECB, a final reflection should be dedicated to the observation that, although the delegation of powers in the SSM Regulation formally concerns the ECB as an institution, the powers are *de facto* exercised by the Supervisory Board.[2294] Therefore, it is important to underline that the first outcome of the exercise of the delegation is a decision of the Supervisory Board, which is subsequently endorsed by the Governing Council, to become an act of the ECB.

2.4. The Acts Adopted by EU Agencies

With regard to the delegation of powers to EU agencies, the absence of a clear provision in the Treaties and the case-by-case proliferation of such bodies impede the provision of a straightforward answer to the question concerning the form of their acts. The acts of the agencies are regulated separately and autonomously in the basic regulations of each agency, differing

[2291] See also Article 17 and 17A of the Rules of Procedure of the ECB.
[2292] Article 6(5) of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.
[2293] See, for instance, Article 14 of Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.
[2294] See Chapter 3, para. 5.3.5.

significantly according to the tasks and powers delegated in that particular field.[2295] Moreover, it is noteworthy that only in a few cases the basic regulations expressly classify the acts to be adopted by the agency,[2296] thus making a systematic categorisation of these acts an even more difficult endeavour.

The difficulties in the categorisation of the agencies' acts are arguably dependent on the absence of an exhaustive legal framework for the agencification phenomenon and of the remaining uncertainties regarding the institutional position of decentralised agencies.[2297] However, the analysis of the powers delegated to these bodies – and, in particular, the described distinction between genuine decision-making agencies, non-decision-making agencies and *de-facto* decision-making agencies[2298] - may shed some light on the issue.

With reference to the genuine decision-making agencies, agencies like EUIPO or CPVO adopt acts in the form of decisions of individual application. In this sense, they may be considered as atypical implementing acts.[2299] Indeed, since Article 288 TFEU recognises as typical acts only the acts adopted by the EU institutions, from a formal perspective the agencies' acts cannot fall within the category of implementing acts, but from a substantive perspective the powers delegated to EU agencies may be assimilated to the powers conferred on the Commission under Articles 291 TFEU.[2300] The same reasoning applies to agencies' acts of general application, although it is questionable whether the powers at issue are more similar to Article 290 or to Article 291 TFEU.[2301]

With reference to agencies exercising non-binding powers, the practice shows a wide variety of instruments adopted by these agencies, such as guidelines, instructions, opinions, and

[2295] TOVO Carlo, *op. cit.* (2016), p. 268.
[2296] See, for instance, Article 2 of ERA Regulation: "The Agency may: (a) address recommendations to the Commission concerning the application of Articles 13, 15, 17, 19, 35, 36 and 37; (b) address recommendations to Member States concerning the application of Article 34; (c) issue opinions to the Commission pursuant to Article 10(2) and Article 42, and to the authorities concerned in the Member States pursuant to Articles 10, 25 and 26; (d) address recommendations to national safety authorities pursuant to Article 33(4);(e) issue decisions pursuant to Articles 14, 20, 21 and 22; (f) issue opinions constituting acceptable means of compliance pursuant to Article 19; (g) issue technical documents pursuant to Article 19; (h) issue audit reports pursuant to Articles 33 and 34; (i) issue guidelines and other non-binding documents facilitating application of railway safety and interoperability legislation […]" See also Article 17b EFCA Regulation; Article 3(4) of ENISA Regulation;; Article 18 of EASA Regulation; Article 4 of ACER Regulation; Article 8 of EBA, EIOPA and ESMA Regulations.
[2297] TOVO Carlo, *op. cit.* (2016), p. 269; BERTRAND Brunessen, "La compétence des agencies pour prendre des actes normatifs: le dualism des pouvoirs d'exécution", 51 *Revue trimestrielle de droit européen* (2015), p. 22.
[2298] See Chapter 3, para. 4.3.2.
[2299] Or "de facto implementing powers", as defined by CHAMON Merijn, "Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty", 53 *Common Market Law Review* (2016a), p. 1536. See also TOVO Carlo, *op. cit*. (2016), p. 269.
[2300] For a discussion of the powers of EU agencies, see Chapter 3, para. 4.3.2.
[2301] See TOVO Carlo, *op. cit.* (2016), p. 75.

recommendations. For the same reasons outlined above, these constitute atypical acts in any case. However, while opinions and recommendations represent atypical acts only with regard to the institution adopting it, acts such as guidelines or standards constitute atypical acts with regard to both the institution and the form of acts,[2302] being atypical acts adopted by atypical institutional actors.

Finally, considering the agencies in relation to which we have recognised a *de facto* delegation of powers, it is important to highlight that these atypical acts enacted by the agencies tend to become an intermediate step in the procedure for the adoption of typical acts by EU institutions. Thus, for instance, the ESAs develop "draft regulatory technical standards"[2303] and "draft implementing technical standards"[2304] which, once endorsed by the Commission, will be published in the form of delegated acts and implementing acts respectively.

3. The Acts of the Delegate in the Hierarchy of Norms

In the EU legal system, as already noted, the identification of a clear hierarchy of norms was considered problematic, presenting a certain opaqueness especially with reference to secondary law.[2305] Considering that the absence of a hierarchical position between different acts and between different procedures, which did not distinguish the role of the Parliament from other rule-making institutions, was at odds with the process of progressive parliamentarisation of the EU,[2306] a rethinking of the hierarchy of norms was carried out during the Convention for the Future of Europe, proposing a substantial reform of the legal instruments of EU law. However, the final provisions inserted in the Lisbon Treaty resulted in a more limited overhaul of the existing acts, whose incompleteness and formalism were already pointed out.[2307]

Against this background, it is thus appropriate to analyse specifically the hierarchical position of the acts adopted according to a delegation of powers,[2308] taking into account not only the relevant

[2302] Ibidem.
[2303] Article 10 of ESMA Regulation; Article 10 of EBA Regulation; Article 10 of EIOPA Regulation.
[2304] Article 15 of EIOPA Regulation; Article 15 of EBA Regulation; Article 15 of ESMA Regulation.
[2305] See Chapter 1, para. 12.2.1.
[2306] BAST Jürgen, "Is There a Hierarchy of Acts?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 157; BAST Jürgen, "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law", 49 *Common Market Law Review* (2012), pp. 885-928.
[2307] See Chapter 1, para. 12.2.2.
[2308] Although recognising that the concept of hierarchy of norms is the object of different legal theories in constitutional law, for the present purposes we will share the traditional concept of hierarchy of norms presented in KELSEN Hans, *Pure Theory of Law* (University of California Press, 1970). Therefore, we will consider that the legal sources are structured according to a gradual hierarchy where all the norms are related to each other, when the one is compared to the other, by either being equal, or inferior norms, or superior norms. Accordingly, these acts will be able to modify norms of the same or lower level, while they

regime enshrined in primary law, but also the implications of the interpretation of the Court and the established practice. Therefore, the hierarchical relationships embedding the delegated and the implementing acts will be explored, testing the three-tiered concept which inspired their introduction in the light of its actual application. Moreover, the acts of the ECB will be considered, while the issues raised by the absence of a legal basis for the acts of EU agencies will be addressed in detail. Although limited to the acts relating to a delegation of powers, a clearer picture of the post-Lisbon hierarchy of norms will possibly emerge, aiming to shed light on this controversial theme in EU law.

3.1. The Delegated Acts in the Hierarchy of Norms

The introduction of the category of "delegated acts" was originally conceived in connection with "a better separation of powers"[2309] and with the establishment of "an appropriate hierarchy between the different categories of acts".[2310] As a consequence of a supposed overhaul of the structure of the executive power in the EU, legislative acts, delegated acts and implementing acts were intended to constitute three different levels of the hierarchy.[2311] From this perspective, delegated acts were originally considered "sub-primary acts", holding a hierarchical position situated between primary legislation and implementation.[2312] However, upon a closer analysis of the post-Lisbon application of Articles 290 and 291 TFEU it is questionable whether such a narrative describes the actual relationship between these three categories of EU acts correctly.[2313]

3.1.1. Delegated Acts and Primary Law

Considering the different hierarchical levels starting from the top, it is evident that, according to its undisputed position at the highest level of the hierarchy, primary law prevails over any rule

will need to abide by norms positioned at a higher level according to this hierarchy. See also MORTATI Costatino, "Concetto, limiti, procedimento della revisione costituzionale", *Rivista trimestrale di diritto pubblico* (1952), p. 30; LIGNOLA Enzo, *La Delegazione Legislativa* (Giuffrè, 1956), p. 178.

[2309] Final Report of the Working Group IX ("Simplification").

[2310] Declaration No. 16 annexed to the TEU, cited in SCHUTZE Robert, "Sharpening the Separation of Powers through a Hierarchy of Norms?", EIPA Working Paper 2005/W/01, available at www.eipa.eu (last accessed 08.08.2016).

[2311] Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 339. See also BAST Jürgen, "Is There a Hierarchy of Legislative, Delegated and Implementing Acts?", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers*, (Oxford University Press, 2016), p. 158.

[2312] See, *inter alia*, MAGARO' Patrizia, *Delega legislativa e dialettica politico-istituzionale* (Giappichelli, 2003), p. 291, where the answer of the President of the Working Group is reported, asserting that the delegated acts should be considered "sub-primary" acts.

[2313] Examples of the three-tiered narrative can found, *inter alia*, in CRAIG Paul, *The Lisbon Treaty*, (Oxford University Press, 2010), pp. 252-255; MARTIN Jean-Christophe, "Le Contrôle du Parlement européen sur les actes délégués" in AUVRET-FINCK Josiane (ed.), *Le Parlement européen après l'entrée en vigueur du traité de Lisbonne*, (Bruxelles, Larcier, 2013) p. 31.

contained in a delegated act.[2314] As consistently held by the Court, Treaty provisions represent the first limit to the delegation of powers which is imposed not only on the Commission in the adoption of the delegated act,[2315] but also on the legislator in the exercise of its discretion in the choice between delegated and implementing acts.[2316] Indeed, representing the first yardstick for the assessment of its legality, any infringement of the Treaties, as well as of the general principles of EU law,[2317] would lead to the annulment of a delegated act.[2318]

3.1.2. Delegated Acts and Basic Act

The relationship between legislative acts and delegated acts appears more complex. Although originally conceived as subordinate to legislative acts, Article 290 TFEU expressly provides that delegated acts can "amend certain non-essential elements of the legislative act". This means that the provisions contained in this non-legislative act can "modify or repeal non-essential elements laid down by the legislature" at the legislative level.[2319] Accordingly, in this respect the Commission is not required to act in compliance with the elements contained in the basic act which it is specifically called to amend.[2320] Assuming that only acts of the same or a higher level have the force to affect an existing act, this derogatory force of delegated acts apparently suggests that they should be considered on the same level as the legislative acts in the hierarchy of norms.[2321]

Such a conclusion would be in line with the constitutional traditions of certain Member States concerning acts adopted pursuant to a legislative delegation.[2322] For instance, under Article 76 of the Italian Constitution,[2323] the *decreti legislativi* have expressly the same hierarchical position as

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[2314] For the pre-Lisbon application of the principle, see Chapter 2, para. 5.2.1. See also BAST Jürgen, "On the Grammar -of EU Law: Legal Instruments*", Jean Monnet Working Paper* 9/03 (Heidelberg 24-27 February 2003), p. 21; TIZZANO Antonio, "La gerarchia delle norme comunitarie", *Il Diritto dell'Unione Europea* (1996), p. 61.

[2315] *Inter alia*, Case C-286/14, *Parliament v Commission (Connecting Europe Facility)*, EU:C:2016:183, para. 61.

[2316] Case C-88/14, *Commission v Parliament and Council (Visa reciprocity)*, EU:C:2015:499, para. 28.

[2317] On the hierarchical position of the general principles of EU law, see TRIDIMAS Takis, *The General Principles of EU Law* (Oxford University Press, 2006); CRAIG Paul, *EU Administrative Law,* (Oxford University Press, 2006).

[2318] Article 263 TFEU. See *infra* para. 4.8.

[2319]*Inter alia*, Case C-286/14, *Parliament v Commission (Connecting Europe Facility)*, EU:C:2016:183, para. 42.

[2320] Ibidem.

[2321] See BAST Jürgen, *op. cit.* (2016), p. 169. See also SCHUTZE Robert, "Delegated Legislation in the (new) European Union: A Constitutional Analysis", 74 *The Modern Law Review* No. 5 (2011), p. 683: "Article 290 TFEU confirms the hierarchical position of delegated legislation: the latter will be able to amend primary legislation and must therefore enjoy at least relative and limited hierarchical parity".

[2322] See Article 76 of the Italian Constitution. See also Articles 82 and 83 of the Spanish Constitution.

[2323] Article 76 of the Italian Constitution reads as follows: "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes." (translation from www.senato.it, last accessed 04.03.2018).

formal laws (i.e. "*forza di legge*"), being able to amend provisions of legislative level. Interestingly, it was argued that the hierarchical relation between the *decreto legislativo* and its enabling act might shed decisive light on the issues related to the hierarchical collocation of delegated acts in EU law.[2324] However, this issue is more controversial than it might initially appear, [2325] and deserves closer attention before drawing any meaningful parallel.[2326]

It is worth considering the issue distinguishing between essential and non-essential elements of the basic act. Firstly, the question whether all the elements of the basic act can be amended through a delegated act is answered by Article 290 TFEU. This provision, in line with the established case law,[2327] expressly rules out the possibility to amend the essential elements of the legislative act. The Commission not only cannot amend the essential elements, but it cannot even derogate from them or supplement them through delegated acts, also when provided expressly.[2328] Therefore, within the basic act, a nucleus of provisions - which were identified as the reserved domain of the legislator[2329] - can be recognised which is shielded from any influence from the delegated act. Hence, considering their ability to shape the content of the delegated act

[2324] BAST Jürgen, *op. cit*. (2012), pp. 885-928; BAST Jürgen, "On the Grammar of EU Law: Legal Instruments", *Jean Monnet Working Paper 9/03 (Heidelberg 24-27 February 2003),* p. 31.

[2325] The hierarchical position of *decreti legislativi* is the object of scholarly debates. In particular, the express provision of their statutory effects places the *decreto legislativo* at the same hierarchical level as formal laws. Therefore, its provisions influence the exercise of normative powers at a lower level, entailing that, for instance, the Government's executive acts shall comply with the rules introduced by a *decreto legislativo* and cannot amend it. According to the common understanding of the hierarchy of norms, when it comes to the relationship between norms at the same level, their equivalence precludes an earlier act from influencing the content of the later act. However, this is not the case for *decreti legislativi*. The enabling act, which is hierarchically equal to the delegated measure, determines its content, and its provisions on principles and criteria which cannot be derogated from without causing a violation of the Constitution. For this reason, in spite of the equal level, part of the doctrine has described the relationship between the enabling act and the delegated decree as "a complete subordination". However, this subordination shall be interpreted narrowly as relating only to the limits provided expressly in the enabling act, without entailing further consequences for the hierarchy of norms. In other words, as remarked by Mortati, considering the effects of *decreti legislativi* with regard to norms of a lower level, they appear to be equal to formal laws but, considering their effects with regard to the enabling law, their position is more similar to subordinate acts, thus determining a "*relative* subordination". See, *inter alia*, CUOCOLO Fausto, *op. cit*. (2003), p. 397; ALBERTI Anna, *op. cit.* (2015), p. 45; LIGNOLA Enzo, *op. cit.* (1956), p. 179; CERVATI Angelo Antonio, *op. cit.* (1972), p. 90; ZAGREBELSKY Gustavo, *La giustizia costituzionale* (Il Mulino, 1988), pp. 139 ss.; MORTATI Costatino, "Concetto, limiti, procedimento della revisione costituzionale", *Rivista trimestrale di diritto pubblico* (1952), p. 30.

[2326] See infra note 2323.

[2327] See Chapter 4, para. 5.1.

[2328] See, *inter alia*, Case 25/70, *Köster*, EU:C:1970:115, para.6; Case C-44/16 P, *Dyson v Commission*, 2017:357, paras. 61-63; C-540/14 P, *DK Recycling v Commission*, EU:C:2016:469, paras. 49-55.

[2329] To use the words of RITLENG Dominique, "The Reserved Domain of the Legislature. The Notion of Essential Elements of an Area", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), pp. 133-155.

and to resist its amendments, it is arguable that these provisions are on a higher position in the hierarchy of norms vis-à-vis the provisions adopted according to Article 290 TFEU.[2330]

Secondly, it is questionable whether the inability to amend or derogate from the delegated act also extends to non-essential elements. On the one hand, if the delegated acts were really at the same hierarchical level than legislative acts, nothing in the text of Article 290 TFEU would preclude such an amendment and the *lex posterior* rule would apply. On the other hand, it is arguable that, being the source of the delegated power and adopted according to the legislative procedure, each provision of the enabling act is binding and shall prevail in relation to the measures taken as result of the exercise of the delegated power.[2331]

In recent case law, the Court appears to endorse the argument that, where the basic act does not allow it expressly, the Commission cannot amend any element of the basic act.[2332] If the basic act provides only a power to supplement, the Commission is only authorised to flesh out the details and, in so doing, it is bound by the entirety of the legislative act.[2333] It interprets the power to amend restrictively since "such a power emanates from an express decision of the legislature and its use by the Commission respects the bounds the legislature has itself fixed in the basic act."[2334] Therefore, also in relation to these non-essential elements, the delegated acts are to be considered subordinate to the basic act.[2335] In other words, "the ability to derogate from the basic act is thus contingent on a permission granted in the basic act rather than an inherent quality of delegated acts".[2336]

However, if the delegated acts are subordinate to the basic act, on which ground can a lower-ranking act amend a higher source of law? Clearly, it is the express provision of this possibility in Article 290 TFEU which determines the hierarchical relationship between the enabling act and the delegated act. This is precisely the effect of the *Delegationsnorm.*[2337] Sanctioning the

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[2330] See, however, the position of TIZZANO Antonio, *op. cit.* (1996), p. 62. TIZZANO argues that the relationship between the basic act and the "delegated" act is not hierarchical, but merely functional. The only case where some hierarchical considerations play a role are identified in the judgments where the Court recognised that an act of individual application cannot condition or limit an act of general application (see Case T-9/93, *Schøller Lebensmittel*, EU:T:1995:99; Case T-51/89, *Tetra Pak*, EU:T:1990:41).

[2331] See, by analogy, ALBERTI Anna, *La delegazione legislativa tra inquadramenti dogmatici e svolgimenti nella prassi* (Giappichelli, 2015), p. 45.

[2332] See, *inter alia*, Case C-286/14, *Parliament v Commission (Connecting Europe Facility)*, EU:C:2016:183.

[2333] Case C-286/14, *Parliament v Commission (Connecting Europe Facility)*, EU:C:2016:183, para. 50. See CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, 2018), p. 728.

[2334] Case C-696/15 P, *Czech Republic v Commission*, EU:C:2017:595, para. 51. As a further element of subordination, it "must be interpreted as far as possible in conformity with the basic act" (para. 33).

[2335] BAST Jürgen, op. cit. (2016), p. 169. See also BARATTA Roberto, "Sulle fonti delegate ed esecutive dell'Unione europea", Il *Diritto dell'Unione europea* (2011), p. 300.

[2336] BAST Jürgen, *op. cit.* (2016), p. 169.

[2337] *Inter alia*, see, by analogy, ALBERTI Anna, *op. cit.* (2015), p. 26.

derogatory effects at the highest level of the hierarchy, Article 290 TFEU introduces an exception to the ordinary relationship between these acts, conferring upon them a hierarchical parity albeit relative and limited.[2338] This exception shall be interpreted narrowly as relating only to the elements expressly mentioned, without entailing further consequences for the hierarchy of norms.

3.1.3. Delegated Acts and Other Legislative Acts

The considerations exposed are also relevant in relation to the position of delegated acts vis-à-vis legislative acts other than the basic act. In this regard, it has been argued that "the priority of legislative acts is only relative to the basic act and does not imply a general hierarchy with respect to other legislative acts, but merely constitutes a partial hierarchy."[2339] This reflection may also be considered in relation to the recent case law which, in a certain sense, has rejected the idea that legislative acts enjoy *a priori* a higher position in the hierarchy vis-à-vis non-legislative acts. Indeed, in the *Slovakia v Council* case, concerning the relocation quotas of third-country nationals, the Court upheld the derogation of provisions of legislative acts by non-legislative acts based directly on the Treaties.[2340]

However, it may be noted that the possibility to introduce rules, which are derogatory or supplementary towards other legislative acts depends on the limits contained in the basic act, which determines objectives, content, scope and duration of the delegation of power. Therefore, the innovative potential of a delegated act in relation to earlier legislative acts is inevitably limited by these elements[2341] and it is mediated by the force of the basic act.[2342] Arguably, the interplay between Article 290 TFEU, the basic act and the delegated act, thus, constitutes the framework for the understanding of the hierarchical position of the delegated acts.

[2338] SCHUTZE Robert, *op. cit.* (2011), p. 683. In this sense, contrary to some scholarly suggestions, this "relative hierarchy" shall be understood in an opposite sense to the one observed for the *decreti legislativi*. While for *decreti legislativi* it is a relative subordination to certain provisions of the basic act which would be otherwise of the same hierarchical position, for delegated acts it is a relative parity, limited to the elements expressly amendable by it. On the notion of "relative hierarchy", see *supra* note 2310.

[2339] BAST Jürgen, *op. cit.* (2016), p. 169.

[2340] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, EU:C:2017:631, esp. para. 78.

[2341] See, by analogy, CERVATI Angelo Antonio, *La delega legislativa* (Giuffrè, 1972), p. 92.

[2342] In this regard, a more pertinent analogy may be proposed with the phenomenon of *regolamenti delegati* in Italian law, which, pursuant to a delegation by the Parliament, aim at regulating at a subordinate level a matter already regulated by legislative acts. By some authors, the ability of these subordinate acts to amend a regime established at legislative level was explained by the mechanism according to which the existing legislative provisions are repealed by the effect of the basic act, thus allowing the lower-ranking provisions to fill the subsequent gap in regulation. See D'ATENA Antonio, "Regolamento delegato, legge abilitante e sindacato di costituzionalità", *Giurisprudenza costituzionale* (1967), pp. 1223-1232; CARLASSARE Lorenza, *Regolamenti dell'esecutivo e principio di legalità* (Padova, 1964), *passim*.

3.2. The Relationship between Delegated Acts and Implementing Acts

The reciprocal position of delegated acts and implementing acts represents one of the most significant issues of the new categorisation of acts. As already noted, a vertical conceptualisation of the relationship between the two emerges from the *travaux préparatoires*, also comprising the legislative acts.[2343] However, this underlying idea was not actually translated in a positive provision in primary law since Articles 290 and 291 TFEU are silent on this particular point.

In the light of the interpretation of the Court and the application of these provisions in the described practice of EU institutions, it is probably closer to reality the observation that the relationship between delegated and implementing acts needs to be understood horizontally, rather than hierarchically.[2344] Although the three-tiered description of these categories is useful to highlight the differences in their political significance, control mechanisms and procedures, it is arguable that it does not necessarily imply a hierarchy in its legal-technical sense.[2345] Actually, the developments in the application of Articles 290 and 291 TFEU point in the opposite direction.

Firstly, the three-tiered conceptualisation of legislative, delegated and implementing acts would perfectly describe the situation of an implementing act enacted on the basis of a delegated act.[2346] However, although the possibility is envisaged in Article 291 TFEU, it was seen that, for legal and practical reasons, such a scenario has remained "an institutional chimera" in the post-Lisbon practice.[2347] Conversely, the common practice is to have different provisions, concerning the adoption of delegated and implementing acts, in the same legislative act, which serves as the basic act for both kinds of delegation. These provisions do not positively establish a hierarchy among the acts[2348] and delegated and implementing acts are used to confer different tasks on the Commission in parallel, without being necessarily subordinated each other.

Secondly, this horizontal understanding of Articles 290 and 291 TFEU appears to be corroborated by the position of the Court of Justice, which in *Biocides* left significant discretion to the legislator

[2343] Documents de Travail Préparatoires de la Convention Européenne, Office de publications officielles des Communautés Européennes, Luxembourg, 2004, p. 339.
[2344] For an early position in this sense, see BIANCHI Daniele, "La comitology est morte! Vive la comitologie!", 48 *Revue trimestrielle de droit européen* (2012), p. 93. See also MIGLIORINI Sara, "La continuità degli atti comunitari e del terzo pilastro dopo l'entrata in vigore del Trattato di Lisbona", *Rivista di diritto internazionale* (2010), p. 425; CANNIZZARO Vincenzo, "Gerarchia e competenza nel sistema di fonti dell'Unione europea", *Il Diritto dell'Unione europea* (2005), pp. 662-664. *Contra* BARATTA Roberto, *op. cit*. (2011), p. 301.
[2345] BAST Jürgen, *op. cit*. (2016), p. 170. See also BAST Jürgen*, op. cit*. (2012), pp. 885-928.
[2346] BAST Jürgen, *op. cit*. (2016), p. 170.
[2347] See Chapter 5, para. 3.2.2.
[2348] BAST Jürgen, *op. cit*. (2016), p. 171.

in the choice between delegated and implementing acts.[2349] Somehow endorsing the idea that there is a "grey zone" between the power to supplement and the power to implement a legislative act, the Court refrained from imposing a clear-cut divide between the two categories of acts. Although the following case law has further qualified the interpretation of these provisions,[2350] the recognition of the political nature of the choice and the blurring of the line between the two systems, is at odds with the juxtaposition in different hierarchical levels and its constitutional implications, which a vertical understanding of the relationship between delegated acts and implementing acts would entail.[2351] Indeed, the position of the Court appears closer to the approach adopted for the choice between the different legal instruments of EU law, at the same level of the hierarchy,[2352] than to the one on the choice of the legal basis, whose institutional balance implications are clearly recognised.[2353]

Therefore, this development in the interpretation of Articles 290 and 291 TFEU also tends to convey the idea of a horizontal relationship between delegated and implementing acts, at least with regard to delegated acts supplementing the basic act. Arguably, these developments are also to be read in relation to the fact that the implementing acts are not adopted pursuant to an autonomous power of the Commission but pursuant to a delegation of powers.[2354] Adopted pursuant to the same legal mechanism, with content which is hard to differentiate and in the absence of an express provision on the point, delegated and implementing acts struggle to find a different position in the hierarchy of norms, flattening the three-tiered concept to a binary reality. At the same time, in a vicious circle, these uncertainties on the hierarchical position and effects of the delegated and implementing acts tend to frustrate the attempt to distinguish the powers involved according to substantive criteria.[2355]

[2349] Case C-427/12, *Commission v Parliament and Council (Biocides)*, EU:C:2014:170. See Chapter 3, para. 2.11.

[2350] See Case C-88/14, *Commmission v Parliament and Council(Visa Reciprocity)*, EU:C:2015:499; Case C-65/13, *Parliament v Commission (EURES)*, EU:C:2014:2289; Case C-286/14, *Parliament and Council v Commission (Connecting Europe Facility)*, EU:C:2016:183. For a comprehensive comment on the cases, see CRAIG Paul, *op. cit*. (2018), pp. 724-729.

[2351] BAST Jürgen, *op. cit*. (2016), p. 171.

[2352] See, *inter alia*, Case 5/73, *Balkan-Import-Export*, EU:C:1973:109, para. 18; Case C-163/99, *Portugal v Commission*, EU:C:2001:189, para. 20; Case C-107/95 P, *Bundesverband der Bilanzbuchhalter v Commission*, EU:C:1997:71, para. 27. See also Chapter 1, para. 12.2.

[2353] See, *inter alia*, Case 8/73, *Hauptzollamt Bremerhaven v Massey-Ferguson*, EU:C:1973:90, para. 4; Case 45/86, *Commission v Council*, EU:C:1987:163, para. 11; Case C-300/89, *Commission v Council*, EU:C:1991:244, para. 10.

[2354] See Chapter 2, para. 2.10.2.

[2355] See Chapter 2, para. 2.11.1

3.3. The Implementing Acts in the Hierarchy of Norms

Having examined the controversial relationship between implementing acts and delegated acts, the hierarchical position of implementing acts in the EU legal system appears more clearly defined. While their lower-ranking position vis-à-vis delegated acts has been arguably scaled down in practice, their subordination is undisputed in relation to primary law and general principles of EU law.

3.3.1. Implementing Acts and Legislative Acts before Lisbon

It is noteworthy that the subordination of an implementing act to its basic act represented established case law in the pre-Lisbon implementation system. As clarified in *Deutsche Tradax,* "an implementing measure […] could not have derogated from the provisions of the basic act to which it is subordinate".[2356] Therefore, an implementing act was bound to comply with the modalities defined in the act containing the delegation of powers and its provisions had to be interpreted accordingly.[2357] Thus, the hierarchy between the two acts entailed the annulment of the implementing act in case of a violation of the basic acts' provisions.[2358]

In the pre-Lisbon regime, it was equally accepted that an implementing act could amend certain provisions of the basic act, where it was expressly so provided.[2359] In particular, since the entry into force of the Comitology Decision of 2006, such measures were to be adopted specifically through the RPS procedure.[2360] This possibility to amend, yet, did not extend to other legislative acts since "in exercising its implementing powers, the Commission (or the Council) has no authority to amend a legislative act other than the basic act".[2361]

[2356] Case 38/70, *Deutsche Tradax GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* EU:C:1971:24, p. 155.

[2357] Case 6/871, *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1971:100, para. 21; Case 34/78, *Yoshida Nederland BV v Kamer van Koophandel en Fabrieken voor Friesland,* EU:C:1979:20; Case 114/78, *Yoshida GmbH contro Industrie- und Handelskammer Kassel*, EU:C:1979:21; Case 121/83, *Zuckerfabrik Franken v Hauptzollamt*, EU:C:1984:175, para. 13. See HOFMANN Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets reality", 15 *European Law Journal* No. 4 (2009), p. 490.

[2358] *Inter alia*, Case T-285/94, *Pfloeschner v Commission*, EU:T:1995:214, para. 51. See also DE WITTE Bruno, op. cit. (2008), p. 91; LENAERTS Koen, VAN NUFFEL Piet and BRAY Robert (ed.), *Constitutional Law of the European Union*, 2nd ed. (Sweet & Maxwell, 2005), p. note 112 No. 14-039. *Contra*, expressing doubts on the conceptualisation of the relationship among basic act and implementing act as hierarchical, see BAST Jürgen, *op. cit.* (2003), p. 31.

[2359] See, *inter alia*, Case 230/78, *Eridania v Ministero dell'agricoltura*, EU:C:1979:216; Case C-156/93, *Parliament v Commission*, EU:C:1995:238.

[2360] See Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006, p. 11–13.

[2361] Opinion of Advocate General Mengozzi in Case C-355/10, *Parliament v Council*, EU:C:2012:516, para. 76. For a more detailed analysis, see VON BOGDANDY Armin, ARNDT Felix and BAST Jürgen, "Legal Instruments

3.3.2. Implementing Acts and Legislative Acts after Lisbon

After the entry into force of the Lisbon Treaty, such a derogatory force of implementing acts was put into question. In this regard, it has been noted that the wording of Article 291 TFEU is not peremptory in determining the relationship between basic and implementing acts, leaving room for an interpretation allowing these acts to amend or derogate the basic act.[2362]

However, reading Article 291 in conjunction with Article 290 TFEU, it is possible to infer that, whenever the basic act is amended, this must be done through a delegated act.[2363] Therefore, *a contrario,* the implementing acts cannot be used. This position was actually endorsed by the Court in *EURES,* where it clarified that "in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements."[2364] This was also later confirmed in *Visa Reciprocity*.[2365] Therefore, although the delays in the alignment of RPS procedure to the post-Lisbon system may entail that implementing acts with amending effects are still adopted,[2366] and although the issue is still debated in literature, for systematic reasons it may be argued that the implementing acts do not enjoy the earlier derogatory force in relation to their basic act, thus positioning themselves more clearly in a subordinate position to legislative acts in the hierarchy.[2367]

3.4. The Acts of the ECB in the Hierarchy of Norms

Although Article 127(6) TFEU serves as a *Delegationsnorm* for the delegation to the ECB, it does not address the specific question of the hierarchical position of the acts issued from this delegation of powers. The ECB acts, moreover, do not fit into the described three-tiered categorisation since they are enacted by an institution not mentioned in Articles 290 and 291 TFEU. Therefore, their

in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis", *Yearbook of European Law* (2004), p. 127.

[2362] In particular, it is possible to interpret Article 290 TFEU as reserving the amendment of "certain elements" to the delegated acts, while "other elements" can be amended by implementing acts, as proposed by BIANCHI Daniele, *op. cit.* (2012), pp. 88-89; See also BAST Jürgen, *op. cit*. (2016), pp. 169-170.

[2363] DRIESSEN Bart, "Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU", 35 *European Law Review* No. 6 (2010), p. 847. See Opinion of Advocate General Mengozzi in Case C-88/14, *Commission v Parliament and Council*, EU:C:2015:304, paras. 39-50.

[2364] Case C-65/13, *Parliament v Commission*, EU:C:2014:2289, para. 45. However, BAST remarks that in this case the basic act did not contain an express authorisation to amend, and hence argues that it is note decisive to rule out the possibility. BAST Jürgen, *op. cit*. (2016), p. 169 note 53.

[2365] Case C-88/14*, Commission v Parliament and Council (Visa Reciprocity)*, EU:C:2015:499, para. 31.

[2366] See Chapter 6, para. 3.4.2. See also Commission Regulation (EU) No. 1368/2014 of 17 December 2014 amending Regulation (EC) No. 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, OJ L 366, 20.12.2014, p. 15–16, mentioned also by BAST Jürgen, *op. cit.* (2016), p. 170.

[2367] *Contra*, see BAST Jürgen, *op. cit.* (2016), p. 170.

existence unveils the incompleteness of the hierarchy thereby established, raising relevant systematic concerns which will be analysed *infra* in relation to agencies' acts.

In relation to the ECB acts, it is interesting to observe that, according to some authors, rather than in terms of hierarchy, the relationship of these acts with other EU acts should be understood in terms of "competence", as alternative criterion regulating the antinomies between the legal sources which are called to regulate constitutionally different domains.[2368] However, being justified by the particular institutional position of independence and by the Treaties provisions conferring specific tasks on this institution, this observation is arguably applicable only to the specific case of acts issued by the ECB pursuant to powers based directly in primary law and not to its delegated powers which constitute the object of the present study.

Therefore, focusing specifically on the acts adopted according to a delegation of powers, it is arguable that, also in the case of the ECB, these acts must abide by the provisions of the basic act, thus being hierarchically subordinate to the latter.[2369] Therefore, the basic act prevails over the provisions of the ECB act, which may be annulled if it is inconsistent with the limits of the empowerment. Moreover, the specific case of a basic act containing an authorisation to amend the same basic act has not emerged in the practice, leaving open the question on its admissibility.

Furthermore, with regard to the different question of the relationship with acts other than the basic act, the SSM Regulation expressly provides for the subordination of the ECB acts not only to the basic act, but also to other legislative and non-legislative acts. Indeed, Article 4(3) of SSM Regulation clarifies that the decisions taken by the ECB are "subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU." This includes, in particular, the "binding regulatory and implementing technical standards developed by EBA and adopted by the Commission." Moreover, interestingly, it is stated that "for the purpose of carrying out the tasks conferred on it by this Regulation […] the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives."[2370]

Therefore, by effect of this provision, the ECB acts are to be considered in a hierarchically lower position not only in relation to legislative acts, but also in relation to delegated acts and

[2368] See ALI' Antonino, *Il principio di legalità nell'ordinamento comunitario* (Giappichelli, 2005), pp. 117-118; ZILIOLI Chiara and SELMAYR Martin, "The European Central Bank: An Independent Specialized Organization of Community Law", 37 *Common Market Law Review* (2000), p. 629.
[2369] BAST Jürgen, op. cit. (2003), p. 30. However, for the reservations of TIZZANO on this conceptualisation, see *supra* note 2315. See TIZZANO Antonio, *op. cit.* (1996), p. 62.
[2370] Article 4(3) of the SSM Regulation. For an application in judicial review, see Case T-122/15, *Landeskreditbank v ECB*, EU:T:2017:337.

implementing acts, including acts adopted according to a procedure which foresees a *de facto* delegation of powers in favour of the ESAs. What is even more interesting, in this establishment of the reciprocal hierarchical positions of EU acts, is that national laws are also taken into account when they are the instrument to transpose EU directives. In this sense, although limited to the mentioned specific case, this provision might be seen as a remarkable attempt to build a hierarchy between acts which deal with the implementation of EU law at different levels. Although expressly "without prejudice to the principle of the primacy of Union law",[2371] recognising the composite structure of EU implementation, which is articulated between the national and EU level, but also within the EU level between the Commission and the agencies, the ECB acts are interestingly posed in a hierarchical dialogue with a plurality of measures.

3.5. The Acts of the Agencies in the Hierarchy of Norms?

In the described context of partial constitutional neglect of EU agencies by the Lisbon reform, one of the most remarkable aspects is the absence of any mention of EU agencies' acts within the categorisation of non-legislative acts contained in Articles 290 and 291 TFEU. This has relevant constitutional implications.

3.5.1. An Incomplete, Inconsistent and Misleading Categorisation

The neglect of agencies' acts highlights that the reform of the hierarchy of norms in EU law is certainly incomplete, arguably inconsistent and probably misleading. Firstly, the lack of a mention of EU agencies in Article 291 TFEU leaves a large number of acts which are adopted by this "important part of the EU institutional machinery" outside the described categorisation.[2372] These are not only acts of individual application, such as EUIPO or CVPO decisions, but they may also be acts of general application,[2373] which are thus considered neither legislative, nor delegated, nor implementing acts. Such an omission of agencies' acts exacerbates the incompleteness of this categorisation, which was also noted with reference to the ECB acts and to the acts directly based on the Treaties which are not legislative acts.[2374] In this sense, the simplification effort which led to this categorisation appears far from achieved,[2375] leaving behind a certain amount of confusion on the hierarchy of EU acts.

[2371] Recital 34 of the SSM Regulation.
[2372] To use the words of CHITI Edoardo, "An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies", 46 *Common Market Law Review* (2009), p. 1395-1442.
[2373] See Case T-94/10, *Rütgers and others v ECHA*, EU:T:2013:107, para. 57.
[2374] See, *inter alia*, DE WITTE Bruno, *op. cit.* (2008), pp. 100-101; CRAIG Paul and DE BURCA Grainne, *EU Law. Text, Cases and Materials*, 5th ed., (Oxford University Press, 2011), p. 118.
[2375] CRAIG Paul, *op. cit.* (2018), p. 747.

Secondly, as the qualification of legislative acts according to the procedure for their adoption appears rather arbitrary,[2376] the qualification of some non-legislative acts as delegated or implementing acts on the basis of the adoption by the Commission or the Council also raises doubts on the consistency of the criterion, particularly in the light of the peculiar institutional structure of the EU and its institutional balance. Indeed, arguably these acts differ from the acts of the agencies not due to the powers nor to the legal tool for the transferral of powers, i.e. the delegation, but merely due to the institutions enacting them. As clearly emerges from this study, other delegation systems exist outside Articles 290 and 291 TFEU, and present relevant commonalities in substance and limits, raising doubts on the reasons underpinning this differentiation and its legal consequences.

Thirdly, the existence of binding legal instruments outside the Treaty categorisation shows that the hierarchical model of the Lisbon Treaty fails to grasp the composite character of the EU governance.[2377] Indeed, it presents an image of unitary executive which does not correspond to the reality of the EU administration, potentially misleading even the experts not fully aware of the escalating agencification process. Moreover, also considering the reciprocal position of delegated and implementing acts, it is arguable that the categorisation does not correspond to a hierarchy *stricto sensu* among these acts, thus casting a shadow on the understanding of the principle of the rule of law in the EU legal system.

3.5.2. Acts in the Shadow of the Hierarchy

Focusing more precisely on the implications of the constitutional neglect of agencies for the hierarchical position of their acts, it is clear that this situation puts them in "the uncomfortable and even unconstitutional position […] operating in the shadow of a recognised hierarchy".[2378] More than the ECB acts, which at least have a *Delegationsnorm* in Article 127(6) TFEU, agencies' acts lack a clear role in the system of legal sources. Thus, although the case law has sanctioned the possibility of adopting binding acts, the relationship of these acts with the other legal sources of EU law appears not to be fully settled. In this regard, although their subordination to primary law and the basic act is not disputed, the absence of a *Delegationsnorm* in the Treaties raises doubts on their ability to amend provisions of the basic act lawfully even if so provided, since it

[2376] See, *inter alia*, DE WITTE Bruno, *op. cit.* (2008), pp. 100-101.
[2377] EVERSON Michelle and VOS Ellen, "European Agencies: What about the Institutional Balance?", *Maastricht Faculty of Law Working Paper* No. 4 (2014), p. 17.
[2378] EVERSON Michelle and VOS Ellen, "Unfinished Constitutionalisation: The Politicised Agency Administration and Its Consequences", *Paper presented at the TARN Conference* (Florence, 10-11/11/2016), p. 14.

constitutes their only legal basis and the source of their powers.[2379] Moreover, when the basic act does not expressly regulate the point, the hierarchical relationship between agencies' acts and other non-legislative acts - in particular delegated and implementing acts - remains to be explored, requiring a careful consideration of the interplay between these parallel systems of implementation of EU law.

4. The Judicial Review of the Acts of the Delegate

4.1. The Importance of the Judicial Review

These considerations of the acts of the delegate, together with the limits and controls identified in the previous chapters, find their application and meaning in the judicial review carried out by the EU judicature. The possibility to challenge the acts issued by a public authority represents a fundamental aspect of the rule of law, empowering the individuals to protect their rights and to seek an effective remedy to abuses of powers. Indeed, the right to an effective remedy before a court of competent jurisdiction constitutes a fundamental right recognised in the constitutional traditions common to the Member States, and it is positively spelled out in Articles 6 and 13 of the ECHR.[2380] Having the same legal value as the Treaties, Article 47 of the Charter highlights the importance of guaranteeing access to justice in EU law, to protect the rights and freedoms guaranteed by the law of the Union.

The judicial review is even more relevant in relation to acts adopted by institutions or bodies which were not originally entrusted with those powers, but were conferred the powers through delegation. Since the first cases related to delegation, the Court has emphasised the importance of judicial review, considering this element as a *condicio sine qua non* for the legality of the transferral of powers. Indeed, putting this requirement in relation to the need to define the powers delegated precisely, the judicial review is seen as the essential instrument to preclude the arbitrary exercise of power by the delegate, maintaining its acts within the boundaries of the delegation.[2381] In particular, the centrality of this requirement is vigorously restated in the *Short*

[2379] On this point, it may be interesting to recall the principle recognised by ZAGREBELSKY Gustavo, *Manuale di diritto costituzionale. Il sistema delle fonti di diritto* (UTET, 1992), p. 5, according to which no source of law can create new sources having the same or a higher effect than itself, but only sources of lower rank.
[2380] As remarked by the Court, *inter alia*, in Case 222/84, *Johnston*, EU:C:1986:206, para. 18.
[2381] See, in particular, Cases 9/56 and 10/56, *Meroni,* EU:C:1958:8, p. 151; Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, para. 90; Opinion 1/76 (*inland waterway vessels*), EU:C:1977:63, para. 21.

Selling case, remaining as one of the few conditions retained by the Court from the *Meroni* doctrine.[2382]

The judicial scrutiny of the acts issued according to a delegation of powers, thus, requires a careful analysis to unveil the peculiarities and pitfalls the different delegation systems may present. In addition to the reviewability of these acts, particular attention will be paid to the innovations brought by the Lisbon Treaty as regards the *locus standi* of non-privileged applicants and to the intensity of the review exercised by the Court, in order to assess whether the control guaranteed by the judicial system of the EU constitutes an effective limit to the exercise of the delegated powers.

4.2. The EU System of Judicial Review

In line with the relevance of the right to an effective remedy for the protection of rights and freedoms guaranteed by the law of the Union, the EU has developed a jurisdictional system which ensures application and effectiveness of the system of EU norms as a whole.[2383] As emphasised by the Court in *Les Verts*, the EU "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[2384] Thus, innovating from the international law tradition and practice of cooperation among States, the jurisdictional system of the EU is articulated in a number of judicial remedies open not only to the institutions and Member States but also to individuals and legal persons for the protection of their legal positions.[2385]

The judicial protection of the rights and freedoms guaranteed by the law of the Union is carried out in a system composed of two levels, procedurally distinct but functionally interrelated.[2386] On the one hand, there is the *direct* control of the Court of Justice, whereby EU institutions, the Member States and the individuals are able to obtain a Court ruling on the validity of an EU act (Article 263 TFEU), on the failure to act of an EU institution or body (Article 265 TFEU), on a plea

[2382] Opinion of the Advocate General Jääskinen in Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2013:562, para. 88; Case C-270/12, *UK v Council and Parliament (Short Selling)*, EU:C:2014:18, para. 53. See ADAMSKI Dariusz, "The ESMA Doctrine: A Constitutional Revolution and the Economies of Delegation", 39 *European Law Review* (2014), p. 832; CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 246.
[2383] TESAURO Giuseppe, *Diritto dell'Unione europea,* VI ed. (Cedam, 2011), pp. 229-231. On the limited jurisdiction of the Court in CFSP and PJCC matters, see Articles 275 and 276 TFEU.
[2384] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, para. 23.
[2385] On the peculiarity of EU judicial system and its implications see, *inter alia*, CORTESE Bernardo, "A la recherche d'un parcours d'autoconstitution de l'ordre juridique interindividuel européen: essai d'une lecture pluraliste 50 ans après Van Gend en Loos et Costa", *Il diritto dell'Unione europea* No. 2 (2015), pp. 227-271. See also CORTESE Bernardo, *op. cit.* (2018).
[2386] TESAURO Giuseppe, *op. cit.* (2011), p. 232.

of illegality (Article 277 TFEU), on the infringement of EU law by Member States (Article 258 TFEU) and on the damage liability of EU institutions or bodies (Article 340 TFEU). On the other hand, there is the mechanism of a preliminary ruling (Article 267 TFEU), which requires a cooperation between the national judge and the Court of Justice. Through the preliminary reference by the national judge, an *indirect* control over the validity and interpretation of EU law is granted by the Court, but the final decision of the case rests on the national judge.[2387]

In the light of this composite system, the Court underlined in *Inuit* that "the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union."[2388] In other words, the judicial control of the validity of EU acts is ensured by the Court of Justice and by the courts and tribunals of the Member States, which are an active part of the system of EU courts.[2389]

Accordingly, focusing in particular on the judicial review the acts adopted pursuant to a delegation of powers, the system permits to challenge their validity either directly in an action for annulment pursuant to Article 263 TFEU or indirectly through the preliminary reference to the Court according to the procedure of Article 267 TFEU.

4.3. The Action for the Annulment of Acts Issued Pursuant to a Delegation

The possibility of a direct control of legality is provided by Article 263 TFEU, which regulates the action for annulment of EU acts. This action allows EU institutions, Member States, and natural and legal persons to protect themselves against illegal binding acts of EU law, under specific conditions. An act considered vitiated and detrimental, thus, can be challenged before the Court of Justice or the General Court,[2390] which carries out a review of its legality in the light of higher-ranking rules of EU law.[2391]

[2387] TESAURO Giuseppe, *op. cit*. (2011), p. 232.
[2388] Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council*, EU:C:2013:625, para. 92. See also Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, para. 40; Case C-131/03 P, *Reynolds Tobacco and Others v Commission*, EU:C:2006:541, para. 80; Case C-59/11, *Association Kokopelli*, EU:C:2012:447, para. 34.
[2389] Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council*, EU:C:2013:625, para. 90.
[2390] For the allocation of jurisdiction between the Court of Justice and the General Court, see Article 256 TFEU and Article 51 of the Statute of the Court. For sake of clarity, the complete name will be used to indicate the specific courts, while the generic term "Court" will be used to indicate the institution as a whole.
[2391] For a detailed analysis of the action see, *inter alia*, LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *EU Procedural Law,* (Oxford University Press, 2014), pp. 253-418; TESAURO Giuseppe, *op. cit.* (2011), pp. 233-257.

In particular, the action can be brought against legislative and non-legislative acts within two months from the publication or notification of the measure, but the jurisdiction of the Court is limited in the Area of Freedom, Security and Justice,[2392] and of the Common Foreign and Security Policy.[2393] Should the Court find a violation, the contested act is annulled, i.e. it is declared void and its effects are cancelled from the date on which it entered into force (*ex nunc*). However, the retroactivity of the judgment may be attenuated by the Court by maintaining the effects of the annulled act as definitive on grounds of legal certainty.[2394]

4.4. The Reviewability of the Acts of the Council, the Commission and the ECB

Article 263 TFEU lists in detail the acts subject to review, stating that the Court has jurisdiction over legislative acts and over certain acts of EU institutions, bodies, offices and agencies.[2395] Considering in particular the EU institutions on which the delegated powers are conferred according to the rules described, this provision comprises "the acts of the Council, the Commission and of the European Central Bank, other than recommendations and opinions". Therefore, the scope of review clearly covers the acts adopted pursuant to a formal delegation of powers to these institutions, irrespective of the form they may take.[2396]

However, the exclusion of recommendations and opinions suggests that the acts subject to review must be binding.[2397] This is defined as the outcome of "the exercise, upon the conclusion of an internal procedure laid down by law, of a power provided for by law which is intended to produce legal effects".[2398] Therefore, to be considered binding acts, they have to produce legal effects. Moreover, if the applicant is a natural or legal person, the acts must be "capable of affecting the interests of the applicant by bringing about a distinct change in his legal position"[2399] or "adversely

[2392] Article 276 TFEU.
[2393] Articles 24 TEU and 275 TFEU.
[2394] Article 264 TFEU.
[2395] Article 263(1) TFEU: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties."
[2396] In this regard, the jurisdiction of the Court clearly covers regulations, directives and decisions, as well as atypical acts.
[2397] *Inter alia*, Joined Cases, 1/57 and 14/57, *Société des usines à tubes de la Sarre v High Authority*, EU:C:1957:13, para. 114; Case 133/79, *Sucrimex v Commission*, EU:C:1980:104, paras. 12-19.
[2398] Case 182/80, *Gauff v Commission*, EU:C:1982:78, para. 18. See LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit*. (2014), pp. 260-261.
[2399] Case 60/81, *IBM v Commission*, EU:C:1981:264, paras. 9-12.

affect his legal position by restricting his rights".[2400] In other words, there must be the exercise of an actual power, as also defined in relation to the notion of delegation of powers.[2401]

In this regard, it is important to underline that the binding nature of an act must be inferred not from its form, but from its content.[2402] Although Article 263 TFEU is less clear than its pre-Lisbon corresponding provision on this point,[2403] the Court looks at the substance of the contested act and may requalify it when the form does not correspond to its legal effects. However, considering the post-Lisbon categorisation of legal acts, such a requalification is more likely to occur among legal instruments of the same category of acts, than across categories of acts.[2404] Therefore, while the Court has recognised that a regulation was in reality a decision, it appears more difficult for the Court to classify, for instance, a delegated act as a legislative act, and then rule on the matter, since this would necessarily mean a violation of the procedural requirements and the invalidity of the act.[2405]

The requirement that the challengeable act be binding means that it must reflect the definitive position of the institution. In a procedure which comprises different stages, such as those described in relation to delegation, "only the measure which concludes the procedure expresses the definitive position of the institution".[2406] The Court cannot rule on decisions on which the institution, against which the action is brought, has not stated its final position, otherwise the administrative and judicial procedure would be confused.[2407] Therefore, since they do not constitute the final act of the procedure, confirmatory[2408] or preparatory acts cannot be the subject of an action for annulment.[2409] Accordingly, for instance, the draft implementing acts submitted to comitology committees by the Commission do not constitute challengeable acts, since they can still be amended by the Commission, which adopts the final act after the

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[2400] LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 268, referring to Case T-541/93, *Connaughton v Council*, EU:T:1997:53, para. 35. This condition is not required of privileged applicants in the case law, see Case 22/70, *Commission v Council (AETR)*, EU:C:1971:32, para. 42; Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post v Commission*, EU:C:2011:656, paras. 37-38.
[2401] See Chapter 1, para. 16.2.
[2402] *Inter alia*, Case C-322/09 P, *NDSHT v Commission*, EU:C:2010:701, para. 46; Joined Cases 16-17/62, *Confédération nationale des producteurs de fruits et légumes v Council*, EU:C:1962:47; Case C-366/88, *France v Commission*, EU:C:1990:348, para. 25.
[2403] See Article 230 EC.
[2404] CRAIG Paul, *op. cit.* (2010), p. 131; BERSTROM Maria, "Judicial Protection for Private Parties in European Commission Rulemaking", in BERGSTROM Carl Frederik and RITLENG Dominique, *Rulemaking by the European Commission. The New System for Delegation of Powers,* (Oxford University Press, 2016), p. 215.
[2405] CRAIG Paul, *op. cit.* (2010), p. 132; BERSTROM Maria, *op. cit.* (2016), p. 215.
[2406] LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit*. (2014), p. 273.
[2407] Case 60/81, *IBM v Commission*, EU:C:1981:264, para. 20; Case C-399/10 P, *Bouygues v Commission*, EU:C:2013:175, para. 78.
[2408] *Inter alia*, Case 56/72, *Goeth v Commission*, EU:C:1973:18, para. 15; Case C-12/90, *Infortec v Commission*, EU:C:1990:415, para. 10; Case C-480/93 P, *Zunis Holding and Others v Commission*, EU:C:1996:1, para. 14.
[2409] See, *inter alia*, Case 60/81, *IBM v Commission*, EU:C:1981:264, paras. 9-12; Case 346/87, *Bossi v Commission*, EU:C:1989:59, para. 23; Case C-147/96, *Netherlands v Commission*, EU:C:2000:335, para. 35.

committee's vote. Similarly, the draft decision adopted by the Supervisory Board represents a preparatory act, which needs to be endorsed by the Governing Council to be final and have legal effects vis-à-vis third parties. In this case, the action for annulment is, thus, to be addressed to the ECB decision.[2410]

However, this does not mean that the preliminary acts are shielded from judicial review. The irregularities in the preliminary phases may be raised in challenging the measure concluding the procedure.[2411] The final act may be annulled as a consequence of the invalidity of the preparatory acts, also when the preparatory work was carried out by an institution different from the one subject to the action for annulment.[2412] Thus, for instance, the acts adopted by EMA in the consultation procedure for the marketing authorisation of a medicinal product are considered preparatory acts in relation to the final decision of the Commission, and, although not directly challengeable, their invalidity may lead to the annulment of the Commission's decision. In the Court's words, "whilst measures of a purely preparatory nature may not themselves be the subject of an application for annulment, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step".[2413]

Moreover, an intermediate act may be exceptionally challenged when it is itself the culmination of a special procedure, distinct from that intended to permit the institution to take a decision on the substance of the case.[2414] The crucial question is, therefore, how to identify the procedures which may be considered distinct within a certain procedure.

4.5. The Reviewability of the Acts of the Agencies

Article 263(1) TFEU sets forth that the Court can review the legality of "acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". Therefore, the possibility to challenge their acts is now expressly provided in primary law, sanctioning the passive *locus standi* of EU agencies in actions for annulment.

[2410] See Case T-122/15, *Landeskreditbank v ECB*, EU:T:2017:337.
[2411] Joined Cases 12/64 and 29/64, *Ley v Commission*, EU:C:1965:28, para. 118; Joined Cases T-10-12 and 15/92, *Cimenteries and others v Commission*, EU:T:1992:123, para. 31; Case T-123/03, *Pfizer v Commission*, EU:T:2004:167, para. 24.
[2412] Case C-445/00, *Austria v Council*, EU:C:2003:445, paras. 31-35.
[2413] Case T-123/03, *Pfizer v Commission*, EU:T:2004:167, para. 24; Case T-108/92, *Calò v Commission*, EU:T:1994:22, para. 13.
[2414] Joined Cases T-10-12 and 15/92, *Cimenteries and others v Commission*, EU:T:1992:123, p. 92; Case 60/81, *IBM v Commission*, EU:C:1981:264, para. 11.

4.5.1. The Evolution of the Case Law on the Annulment of Agencies' Acts

The mention of EU agencies in Article 263 TFEU is a significant innovation of the Lisbon Treaty, which follows a long and tortuous evolution of the case law on this point.[2415] Indeed, with the exception of the plea of illegality,[2416] the jurisdiction over the acts of EU agencies was not immediately accepted by the Court, which for a long time adopted a formalistic interpretation of the treaty provisions concerning judicial review.[2417]

In this regard, it is noteworthy that certain enabling acts of the agencies contained a provision which conferred jurisdiction on the Court for the judicial review of their acts.[2418] These provisions, however, constituted an exception, whereas the basic regulations generally limited the jurisdiction of the Court to cases concerning the contractual and non-contractual liability of these bodies and access to documents.[2419] In any case, these provisions concerning jurisdiction have been interpreted restrictively by the Court, not allowing the judicial review of other acts than those expressly mentioned.[2420] Therefore, emphasising that the agencies were not among the institutions listed in the relevant treaty provisions on jurisdiction, the Court used to reject the applications brought against acts with legal effects which affected third parties on grounds of inadmissibility.[2421] Although in the specific cases other judicial remedies were open to the applicants,[2422] the inadmissibility of a direct challenge of these acts appeared as a remarkable lacuna in the jurisdictional system of EU law.[2423]

[2415] See TOVO Carlo, *op. cit.* (2016), pp. 342-361.
[2416] See Case T-120/99, *Kik v UAMI*, EU:T:2001:189, para. 21.
[2417] TOVO Carlo, *op. cit.* (2016), p. 343.
[2418] See Article 22 of Regulation (EC) No. 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), OJ L 376, 27.12.2006, p. 1–13, p. 1–8: "The Court of Justice shall have jurisdiction in actions brought against the Centre under Article 230 of the Treaty"; Article 27(3) of Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1–14: " The Court of Justice shall have jurisdiction in actions brought against the Agency under the conditions provided for in Articles 230 and 232 of the Treaty." For a criticism of this practice, which creates legal uncertainty, see CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 337.
[2419] All the basic regulations contain a provision of this kind: "1. The contractual liability of the Authority shall be governed by the law applicable to the contract in question. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Authority. 2. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or its servants in the performance of their duties. The Court of Justice shall have jurisdiction in any dispute relating to compensation for such damage." See, for instance, Article 47 of EFSA Regulation.
[2420] See Case T-411/06, *Solgema v EAR*, EU:T:2008:419, para. 34.
[2421] Case T-148/97, *Keeling v OHIM*, EU:T:1998:114; Case C-160/03, *Spain v Eurojust*, EU:C:2005:168, paras. 36-37.
[2422] As remarked in Case T-411/06, *Solgema v EAR*, EU:T:2008:419, para. 45.
[2423] This problematic aspect was also noted in European Commission, Communication - The operating framework for the European Regulatory Agencies, COM(2002) 718, last paragraph.

Such a lacuna, actually, was attenuated by the existence of a sort of "administrative appeal" to the Commission[2424] and by the application of the *SNUPAT* case law to EU agencies.[2425] Thus, on the one hand, the basic regulations contained a mechanism which allowed for a referral of a contested measure of the agency to the Commission, which was required to review the legality of the measure. The subsequent decision of the Commission on the matter, then, constituted a challengeable act subject to the jurisdiction of the Court, thus providing an indirect means for judicial protection.[2426] On the other hand, the Court applied the principle enshrined in *SNUPAT* to EU agencies, according to which the decisions adopted by auxiliary organs or agencies were to be attributed to the Commission. Indeed, considering that such bodies were created and derived their powers from the Commission, their acts were eventually imputable to the Commission.[2427] Therefore, it was possible for the applicant to challenge the decision of an agency, in particular of the EMA, by lodging an application against the Commission[2428] - but this was possible only against the Commission.[2429]

However, the extension of this case law to EU agencies was far from unproblematic. Firstly, it represented an exception to the consolidated principle that the action for annulment needs to be directed against the author of the act concerned, constituting the outcome of the decision-making power of that authority.[2430] Secondly, while the argument that the set up and delegation of powers derived from the Commission was understandable in relation to the "Brussels agencies" or the executive agencies, the decentralised agencies are created and empowered by the legislator, i.e. the Council, or the Council and Parliament.[2431] Therefore, attributing the agency's powers to the Commission constitutes a misunderstanding of the chain of delegation and of the institutional transformation occurred within the agencification phenomenon. Thirdly, the resulting rejection

[2424] As named by LAUWAARS Richard H., "Auxiliary Organs and Agencies in the EEC", 16 *Common Market Law Review* No. 3 (1979), p. 380.
[2425] See Joined Cases 32-33/58, *SNUPAT v High Authority*, EU:C:1959:18, pp. 137-138. The case concerned an action for the annulment of a decision of the Imported Ferrous Scrap Equalization Fund, which was considered admissible by the Court because the Fund was set up and held its powers from the High Authority. Therefore, its decisions were to be equated to the decisions of the High Authority.
[2426] See TOVO Carlo, op. cit. (2016), p. 343.
[2427] Joined Cases 32-33/58, *SNUPAT v High Authority*, EU:C:1959:18, pp. 137-138.
[2428] Case T-123/00, *Thomae v Commission*, EU:T:2002:307, para. 97.
[2429] Case T-133/03, *Schering-Plough v Commission and EMEA*, EU:T:2007:365, para. 23.
[2430] *Inter alia*, Case C-201/89, *Le Pen and Front National*, EU:C:1990:133, para. 14; Case C-97/91, *Oleificio Borelli v Commission*, EU:C:1992:491, paras. 9-10; Case T-45/06, *Reliance Industries v Commission and Council*, EU:T:2008:398, paras. 50-51. *Contra*, another exception to the principle can be found in Case T-49/04, *Hassan v Council and Commission*, EU:T:2006:201, para. 59. See DE BURCA Grainne, "The Institutional Development of EU: A Constitutional Analysis" in CRAIG Paul and DE BURCA Grainne (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), p. 76.
[2431] On the break in continuity among the two kind of bodies, see CHAMON Merijn, "EU Agencies: Does the Meroni Doctrine Make Sense?", *Maastricht Journal of European and Comparative Law* (2010), p. 281-305; CHAMON Merijn, "EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea", 48 *Common Market Law Review* (2011), p. 1055-1075; TOVO Carlo, *op. cit.* (2016), p. 348.

of any action brought against the EU agencies, on the ground that the Commission was the correct defendant,[2432] represented a distortion of the *SNUPAT* principle, which was originally put forward with the intention of expanding the jurisdiction of the Court and the judicial protection of individuals.[2433] Finally, both these mechanisms - the extension of the *SNUPAT* case law and the provision of an administrative appeal to the Commission - appeared at odds with the institutional independence of EU agencies, putting these bodies under the authority of the Commission in a way which contradicts the lines of development of agencification.[2434]

4.5.2. The Solgema Case and the Lisbon Treaty

In light of these considerations, a *révirement* of the case law on the judicial review of the agencies' acts was particularly desirable.[2435] The Court took this step only in 2008, just before the entry into force of the Lisbon Treaty. Indeed, the *Sogelma* case, which concerned the annulment of decisions of the EAR relating to a tender procedure, represented the turning point in the position of the Court on this matter.[2436]

Ruling on the admissibility of the action, the Court started by recalling the principle enshrined in *Les Verts*.[2437] Since the EU is "a community based on the rule of law", the Treaties must be interpreted as permitting the Court of Justice to review the legality of measures adopted by its institutions. Accordingly, there is, in the general scheme of primary law, the possibility "to make a direct action available against all measures adopted by the institutions which are intended to have legal effects".[2438] Although not expressly established in primary law, it derives from that case that "any act of a Community body intended to produce legal effects vis-à-vis third parties must

[2432] See Case T-133/03, *Schering-Plough v Commission and EMEA*, EU:T:2007:365, para. 23.
[2433] CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), p.493; TOVO Carlo, *op. cit.* (2016), p. 348.
[2434] TOVO Carlo, *op. cit*. (2016), p. 348.
[2435] The extension of the *Les Verts* case law to EU agencies was particularly supported by LENAERTS Koen, "Regulating the Regulatory Process: Delegation of Powers in the European Community", 18 *European Law Review* (1993), pp. 45-46. See also Case C-15/00, *Commission v EIB*, EU:C:2003:396.
[2436] Case T-411/06, *Sogelma v EAR*, EU:T:2008:419. For a comment, see BERNARD Elsa, "Recours contre les actes des agencies", *Europe* No. 403 (2008), pp. 14-16; PISELLI Elisabetta, "Minimum Selection Criteria and their Application during the Evaluation Process: Sogelma Srl v European Agency for Reconstruction (EAR)", *Public Procurement Law Review* 2009 pp. 83-90; VANDERSANDEN Georges, "Arrêt "Sogelma": l'annulation d'actes adoptés par des organes établis sur la base du droit dérivé", *Journal de droit européen* (2008), pp. 297-298.
[2437] Case 294/83, *'Les Verts' v Parliament*, EU:C:1986:166, para. 24. For an analysis, see Chapter 2, para. 7.4. This case was cited already in the Opinion of Advocate General Poiares Maduro in Case C-160/03, *Spain v Eurojust*, EU:C:2004:817, paras. 15-21; and considered as crucial precedent before the case by LENAERTS Koen, *op. cit.* (1993), p. 23; CHITI Edoardo, *op. cit.* (2009), p. 1420.
[2438] Case T-411/06, *Sogelma v EAR*, EU:T:2008:419, para. 36.

be open to judicial review", including acts of EU agencies.[2439] In the absence of such a possibility, there would be an unacceptable "legal vacuum" in the judicial review of EU acts.[2440]

The Court, thus, recognised an important continuity between the acts adopted by the institutions, in particular the Parliament in *Les Verts*, and those of the agencies, and could not accept that a delegation of powers from an institution to another body would deprive the applicants of judicial protection. Moreover, the reasoning of the Court was justified by the fact that, different from the previous case, no other judicial remedy was available to the applicant.[2441] In this sense, the case has been read as a logical development of the previous case law, which, interpreted *a contrario*, would have paved the way for a recognition of direct action against agencies' acts where no other remedies were available.[2442]

However, more than in the distinction of this case from the previous cases, this *revirement* of the Court should be considered in the light of the changing institutional context. Indeed, the Lisbon Treaty, which extended the scope of the actions for annulment and the failure to act, was already signed and about to enter into force, definitively opening the way for the direct judicial review of agencies' acts.[2443]

4.5.3. The Review of Acts of Third Pillar Agencies

Despite the improvements in the case law, the lacuna remained for former third pillar agencies.[2444] Indeed, Europol and Eurojust remained outside judicial scrutiny since they were part of the so-called Third Pillar, thus being subject to limited scrutiny of the Court.[2445] In particular, the issue was raised in the *Spain v Eurojust* case, concerning the annulment of a call for application for the recruitment of temporary staff at the agency.[2446] While the Advocate General took a strong position for the admissibility of the annulment by making an analogy with *Les Verts*,[2447] the Court refused to take such an innovative step, steering clear from ruling on the matter.[2448]

[2439] Ibidem, para. 37.
[2440] Ibidem, para. 40.
[2441] Ibidem, paras. 41-43.
[2442] See ROSSOLINI Renzo, "La competenza del giudice comunitario per l'annullamento degli atti delle agenzie europee", *Diritto comunitario e degli scambi internazionali* No. 3 (2009), p. 496; TOVO Carlo, *op. cit*. (2016), p. 351.
[2443] See also TOVO Carlo, *op. cit*. (2016), p. 351.
[2444] See BUSUIOC Madalina, *European Agencies: Law and Practices of Accountability*, (Oxford University Press, 2013), p. 206.
[2445] See Article 46 former TEU. For a criticism, see, *inter alia*, PEERS Steve, "Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments", 44 *Common Market Law Review* No. 4 (2007), p. 885.
[2446] Case C-160/03, *Spain v Eurojust*, EU:C:2005:168.
[2447] Opinion of Advocate General Poiares Maduro in Case C-160/03, *Spain v Eurojust*, EU:C:2004:817, paras. 20-21.
[2448] Case C-160/03, *Spain v Eurojust*, EU:C:2005:168, para. 41.

For these agencies, therefore, the Lisbon Treaty constituted a true ground-breaking innovation, which finally filled this "significant and salient treaty lacuna".[2449] With the abolition of the Pillar structure, also the agencies in the Area of Freedom Security and Justice are subject to the Court's judicial review according to Article 263 TFEU.[2450]

4.5.4. The Review of Acts Not Intended to Produce Legal Effects vis-à-vis Third Parties

The expansion of the scope of the action for annulment in Article 263 TFEU to the agencies concerns the acts "intended to produce legal effects vis-à-vis third parties". Therefore, the acts adopted by genuine decision-making agencies, which are delegated formal powers towards third parties, can be challenged before the Court of Justice, lodging the action directly against the agency as defendant. In fact, a relevant number of actions against these agencies, such as EUIPO or CPVO, are now initiated every year in Luxembourg.[2451]

However, such direct action appears precluded in relation to agencies which are only delegated decision-making powers *de facto.* Indeed, although in actions for annulment the substance should prevail over the form of the act,[2452] agencies involved in the preparation of acts eventually adopted by other institutions or of soft law measures cannot be considered to exercise powers having legal effects towards third parties.[2453] Without entering the debate on the legal effects of soft law measures,[2454] these cases arguably do not fall within the definition of acts "intended to produce legal effects vis-à-vis third parties".

Although a direct action appears precluded by the wording of Article 263 TFEU, the acts of EU agencies which constitute preparatory acts of final acts adopted by an EU institution are still subject to judicial review indirectly, through the action lodged against the final act which they concurred to produce. As we have seen, it is settled case law that the invalidity of preparatory acts

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[2449] CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford University Press, 2009), p. 162. However, on the qualifications of this opening in relation to the transitional period and to the decisions of the JSBs of Europol and Eurojust, see BUSUIOC Madalina, *op. cit.* (2013), p. 210.
[2450] CRAIG Paul, *op. cit.* (2012), p. 159.
[2451] For instance, in 2017 almost 300 actions were brought before the General Court just against EUIPO.
[2452] *Inter alia*, Case C-322/09 P, *NDSHT v Commission*, EU:C:2010:701, para. 46; Joined Cases 16-17/62, *Confédération nationale des producteurs de fruits et légumes v Council*, EU:C:1962:47; Case C-366/88, *France v Commission*, EU:C:1990:348, para. 25.
[2453] About EMA's opinion: "the revised opinion is an intermediate measure whose purpose is to prepare for the marketing authorisation decision. It is a preparatory measure which does not definitively lay down the Commission's position and is therefore not a challengeable act", T-326/99, *Olivieri v Commission and EMA*, EU:T:2003:351, para. 53.
[2454] See SENDEN Linda, *Soft Law in European Community Law,* (Hart Publishing, 2004); CHAMON Merijn, "Le recours à la soft law comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE", *Revue de l'Union européenne*, no. 576 (2014), pp. 152-160.

may lead to the annulment of the final decision.[2455] In relation to EU agencies, this principle was stated in particular in the *Artegodan* case,[2456] which concerned the withdrawal of marketing authorisations of medicinal products. The decision of withdrawal was adopted by the Commission on the basis of a scientific opinion of the EMA which assessed the risks for human health of the substances at issue. In ruling on the lawfulness of such a withdrawal, the Court addressed the issue of the scope of its review. Considering that "the Commission is not in a position to carry out scientific assessments of the efficacy and/or harmfulness of a medicinal product",[2457] the Court recognised the "vital role accorded to an objective and detailed scientific assessment"[2458] by the agency, which is called to provide the institution with the evidence of scientific assessment which is essential for its decision-making. From this perspective, the Commission's acts could be seen as a mere confirmation of the agency's assessment.[2459]

Therefore, the scope of the Court's review included not only the Commission's exercise of its discretion, but also the legality of the EMA's scientific opinion.[2460] Thus, analysing the agency's statement of reasons (in a particularly strict way since it related to scientific uncertainty), the Court annulled the Commission's decision as a consequence of the irregularities observed in the agency's scientific assessment.[2461]

Such indirect judicial review of the agency's *de facto* delegated powers is justified by the significance of its acts in the determination of the outcome of the procedure for the adoption of the final act. Considering that "the content of [agency's] opinions is an integral part of the statement of reasons on which [Commission's] decisions [are] based", they are "inextricably linked, the measure forming a whole".[2462] However, where such an effect in the Commission's decision is not proven, the indirect review of the agency's act is not granted by the Court.[2463]

In conclusion, the recognition of the legal effects in the procedure for the adoption of the final act does not amount to the recognition of legal effects vis-à-vis third parties, which would justify a

[2455] See *supra* para. 4.4.
[2456] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH v Commission*, EU:T:2002:283. See also T-326/99, *Olivieri v Commission and EMA*, EU:T:2003:351.
[2457] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH v Commission*, EU:T:2002:283, para. 198.
[2458] Ibidem, para. 197.
[2459] On this point, see also T-326/99, *Olivieri v Commission and EMA*, EU:T:2003:351, para. 55.
[2460] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH v Commission*, EU:T:2002:283, para. 197.
[2461] Ibidem, para. 221.
[2462] Case T-240/10, *Hungary v Commission*, EU:T:2013:645, paras. 82-91.
[2463] TOVO Carlo, op. cit. (2016), p. 357.

direct action against these bodies.[2464] However, although the indirect review granted thanks to this case law, the solution adopted by the Court still appears to be unsatisfactory. Indeed, in case of *de facto* delegation, the actual decision-maker remains concealed, attributing factiously the measures to the Commission's discretion also where it merely rubber-stamps the agencies' decisions.[2465] Moreover, since this review is dependent on the effect of the agencies' decision on the final outcome, it may leave a gap in the judicial control of exercise of delegated powers of the agencies.[2466] Therefore, the jurisdictional remedies accorded in relation to a *de facto* delegation of powers are not equivalent to those available for a delegation of formal decision-making powers, thus making a difference between the two forms of delegation. This, in the light of the increasing powers delegated to the new agencies *de facto*, appear not entirely justifiable, entailing the risk of shielding their activities from judicial review.[2467]

4.6. The Standing for the Applicants

4.6.1. Privileged and Semi-Privileged Applicants

Considering the right to bring actions for annulment, Article 263 TFEU confers to the Parliament, the Council, the Commission and Member States the status of privileged applicants.[2468] Accordingly, they can challenge any binding EU act without the need to prove that they have an interest in bringing proceedings.[2469] Therefore, they can always bring an action for annulment, even where the act is addressed to another institution, body or person.[2470] Conversely, the Court of Auditors, the Committee of the Regions and the ECB, in their position as semi-privileged applicants, can bring an action for annulment against acts of EU institutions and bodies "for the purpose of protecting their prerogatives".[2471] Building from the *Chernobyl* judgment, this category of applicants was inserted by the former EC Treaty to allow these institutions to act for the protection of their position within the institutional balance.[2472]

However, considering the list of entities which can be defendants in an action for annulment, an asymmetry is evident. Indeed, the European Council and, especially the "bodies, offices or agencies

[2464] See Joined Cases T-311/06 R I, T-311/06 R II, T-312/06 R and T-313/06 R, *FMC Chemical ad others v EFSA*, EU:T:2007:67
[2465] BUSUIOC Madalina, *op. cit.* (2013), p. 215.
[2466] Ibidem, p. 216.
[2467] HOFMANN Herwig C. H. and MORINI Alessandro, "Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"", 37 *European Law Review* No. 4 (2012), p. 442.
[2468] Article 263(2) TFEU.
[2469] See, *inter alia*, Case 45/86, *Commission v Council*, EU:C:1987:163, para. 3; Case T-369/07, *Latvia v Commission*, EU:T:2011:103, para. 33.
[2470] Case 41/83, *Italy v Commission*, EU:C:1985:120, para. 30.
[2471] Article 263(3) TFEU.
[2472] See LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 311.

of the Union", whose acts can be challenged, are neither granted the role of privileged nor semi-privileged applicants. Yet, there could be cases where an agency might wish to contest the encroachment of its prerogatives, as established in its basic regulation, by another institution or body.[2473] In this case, the only possibility for the agency would be to bring an action as a non-privileged applicant, having to satisfy the criteria for standing of a natural or legal person.[2474]

Arguably, this neglect of EU agencies in the list of semi-privileged applicants is meaningful as to the position of these bodies within the institutional context. The recognition of a position of a semi-privileged applicant would require the identification of clear institutional prerogatives, which the action for annulment would protect. However, in the case of EU agencies, their identification is hindered by the absence of a clear role in the institutional scheme. As we have seen, the constitutional neglect of EU agencies by the Lisbon Treaty, which has failed to provide a legal basis in primary law for agencification,[2475] has equally failed to provide agencies with a distinct role, opposable to the other institutional actors. Therefore, if the Court decides to extend its *Chernobyl* case law to EU agencies, it would have to argue that such prerogatives are identifiable even without a legal basis in the Treaties, and that, nonetheless, they constitute "elements of the institutional balance created by the Treaties."[2476] Since the Treaties are silent on this point,[2477] and the tasks of EU agencies are established only in the lower ranking basic regulations,[2478] such a conclusion appears far from evident,[2479] requiring a rather ground-breaking interpretation by the Court. In the absence of a clarification on the point, the issue remains to be settled by the case law.

4.6.2. Non-Privileged Applicants

The possibility for natural and legal persons to bring proceedings before the Court against acts of EU institutions or bodies represents a controversial aspect of the EU system of judicial remedies. The applicable rules and the Court's approach on this point have been the object of passionate

[2473] CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), p. 490.
[2474] A differentiation of the position of the agencies from natural and legal persons emerges in relation to their power of intervention, see Article 40 of Protocol No. 3 on the Statute of the Court of Justice of the European Union.
[2475] See Chapter 4, para. 2.5.
[2476] Case C-70/88, Parliament v Council, EU:C:1990:217 (interlocutory judgment of 22 May 1990), EU:C:1990:217, para. 21. See TOVO Carlo, *op. cit.* (2016), p. 357.
[2477] With the exception of the agencies expressly mentioned in the Treaties, i.e. Europol, Eurjoust and EDA.
[2478] This point, in particular, distinguishes the case of the agencies from the European Investment Bank, which also is not among the semi-privileged applicants, but its tasks are regulated in the Treaties. On the possible analogy, see LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 311, citing MARCHEGIANI G., "The European Investment Bank after the Lisbon Treaty", *European Law Review* (2014), pp. 70-78.
[2479] See CHAMON Merijn, *op. cit.* (2016), p. 365, where it is argued that EU agencies are not part of the institutional balance and, thus, cannot be granted active *locus standi*; *contra,* considering that the Short Selling case has institutionally recognised the tasks of EU agencies, TOVO Carlo, *op. cit*. (2016), p. 353.

debate among those who believe that the strict restrictions from judicial challenges are hardly justifiable, and those who recognise in them a decentralised system of judicial protection, granting the right to an effective remedy through a composite judiciary articulated in EU and national courts.[2480] Arguably, this issue is also particularly relevant in relation to the judicial review of the delegation of powers. According to Article 263 TFEU, for a natural and legal person, the action for annulment against an EU act is possible in three cases.[2481]

4.6.2.1. Acts Addressed to the Applicant

Firstly, a non-privileged applicant can institute proceedings where the act is specifically addressed to him/her. Therefore, when the exercise of the powers results in an act of individual application, the person concerned has the possibility to challenge the act under the conditions laid down in Article 263 TFEU. Considering the delegation systems analysed, this possibility is applicable, for instance, to the decisions whereby the ECB exercises direct supervisory powers in relation to significant entities according to the SSM Regulation,[2482] or to the decisions of the genuine decision-making agencies, such as the EUIPO. Conversely, with regard to the delegation to the Commission, implementing acts can be of individual application and, thus, challengeable accordingly, whereas delegated acts are by definition only acts of general application.

4.6.2.2. Acts Not Addressed to the Applicant: Requirements of Direct and Individual Concern

Secondly, any natural or legal person may institute proceedings against an act which is of direct and individual concern to them. Thus, to have standing for the annulment of legal acts not addressed to them, they have to satisfy two cumulative conditions, i.e. direct concern and individual concern. In this regard, on the one hand, the case law has clarified that *direct concern* is satisfied where the act directly affects the legal situation of the applicant and leaves no discretion to the persons to whom that measure is addressed and who are responsible for its implementation.[2483] Therefore, EU acts which require discretionary implementation by national

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[2480] See, *inter alia*, BAST Jürgen, *op. cit*. (2012), pp. 898-899; CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), pp. 506-507; ELIANTONIO Mariolina, BACKES Chris W, VAN RHEE C.H., SPRONKEN Taru, BERLEE Anna (eds.), *Standing Up for Your Right in Europe: A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts*, (Intersentia, 2013), p. 45; NIHOUL Paul, "La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale", *Revue trimestrielle de droit européen* No. 2 (1994), pp. 171-194; WAELBROECK Denis F. and VERHEYDEN A.-M., "Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires : à la lumière du droit comparé et de la Convention des droits de l'homme", *Cahiers de droit européen* No. 3-4 (1995), p. 399-441.

[2481] Article 263(4) TFEU.

[2482] See Case T-122/15, *Landeskreditbank v ECB*, EU:T:2017:337.

[2483] *Inter alia*, Joined Cases 41-44/70, *NV International Fruit Company v Commission*, EU:C:1971:53, paras. 23-29; Case C-15/06 P, *Regione siciliana v Commission*, EU:C:2007:183, para. 31; Case 222/83, *Commune de Differdange v Commission*, EU:C:1984:266, paras. 10-12.

authorities are not challengeable, but in this case the natural or legal person is entitled to challenge the measure implementing them at the national level.

On the other hand, according to the much criticised *Plaumann* test, an act is of *individual concern* when it "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[2484] Accordingly, a person was considered individually concerned when he/she belonged to a fixed and identifiable group,[2485] but not to a category of persons described in a generalised and abstract manner.[2486] Although the case law has provided some more relaxed applications of the test in certain cases[2487] and in relation to certain policy areas,[2488] the Court continues to limit the access to non-privileged applicants, strictly applying the *Plaumann* test to actions for annulment.[2489] This approach of the Court has attracted much criticism in the literature,[2490] raising doubts on the effectiveness of access to justice and on the actual completeness of the EU system of legal remedies and procedures.[2491] However, the Court regarded the possibility to open the standing for individuals as a matter of Treaty amendment, refusing to revise its criteria for actions of annulment without a reform of the system of judicial review.[2492]

4.6.2.2. Regulatory Acts which Do Not Entail Implementing Measures

As a reaction to the concerns expressed in relation to the *locus standi* of individuals, the issue was addressed in the context of the treaty revision. The Working Group II of the Convention was conferred the mandate to examine the compliance of the existing provisions with the

[2484] Case 25/62, *Plaumann v Commission*, EU:C:1963:17, p. 107. For a detailed analysis of the case law, see CRAIG Paul and DE BURCA Grainne, *op. cit.* (2011), pp. 493-507; LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), pp. 323-332.
[2485] See, *inter alia*, Joined Cases 41-44/70, *NV International Fruit Company v Commission*, EU:C:1971:53, paras. 21-22; Case 11/82, *Piraiki-Patraiki v Commission*, EU:C:1985:18.
[2486] See, *inter alia*, Joined Cases 789 and 790/79, *Calpak and others v Commission*, EU:C:1980:159, para. 9.
[2487] See, *inter alia*, Case C-309/89, *Cordoniu v Council*, EU:C:1994:197, paras. 18-22.
[2488] In particular, anti-dumping, competition and State aid policies, see, *inter alia*, Case C-358/89, *Extramet v Council*, EU:C:1992:257, para. 17.
[2489] See, *inter alia*, Case C-209/94 P, *Buralux and others v Council*, EU:C:1996:54; Case C-321/95 P, *Stichting Greenpeace Council and others v Commission*, EU:C:1998:153, para. 28; Case C-132/12 P, *Stichting Woonpunt and others v Commission*, EU:C:2014:100, para. 57; Case C-274/12 P, *Telefónica SA v Commission*, EU:C:2013:852, para. 46.
[2490] See, *inter alia*, KOCHENOV Dimitry, DE BURCA Grainne and WILLIAMS Andrew, *Europe's Democratic Deficit?,* (Hart Publishing,2015); CRAIG Paul and DE BURCA Grainne, *op. cit.* (2011), pp. 506-507; ELIANTONIO Mariolina, BACKES Chris W, VAN RHEE C.H., SPRONKEN Taru, BERLEE Anna (eds.), *op. cit.* (2013), p. 45; NIHOUL Paul, *op. cit.* (1994), pp. 171-194; WAELBROECK Denis F. and VERHEYDEN A.-M., *op. cit.* (1995), pp. 399-441.
[2491] See, in particular, the Opinion of Advocate General Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:197, para. 102.
[2492] See Case C-263/02 P, *Commission v Jégo-Quéré,* EU:C:2004:210, para. 48.

requirements of the Charter of Fundamental Rights.[2493] In the absence of clear recommendations from the Working Group, the Preasidium of the Convention entered a political discussion on the opportunity of a Treaty revision on this point and eventually reached a "fragile compromise",[2494] now enshrined in Article 263(4) TFEU.

The revised text introduces a third route for individuals, who can now bring proceedings "against a regulatory act which is of direct concern to them and does not entail implementing measures." In other words, for certain acts, it is sufficient to satisfy the requirement of a direct concern, while the "individual concern" criterion is substituted by the condition that the act does not require implementing measures. In this sense, it aims at relieving the individuals from a requirement which has been so restrictively applied by the Court. However, the scope of application of this third possibility depends on the meaning of "regulatory acts", on the one hand, and of "implementing measures", on the other.

4.6.3. The Notion of Regulatory Acts

With regard to the notion of regulatory act, the Court has clarified in *Inuit* that it covers "all acts of general application apart from legislative acts".[2495] Adopting a literal, historical and teleological interpretation of Article 263(4) TFEU, the Court gave significance to the circumstance that the Praesidium voted against a proposal of amendment in the sense of including legislative acts in the notion, maintaining the mention to a category of acts which, although withdrawn from the provisions on EU acts, still has a proper meaning.[2496] Therefore, the regulatory acts designate non-legislative acts of general application, such as delegated and implementing regulations. Moreover, as remarked by Advocates General Wathelet and Kokott, it may also cover implementing or

[2493] In particular, Article 47. See BARENTS René, "The Court of Justice after the Treaty of Lisbon", 47 *Common Market Law Review* (2010), p. 723.
[2494] BARENTS René, *op. cit.* (2010), p. 724.
[2495] Case C-583/11 P, *Inuit Tapiriit Kanatami and others v Parliament and Council*, EU:C:2013:625, paras. 11-12. For a comment, see ARNULL Anthony, "Arrêt "Inuit": la recevabilité des recours en annulation introduits par des particuliers contre des actes réglementaires", *Journal de droit européen* No. 205(2014), pp. 14-16; VAN MALLEGHEM Pieter-Augustijn and BAETEN Niels, "Before the law stands a gatekeeper - Or, what is a "regulatory act" in Article 263(4) TFEU?", *Common Market Law Review* (2014), pp. 1187-1216; BROSSET Estelle, "Les enseignements de l'affaire Inuit Tapiriit Kanatami", *Revue de l'Union européenne* No. 586 (2015), pp. 173-188; KORNEZOV Alexander, "Shaping the New Architecture of the EU System of Judicial Remedies: Comment on Inuit", *European Law Review* (2014), pp. 251-263; BARTOLONI Maria Eugenia, "La nozione di "atto regolamentare" nell'interpretazione offerta dalla Corte di giustizia dell'Unione europea e i suoi riflessi sul ricorso individuale di invalidità", *Diritti umani e diritto internazionale* (2014), pp. 249-253; GUIOT François-Vivien, "L'affaire Inuit : une illustration des interactions entre recours individuel et équilibre institutionnel dans l'interprétation de l'article 263 du TFUE", *Revue trimestrielle de droit européen* (2014), pp.389-408; BOMBOIS Thomas and WAELBROECK Denis, "Des requérants "privilégiés" et des autres. À propos de l'arrêt Inuit et de l'exigence de protection juridictionnelle effective des particuliers en droit européen", 50 *Cahiers de droit europeen* No. 1 (2014), pp. 21-75.
[2496] See the order of the General Court, Case T-18/10, *Inuit Tapiriit Kanatami and others v Parliament and Council*, EU:T:2011:419, para. 49. See also BAST Jürgen, *op. cit.* (2012), pp. 898-907.

delegated decisions addressed to Member States since, although having specific addressees, they may shape a national legal system and, thus, be measures of general application.[2497]

With regard to the notion of implementing measures, Article 263(4) TFEU excludes from the new possibility the measures, such as directives, which require implementation by national authorities. The *ratio* appears clear from the *Télefonica* judgment: "regulatory act which … does not entail implementing measures, within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, is to be interpreted in the light of that provision's objective, which, as is clear from its origin, consists in preventing an individual from being obliged to infringe the law in order to have access to a court."[2498] Therefore, in the absence of implementing measures which could be challenged before the national courts, the individual cannot be denied effective judicial protection. In this regard, the General Court considered whether the fact that a regulatory act leaves a degree of discretion to the authorities responsible for the implementing measure is relevant for recognising the absence of implementing measures or not. It pointed out that this aspect is relevant to determine the direct concern of the applicant, but it has no bearing on determining the existence of implementing measures.[2499] Therefore, an act is also considered to entail implementing measures when the implementing authorities have no discretion in the application.

In the light of these considerations, the actual extent of the opening brought by the Lisbon Treaty is questionable. The outcome of the negotiations appear a smaller concession than the one envisaged, for instance, in the General Court's judgment in *Jégo-Quéré*.[2500] Moreover, it has been noted that excluding legislative acts from the notion of regulatory acts anomalously affects the coherence of the judicial protection for individuals.[2501] Indeed, the new rule makes the admissibility of certain actions dependent on whether certain provisions have been included in a basic act or delegated. To use Barent's example, from the perspective of the individuals, it would be very different whether a prohibition of certain fishing techniques is inserted in a legislative act or whether the legislator decides to delegate this decision to the Commission for the adoption of

[2497] See Opinion of Advocate General Wathelet in Case C-132/12 P, *Stichting Woonpunt and others v Commission*, EU:C:2013:335, para. 85; Opinion of Advocate General Kokott in Case C-274/12 P, *Telefónica SA v Commission*, EU:C:2013:204, paras. 21-29; cited also in BERSTROM Maria, op. cit. (2016), p. 217. See also Case T-172/16, *Morgagni v Commission*, EU:T:2018:34; Case T-220/13, *Montessori v Commission*, EU:T:2016:484.
[2498] Case C-274/12 P, *Telefónica SA v Commission*, EU:C:2013:852, para. 27. See BERSTROM Maria, *op. cit*. (2016), p. 219.
[2499] Case T-94/10, *Rütgers Germany v ECHA*, EU:T:2013:107, paras. 33-38; Case T-379/11, *Hüttenwerke Krupp Mannesmann v Commission*, EU:T:2012:272, paras. 48-53; T-381/11, *Eurofer v Commission*, EU:T:2012:273, para. 59. *Contra* Opinion of Advocate General Wathelet in Case C-132/12 P, *Stichting Woonpunt and others v Commission*, EU:C:2013:335, para. 76.
[2500] Case C-263/02 P, *Commission v Jégo-Quéré,* EU:C:2004:210, para. 48. See LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 336.
[2501] BARENTS René, *op. cit*. (2010), p. 725; BERSTROM Maria, *op. cit*. (2016), p. 229.

a delegated act.[2502] Thus, the freedom of the legislator to delegate or to regulate certain aspects is qualified by the unprecedented effect it has on the judicial remedies available to individuals. The direct access to judicial protection becomes dependent on the form of the act and, considering the formal definition of legislative act, more precisely on the procedure according to which the act was adopted.[2503] This result appears at odds with the principle that, in actions for annulment, the substance of the act counts more than its form.[2504] For these reasons, the effectiveness of the direct action for annulment for individuals in EU law remains open to debate, raising doubts on the coherence of the system.

4.6.4. Acts of the ECB as Regulatory Acts

Delegated and implementing regulations of the Commission represent paradigmatic examples of regulatory acts which do not entail implementing measures. In the *Microban* case, moreover, the Court included implementing decisions of general application in the notion.[2505]

Considering the acts issued according to other delegation systems, it is interesting to consider whether the regulations adopted by the ECB in its supervisory capacity pursuant to the SSM Regulation may also constitute regulatory acts. Unlike ECB supervisory decisions addressed to significant credit institutions which are acts of individual applications,[2506] the ECB regulations are non-legislative acts addressed to national authorities. In this sense, a parallel might be drawn with the decisions addressed to the Member States which directly shape the national policies and, thus, are of general application.[2507]

However, according to Article 6(5) of the SSM Regulation, such regulations are always required to be performed by national authorities, which are bound to adopt the supervisory decisions vis-à-vis the credit institutions. Therefore, an act of implementation at the national level is necessary to produce their effects on third parties, thus arguably falling outside the scope of the new standing in Article 263(4) TFEU. Therefore, legal protection should be sought at the national level against

[2502] BARENTS René, *op. cit*. (2010), p. 725.
[2503] LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit*. (2014), p. 336; BAST Jürgen, *op. cit*. (2012), pp. 906-907.
[2504] BARENTS René, *op. cit*. (2010), p. 725; BERSTROM Maria, *op. cit*. (2016), p. 229.
[2505] See Case T-262/10, *Microban International e Microban (Europe) v Commission*, EU:T:2011:623, paras. 22-25.
[2506] See Article 6(4) of SSM Regulation.
[2507] See Opinion of Advocate General Wathelet in Case C-132/12 P, *Stichting Woonpunt and others v Commission*, EU:C:2013:335, para. 85; Opinion of Advocate General Kokott in Case C-274/12 P, *Telefónica SA v Commission*, EU:C:2013:204, paras. 21-29.

these measures adopted within the SSM,[2508] considering the conditions and limitations established according to the relevant national law.

4.6.5. Acts of the Agencies as Regulatory Acts

With regard to EU agencies, it has already been underlined that the bulk of genuine decision-making agencies are entrusted with powers to adopt acts of individual application, such as registrations of intellectual property rights or marketing authorisations. Also considering the relevant powers of the ESAs, especially in emergency situations or in the case of breach of EU law, the relevant provisions in their founding regulations specify that the measures shall be "individual decisions", directed to national authorities or to specific financial institutions.[2509] Moreover, it has been noted that agencies are generally part of administrative networks which engage in a dialogue between national authorities and the EU level.[2510] Thus, not only the preparatory work is often shared and articulated within the two levels, giving rise to a procedure of a composite character,[2511] but also the application of the measures requires the collaboration of national authorities. This interplay between the composite structure of EU agencies and the composite system of judicial protection, thus, causes these acts to fall outside the scope of the definition. In other words, most acts of EU agencies are of individual application, or require implementing measures by national authorities, arguably not fulfilling the criteria for being considered regulatory acts without implementing measures.

However, although the notion of regulatory acts is not applicable to the majority of agencies' decision-making, there may be cases where the acts of the agencies fall within its scope. In particular, this was pointed out by the General Court in the case *Rütgers*,[2512] which concerned the annulment of a decision by the ECHA to classify anthracene oil as a carcinogenic substance.[2513] In considering the admissibility of the action, the Court recognised that the decision of the agency

[2508] WOLFERS Benedikt and VOLAND Thomas, "Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank", 51 *Common Market Law Review* (2014), pp. 1484. The author claims, however, that where the ECB acts leave no discretion to national authorities, the ECB should be reviewed at the EU level. In the light of the recent case law on the interpretation of "implementing measures", this part of argument cannot be shared.
[2509] See Articles 17 and 18 of EBA Regulation.
[2510] DEHOUSSE Renaud, "Regulation by Networks in the European Community: The Role of European Agencies", 4 *Journal of European Public Policy* No. 2 (1997), pp. 246-261.
[2511] HOFMANN Herwig C. H. and MORINI *Alessandro, op. cit. (2012), p. 440.*
[2512] Case T-94/10, *Rütgers and others v ECHA*, EU:T:2013:107. See also Case T-93/10, *Bilbaína de Alquitranes and others v ECHA*, EU:T:2013:106; Case T-95/10, *Cindu Chemicals and other v ECHA*, EU:T:2013:108.
[2513] In this regard, it is noteworthy that the Court considered the publication of the list of substances by ECHA as a special procedure which affected the applicants, since the Commission's intervention, which could have led to the inclusion of the substance in the Annex of REACH Regulation, was not a mandatory step. For a comment on the judgment, see SIMON Denys, "Acte réglementaire ne comportant pas de mesures d'exécution. Des précisions sur la nouvelle hypothèse de recevabilité introduite par l'article 263 TFUE, ainsi que sur l'intensité du contrôle en matière de substances dangereuses", *Europe* No. 5 (2013) p. 15.

constitutes a regulatory act, since it "is of general application inasmuch as it applies to situations which have been determined objectively and have legal effects as regards a category of persons viewed in a general and abstract manner".[2514] It results from this observation that the exercise of the regulatory powers is not reserved for the Commission, but also these acts of the ECHA are regulatory acts according the fourth paragraph of Article 263 TFEU.[2515]

Therefore, also acts of the agencies may be considered regulatory acts, and challenged by a natural or legal person without the need to demonstrate individual concern. Such a situation can be recognised not only in the case of ECHA, but arguably also in relation to the powers of ESMA with regard to short selling. Indeed, pursuant to Article 28 of the Short Selling Regulation, ESMA is empowered to "prohibit or impose conditions on the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument",[2516] therefore potentially enacting acts of general application which do not entail implementing measures.

4.7. The "Specific Conditions and Arrangements" in Secondary Union Law

Article 263(5) TFEU establishes that "acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them." Albeit innovatively inserted into primary law by the Lisbon Treaty, this provision merely codifies the existing practice,[2517] already sanctioned in the case law.[2518]

In this regard, it is important to highlight that a number of basic regulations established internal Boards of Appeal with the aim of reviewing the legality of EU agencies' acts.[2519] The possibility to bring proceedings against agencies' acts is often made conditional upon an appeal already being lodged before these Boards. These internal bodies are also mentioned in the Common Approach, where special attention is devoted to the impartiality and independence of their members.[2520] Although they carry out quasi-judicial activities, they are not administrative courts, but they represent administrative review bodies, which form an integral part of the agency and act "in

[2514] Case T-94/10, *Rütgers and others v ECHA*, EU:T:2013:107, para. 57.
[2515] Ibidem, paras. 58-60.
[2516] Article 28(1)(b) of Short Selling Regulation.
[2517] BARENTS René, *op. cit.* (2010), p. 726.
[2518] *Inter alia*, Case C-29/05, *Kaul v OHIM*, EU:C:2007:162, paras. 51-54; Case T-63/06, *Evropaïki Dynamiki v EMCDDA*, EU:T:2010:368.
[2519] The EU agencies having Boards of Appeals are: EUIPO, CPVO, EASA, ECHA, ACER, ESAs (a joint Board of Appeal for the three agencies), SRB and ERA. These Boards of Appeal differ significantly in their organisation and functioning. See CHAMON Merijn, *op. cit.* (2016), p. 338.
[2520] Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, point 21.

continuity in terms of their functions".[2521] Their establishment and functioning now finds express justification in the Treaties, paving the way for the further development of this internal review mechanism.

4.8. The Grounds of Review

Once it is established that the acts issued pursuant to a delegation of powers can be challenged in an action for annulment under the conditions set forth in Article 263 TFEU, especially with regard to the active and passive *locus standi* of the actors concerned, it is now important to reflect on the grounds according to which these acts can be reviewed. Article 263(3) TFEU specifies that the Court has jurisdiction "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

Focusing on the aspects which are more relevant for the delegation of powers, it is important to highlight that the exercise of delegated powers *ultra vires* results in annulment on the ground of a lack of competence.[2522] As it is clear from the analysis, the legal framework established in the enabling act determines the scope of the powers of the delegate, and the exercise of powers beyond these limits lacks a legal basis which upholds the competence.[2523] Conversely, where the resulting act expressly contradicts the basic act, exercising its powers "*contra vires*", it may also be considered an infringement of a rule of law.[2524]

Moreover, as a consequence of the described proceduralisation which certain delegation systems are experiencing, it appears more probable that the acts adopted pursuant to a delegation of powers may also be annulled for the infringement of a procedural requirement. Thus, where the delegate fails, for instance, to duly consult an institution or body, or it does not provide a statement of reasons, or infringes the relevant internal procedural rules,[2525] the resulting act may be

[2521] Case T-163/98, *Procter & Gamble v OHIM*, EU:T:1999:145, para. 38. See also Case T-273/02, *Krüger GmbH v OHIM*, EU:T:2005:134, para. 62; Case C-29/05 P, *OHIM v Kaul*, EU:C:2007:162, para. 51; Case T-102/13, *Heli-Flight GmbH v EASA*, EU:T:2017:769, para. 27. For a discussion on the nature of the Board of Appeal, see CHAMON Merijn, *op. cit.* (2016), p. 339; NAVIN-JONES Marcus, "A legal review of EU boards of appeal in particular the European Chemicals Agency Board of Appeal", 21 *European public law* No. 1 (2015), pp. 143-168.
[2522] See LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 369.
[2523] Examples of annulments for lack of competence are, *inter alia*, in Case 6/88, *Spain v Commission*, EU:C:1989:420; Case C-303/94, *Parliament v Commission*, EU:C:1996:238; Case C-355/10, *Parliament v Council*, EU:C:2012:516; Case C-44/16 P, *Dyson Ltd v Commission*, EU:C:2017:357.
[2524] See Case 38/40, *Deutsche Tradax v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1971:24, para. 10.
[2525] According to TOVO, however, the annulment of an act for the disregard of internal procedures is limited to the case of express mention in the basic act, TOVO Carlo, *op. cit.* (2016), p. 362.

annulled on this ground. However, the procedural rules infringed need to be essential[2526] and they have to affect the outcome of the procedure.[2527]

Finally, the acts adopted according to a delegation of powers have also been challenged on the ground of "misuse of powers".[2528] This concept, drawing from the French administrative law tradition of *détournement de pouvoirs*, designates the adoption by an institution of a measure with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated, or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.[2529] In the case of a delegation of powers, the objectives are those specifically established in the basic act as essential elements;[2530] the pursuit of different objectives causes the annulment of the measure.[2531] However, actions brought on this ground rarely succeed before the Court.[2532]

4.9. The Intensity of Review

The effectiveness and extent of judicial review depends not only on the conditions to have access to the Court but also on the intensity of the judicial review exercised by the judges in the contested acts. Indeed, the question on how far the Court goes in assessing the decision and reassessing the elements that lead the author to such a decision is crucial especially in relation to decisions involving discretion. In this regard, it is important to recall that judicial review generally involves a review on law, fact, and discretion.[2533] While the Court fully substitutes judgements of the parties in relation to questions of law, the intensity of review of fact and discretion is different since it needs to respect the institutional prerogatives of the author in deciding on the merit.[2534] In the balance between full judicial scrutiny and deference to the institutions' assessment of the merit lies the standard of review of the Court.[2535]

[2526] Case 138/79, *Roquette Fréres v Council*, EU:C:1980:249, para. 33.
[2527] *Inter alia,* Case 282/81, *Ragusa v Commission*, EU:C:1983:105, para. 22; Joined Cases 209-215/78, *Van Landewyck v Commission*, EU:C:1980:248, para. 47.
[2528] See Case C-156/93, *Parliament v Commission*, EU:C:1995:238, paras. 31-34; Case C-65/13, *Parliament v Commission*, EU:C:2014:2289.
[2529] *Inter alia*, Case C-248/89, *Cargill v Commission*, EU:C:1991:264, para. 26.
[2530] See Chapter 4, para. 5.
[2531] See, for instance, Case C-403/05, *Parliament v Commission*, EU:C:2007:624.
[2532] LENAERTS Koen, MASELIS Ignace and GUTMAN Kathleen, *op. cit.* (2014), p. 387.
[2533] CRAIG Paul, *EU Administrative Law*, (Oxford University Press, 2012), Chapter 13.
[2534] CRAIG Paul and DE BURCA Grainne, *op. cit*. (2011), p. 551.
[2535] On the intensity of judicial review see, *inter alia*, ELIANTONIO Mariolina, "Deference to the Administration in Judicial Review - EU report", (on file from the author), pp. 1-19; BARAN Mariousz, "The scope of EU Courts' jurisdiction and review of administrative decisions - the problem of intensity control of legality", in HARLOW Carol, LEINO Päivi and DELLA CANANEA Giacinto, *Research Handbook on EU Administrative Law* (Elgar, 2017), pp. 292-315; CARANTA Roberto, "Burden of Proof vs Duty to Give Reasons in Administrative Law", in BALÁZS Gerencsér, LILLA Berkes e VARGA Zs. András, *A hazai és az uniós közigazgatási eljárásjog aktuális kérdései*, (Pázmány Press, 2015), pp. 305-323; KOURI Karim, "The intensity of judicial review by the Court of Justice of the European Communities in merger cases", *Luxembourg journal of law, economics & finance* (2007), pp. 114-136.

4.9.1. The Intensity of Review of EU Institutions' Acts

In relation to the acts of EU institutions, the Court is called to exercise a comprehensive review of their legality, intensively scrutinising the exercise of their powers, also in case of delegated powers.[2536] However, when the exercise of discretion involves the evaluation of a complex economic or technical situation, the Court has a rather deferential approach, which was evident especially in the past.[2537] This approach was applied in relation to any EU institution, including the Commission, the Council, and the ECB.[2538]

In particular, in the field of the CAP - an area where the delegation of powers to the Commission was particularly extensive - the Court recognised that the EU institutions enjoyed "a broad discretion" in the choice of appropriate means of action in the light of the various objectives of the CAP.[2539] Therefore, "in reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it is not vitiated by a manifest error or misuse of power or whether the institution in question has not manifestly exceeded the limits of its discretion."[2540] In other words, since the Commission alone is in the position to anticipate and evaluate ecological, scientific, technical, and economic changes of a complex and uncertain nature, the Court cannot substitute its own assessment of the matter for the Commission's decision.[2541]

Such a light approach of the Court was also applied to other policy areas, whenever the EU institution's decision involves complex economic or technical appraisals. However, in more recent judgments, and especially certain policy areas such as risk regulation and competition, the Court has undertaken a more intensive review of the exercise of powers, rigorously applying the test for assessing whether a manifest error occurred.[2542] In particular, the change in the approach of the

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[2536] TESAURO Giuseppe, *op. cit.* (2011), p. 252.

[2537] See, *inter alia*, Case 42/84, *Remia v Commission,* EU:C:1985:327, para. 34; Joined Cases 142 and 156/84, *BAT and Reynolds*, EU:C:1987:490, para. 62; Case C-7/95, *Deere v Commission*, EU:C:1998:256, para. 34; Case C-272/09 P, *KME Germany v Commission*, EU:C:2011:810, para. 39; Case C-87/00, *Roberto Nicoli v Eridania SpA*, EU:C:2004:604, para. 37.

[2538] For a reference to the ECB discretion under judicial review, see Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, EU:T:2017:337, paras. 139. See also Recital 64 of the SSM Regulation: "The ECB should provide natural and legal persons with the possibility to request a review of decisions taken under the powers conferred on it by this Regulation and addressed to them, or which are of direct and individual concern to them. The scope of the review should pertain to the procedural and substantive conformity with this regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions."

[2539] *Inter alia*, Case 57/72, *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker*, EU:C:1973:30; Case C-335/13, *Robin John Feakins v The Scottish Ministers*, EU:C:2014:2343, paras. 56-58.

[2540] Case C-369/95, *Somalfruit and others v Ministero delle Finanze*, EU:C:1997:562, para. 50; Case C-354/95, *National Farmer's Union and Others*, EU:C:1997:379, para. 50.

[2541] See, *inter alia*, Case C-87/00, *Nicoli v Eridania*, EU:C:2004:305, para. 37; Case T-123/97, *Solomon v Commission*, EU:T:1999:245, para. 47; Case T-333/10, *Animal Trading Company (ATC) BV and Others v European Commission*, EU:T:2013:451, para. 64.

[2542] For an analysis of the review in risk regulation, see in particular VOS Ellen, "The European Court of Justice in the Face of Scientific Uncertainty and Complexity", in DE WITTE Bruno, MUIR Elise and DAWSON

Court towards the intensity of review of the discretion is exemplified by the paradigmatic *Pfizer* case, which involved the acquisition of technical advice from a scientific body.

Here, the applicant brought proceedings against a Council regulation which withdrew authorisation for an additive to animal feeding stuff.[2543] The decision was based on an opinion of the Scientific Committee for Animal Nutrition on the risk it posed to human health. The Court, after repeating the traditional formula on the limited judicial review of complex technical appraisals,[2544] proceeded to carry out a close assessment of the applicant's claims regarding fact and discretion. In this, it applied the test for manifest error in a way which went far beyond the earlier practice, demonstrating a significant evolution in the intensity of the scrutiny.[2545]

Considering that the EU legislator resorts to the delegation of powers especially for the definition of technical rules, the approach of the Court in cases involving complex technical and economic appraisals is particularly relevant for the review of delegated powers of the Commission. In particular, it has been noted that the review of the Court on the exercise of the Commission's power under the previous comitology regime was not particularly intensive, leaving wide discretion to the Commission in the adoption of implementing acts.[2546] This might change with the express provision of the "objectives, content, scope and duration" for delegated acts pursuant to Article 290 TFEU. In any case, the judicial review still tends to focus on the *ex ante* limits on the delegation, which represent the yardstick for assessment of Commission's acts.[2547] Therefore, the more precisely the essential elements are spelled out in the basic act, the more intense the review can be, since the Court is provided with more criteria to assess whether the Commission has manifestly erred or manifestly exceeded the limits of its discretion.

Mark (eds.), *Judicial Activism at the European Court of Justice*, (Cheltenham, 2013), pp. 142-166; in merger control, see KOURI Karim, *op. cit.* (2007), pp. 114-136.

[2543] Case T-13/99, *Pfizer v Commission*, EU:T:2002:209. For a detailed analysis of the case, see VOS Ellen, op. cit. (2013), pp. 152-160. See also Case C-12/03 P, *Commission v Tetra Laval*, EU:C:2005:87, esp. para. 39: "Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect."

[2544] Case T-13/99, *Pfizer v Commission*, EU:T:2002:209, para. 166.

[2545] VOS Ellen, *op. cit.* (2013), pp. 152-160.

[2546] CRAIG Paul, *op. cit*. (2010), p. 266.

[2547] Ibidem, p. 265.

4.9.2. The Intensity of Review of Agencies' Acts

The intensity of the review of agencies' action represents a crucial aspect of this delegation system, whose legitimation, according to the *Meroni* and *Short Selling* rulings, is inherently dependent on the judicial review and on the limited discretion enjoyed by these bodies.

Considering the issue in the abstract, two opposing attitudes, which may lead to a more lenient or a more intensive scrutiny, may influence the approach of the courts to agencies' activities.[2548] On the one hand, the institutional independence and the specific expertise that agencies enjoy may justify a certain deference towards agencies' assessment, which cannot be substituted by the judgement of an institution lacking the scientific and technical knowledge on the matter.[2549] On the other hand, precisely because the agencies enjoy a considerable autonomy from political oversight, this must be compensated by a closer examination of their acts by the courts, aimed at strengthening the accountability of these bodies.[2550]

Against this background, it is arguable that, in the EU, the tendency is towards the first approach as in recent cases concerning the exercise of powers by EU agencies the Court appears to give crucial value to the scientific expertise employed by these bodies. This emerges with respect to the delegation both of formal powers and of *de facto* powers to EU agencies. Indeed, in both cases, the judicial review is not particularly intensive, irrespective of the fact that the political control is rather limited.[2551]

Firstly, considering the judicial review of the exercise of the powers *de facto* delegated to EU agencies, the Court has also applied its case law on complex economic or technical assessments of EU institutions where the Commission's decision was based on agencies' opinions. Accordingly, it recognised that, in its preparatory activities, the agency "enjoys a wide measure of discretion, the exercise of which is subject to a judicial review restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion".[2552] Therefore, in considering the legality of the Commission's act, it also reviews agencies' action, but it refrains from substituting its judgement

[2548] For a theoretical and comparative analysis of the judicial scrutiny of agency action, see ZWART Tom, "Judicial Review of Agency action: The Scope of Review", in ZWART Tom and VERHEY Luc (eds.), *Agencies in European and Comparative Law,* (Intersentia, 2003), pp. 171-178.
[2549] Example of this attitude is the famous US case *Chevron USA v Natural Resources Defence Council*, 467 US 837 (1984).
[2550] ZWART Tom, *op. cit.* (2003), p. 172.
[2551] TOVO Carlo, *op. cit*. (2016), p. 364.
[2552] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH v Commission*, EU:T:2002:283, para. 201. See also Case C-120/97, *Upjohn Ltd v The Licensing Authority*, EU:C:1999:14, para. 34.

on complex matters, although in case of scientific uncertainty it exercised stricter scrutiny through the examination of the statement of reasons.[2553]

Secondly, what is more remarkable is that the Court has also accepted this marginal scrutiny in relation to genuine decision-making agencies. Indeed, in *Schräder,* it has applied the principles elaborated in relation to complex technical appraisals of EU institutions to a decision of CPVO.[2554] Emphasising that CPVO - as any EU institution called to make complex assessments - enjoys "a wide measure of discretion", the Court stated that its action "is subject to limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned."[2555] Therefore, the judicial review "must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by the authority is not vitiated by a manifest error or misuse of powers and that it clearly did not exceed the bounds of its discretion."[2556]

This limited scrutiny of the Court over agencies' delegated powers was confirmed in *Rütgers*, which dealt with the powers delegated to ECHA.[2557] In this case, the Court went even further, acknowledging that the ECHA "has a broad discretion in a sphere which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments".[2558] As emerges from recent case law, such broad discretion concerns not only the nature and scope of the measures to be taken into account but also, to some extent, the finding of the basic facts.[2559] When the EU authorities show that they actually exercised their discretion, taking into consideration all the relevant factors and circumstances of the situation the act was intended to regulate, judicial review is "of limited scope".[2560] Accordingly, on these aspects the Court exercises only a marginal scrutiny on the legality of the assessment on these aspects, resulting in the annulment of the act only as far as it is proven that it is manifestly inappropriate.[2561]

This approach of the Court in the judicial review of agencies' acts, however, sits uneasily with the limits on the delegation of powers which were identified in relation to EU agencies. On the one

[2553] Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH v Commission*, EU:T:2002:283, para. 221.
[2554] Case T-187/06, *Schräder v CPVO*, EU:T:2008:511, upheld on appeal in Case C-38/09 P, *Schräder v CPVO,* EU:C:2010:196.
[2555] Case T-187/06, *Schräder v CPVO*, EU:T:2008:511, para. 59.
[2556] Ibidem.
[2557] Case T-96/10, *Rütgers Germany v ECHA*, EU:T:2013:109.
[2558] Ibidem, para. 134.
[2559] Case T-115/15, *Deza v ECHA*, EU:T:2017:329, para. 164; Case T-134/13, *Polynt and Sitre v ECHA*, EU:T:2015:254, para. 52.
[2560] Ibidem.
[2561] Case T-96/10, *Rütgers Germany v ECHA*, EU:T:2013:109, para. 134.

hand, the recognition that the ECHA is called to exercise discretion in "political, economic and social choices" is at odds with the prohibition to delegate discretionary powers enshrined in *Meroni*. While political choices should be reserved for the legislator, and the agencies' discretion limited to "clearly defined executive powers", the scope of discretion acknowledged in *Rütgers* appears to go beyond the traditional limits of the *Meroni* doctrine.[2562] Also considering the relaxing of the *Meroni* requirements in the *Short Selling* case, the compatibility of these two lines of case law appears controversial.[2563]

On the other hand, the limited judicial scrutiny of the Court on the agencies' exercise of discretion casts some doubts on the respect of the requirement expressed in *Short Selling* that the exercise of ESMA's powers is "amenable to judicial review in the light of the legislator's objectives".[2564] It is questionable whether the strict supervision required in that case is satisfied by the rather marginal judicial review exercised by the Court in relation to agencies' complex appraisals. Considering that the agencies are generally delegated powers precisely to carry out technical and scientific work, the result is that most of their activities fall outside the scope of a full review by the Court. Although it is doubtful that the Court constitutes an appropriate forum for scientific assessments, a stricter standard of review, such as the one shown in *Pfizer,* would appear more in line with the requirements of delegation.

This is even more problematic in the light of the grounds on which the legitimacy of EU agencies is based. Indeed, in the absence of an express legal basis in the Treaties, the requirements enshrined in *Short Selling,* including judicial review, are not only the limits, but also the crucial conditions for the legality of these bodies under EU law. Limiting the scope of judicial review, thus, risks undermining the position of EU agencies within the EU institutional system.[2565]

4.10. The Preliminary Ruling on Acts Issued Pursuant to a Delegation

According to Article 267 TFEU, the Court of Justice of the European Union has jurisdiction to give preliminary rulings on "the validity and interpretation of acts of the institutions, bodies, offices or

[2562] HOFMANN Herwig, ROWE Gerard and TURK Alexander, *Administrative Law and Policy of the European Union*, (Oxford University Press, 2011), p. 244.
[2563] CHAMON Merijn, "The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: comment on United Kingdom v Parliament and Council (*Short Selling*) and the Proposed Single Resolution Mechanism", 39 *European Law Review* No. 3 (2014), p. 396. The author interestingly remarks that *Schräder* and *Rütgers* are not mentioned in *Short Selling*. It is equally interesting to remark that in the following cases, *Deza* and *Polynt and Sitre, Short Selling* is not mentioned.
[2564] Case C-270/12, *UK v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18, para. 53. On the point, see CHAMON Merijn, *op. cit.* (2014), p. 396; HOFMANN Herwig, ROWE Gerard and TURK Alexander, *op. cit*. (2011), p. 244.
[2565] TOVO Carlo, *op. cit.* (2016), p. 365.

agencies of the Union".[2566] Considering the acts adopted according to the different delegation systems analysed, it is uncontroversial that the acts of the Commission, of the Council, of the ECB and of the agencies do fall within the scope of this provision. Therefore, a question on the validity of delegated or implementing acts (in the form of regulations, directives or decisions), but also of atypical acts (such as acts of the agencies) can be raised before a national judge.[2567] This may occur, in particular, in cases where the implementation of an invalid EU act is demanded of the Member States, triggering the contestation of the EU act in national proceedings.[2568] However, the validity of EU measures can also be the object of a preliminary ruling where no national implementation measure has been adopted.[2569]

The initiation of the preliminary procedure is demanded of a court or tribunal of a Member State,[2570] "if it considers that a decision on the question is necessary to enable it to give judgment".[2571] In this regard, Article 267 TFEU draws a distinction between courts or tribunals which have the possibility to refer the case, on the one hand, and court and tribunals which are under an obligation to refer the question to the Court of Justice, on the other hand. The latter, in particular, is constituted by a "court or tribunal of a Member State against whose decisions there is no judicial remedy under national law",[2572] to be interpreted according to the concrete situation at issue.[2573] However, this obligation imposed on the courts of last instance has been qualified in the case law. Indeed, there is no obligation to refer a question which has already been solved by the Court, for a ruling on the same point of law, as well as where the interpretation is so evident that no reference is required (*acte clair* doctrine).[2574]

[2566] Article 267 TFEU.
[2567] Preliminary rulings are, for instance, Case 25/70, *Köster*, EU:C:1970:115; Joined Cases C-154/04 and c-155/04, *Alliance for Natural Health*, EU:C:2005:449; Case 98/80, *Romano*, EU:C:1981:104.
[2568] See, for instance, Case 66/80, *International Chemical Corporation v Amministrazione delle Finanze dello Stato*, EU:C:1981:102; Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, EU:C:1987:452. On the questions raised in preliminary rulings, see DE WITTE Bruno, "The preliminary ruling dialogue : three types of questions posed by national courts", in DE WITTE Bruno, MAYORAL Juan A., JAREMBA Urszula, WIND Marlene and PODSTAWA Karolina (eds), *National courts and EU law : new issues, theories and methods*, (Edward Elgar Publishing, 2016), p. 15-25.
[2569] Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, EU:C:2002:741. See BERSTROM Maria, *op. cit.* (2016), p. 230.
[2570] On the notion of "court or tribunal", see, *inter alia*, Case 43/71, *Politi v Italy*, EU:C:1971:122; Case C-24/92, *Corbiau*, EU:C:1993:118; Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin*, EU:C:1997:413; Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587; Case C-178/99, *Salzmann*, EU:C:2001:331; Case 246/80, *C. Broekmeulen v Huisarts Registratie Commissie*, EU:C:1981:218, paras. 14-18.
[2571] Article 267(2) TFEU.
[2572] Article 267(3) TFEU.
[2573] See, *inter alia*, Case 6/64, *Costav ENEL*, EU:C:1964:66; Case 99/00, *Lyckeskog*, EU:C:2002:329; Case C-210/06, *Cartesio*, EU:C:2008:723.
[2574] See, inter alia, Joined Cases 28-30/62, *Da Costa*, EU:C:1963:6; Case 283/81, *CILFIT*, EU:C:1982:335, para. 14; Joined Cases C-428-434/06, *UGT-Rioja*, EU:C:2008:488, para. 39.

In light of this, it appears that the possibility of review of an act issued pursuant to a delegation of powers through Article 267 TFEU is remarkably dependent on the willingness of national courts to raise a preliminary question[2575] and on the specific circumstances addressed in the national proceedings. Therefore, although the national proceedings has the advantage of constituting a familiar environment for the applicants to contest the validity of an EU act, it is clear that the preliminary ruling procedure cannot constitute the main instrument for the control of the legality of the acts of the delegate, still being a complementary and useful mean for individuals to challenge the validity of an *ultra vires* exercise of delegated powers indirectly.[2576]

5. Conclusion

The analysis of the acts issued by the different institutions and bodies pursuant to a delegation of powers has shown that the exercise of these powers may result in a plurality of measures, whose collocation in the hierarchy of norms and judicial review raises relevant issues. In particular, considering their formal aspects, these acts can take different forms and may be of individual or general application, typical or atypical acts.

In this regard, the Lisbon Treaty has brought much clarity and legal certainty in relation to the acts adopted by the Commission, indicating and typifying the form of delegated and implementing acts in Articles 290 and 291 TFEU. Conversely, the acts of EU agencies lack equal clarity and systematic classification. Indeed, the acts of the agencies are atypical acts, which can take different forms according to the basic regulation of each agency. In this regard, also the case of the ECB is peculiar since, being an EU institution, it can adopt typical acts according to Article 288 TFEU, but the SSM Regulation also provides for the adoption of atypical acts as a result of the exercise of the delegated powers in the field of banking supervision.

The consideration of these acts adopted by the ECB and the EU agencies has revealed the fundamental incompleteness of the Lisbon categorisation of acts. Not amenable to the formal notions of delegated or implementing acts, these measures nevertheless have binding effects vis-à-vis third parties and contribute to the implementation of EU law. Arguably, their existence outside the categorisation of Articles 290 and 291 TFEU reveals how the hierarchy allegedly fixed in primary law is incomplete and based on inconsistent criteria. Moreover, considering the hierarchical relationship between delegated and implementing acts, it was argued that the three-tiered image of the hierarchy between legislative, delegated and implementing acts does not correspond to the reality of the post-Lisbon application of Articles 290 and 291 TFEU. Indeed, in

[2575] BERSTROM Maria, *op. cit*. (2016), p. 230.
[2576] Ibidem, p. 230.

the practice of the institutions and in the case law of the Court, a horizontal understanding of delegated and implementing acts prevails, contradicting the intentions underpinning the introduction of this categorisation.

Therefore, the uncertainties with regard to the institutional position of agencies and with regard to the divide between delegated and implementing acts are inevitably mirrored in the fuzziness of the form of agencies' acts and of the hierarchy of norms within the EU legal system. This highlights that, on the one hand, the empowerment of agencies is still in need of further constitutionalisation and, on the other hand, that the Lisbon reform does not appear to be fully achieved, presenting relevant shortcomings that the current practice tends to exacerbate.

Having clarified the formal and hierarchical aspects of the acts of the delegate, the analysis then focused on their judicial review. Thus, in the light of the two levels in which the EU system of judicial remedies is articulated, the possibility to review these acts through an action for annulment and a preliminary ruling was considered. Firstly, in relation to the former, it was observed that, while the possibility to challenge acts adopted by the Commission, the Council and the ECB pursuant to a delegation of powers has never been questioned, the inclusion of acts of EU agencies among the reviewable acts has been the result of a long evolution. While the judicial review of agencies' acts was in certain cases assured by legal mechanisms established in the basic acts and by the evolution in the interpretation of the Court, the introduction of an express provision on this point in primary law by the Lisbon Treaty has brought a positive innovation. The reviewability of the acts adopted pursuant to a *de facto* delegation of powers, however, remains problematic, revealing an inconsistency in the judicial review between the two forms of delegation and the risk of shielding the activities of these agencies from an effective control.

Secondly, the issue of the *locus standi* before the Court has been considered. On the one hand, the position of the Commission and the Council as privileged applicants and of the ECB as a semi-privileged applicant has been contrasted with the absence of a corresponding provision with regard to EU agencies. Such a neglect constitutes another sign of the unfinished constitutionalisation of these bodies, to whom the Lisbon Treaty has not recognised specific prerogatives in primary law and thereby left their role within the institutional balance uncertain. On the other hand, the particular issue of the *locus standi* of natural and legal persons has emerged, recognising that the controversial limitations of the access to justice, determined by the strict application of the *Plaumann* case law by the Court, are also problematic in case of the delegation of powers. However, in this regard, the delegated acts, the implementing acts and certain acts of EU agencies were considered to fall within the new notion of a regulatory act, while the integrated

system of banking supervision established by the SSM Regulation arguably hinders this simplified access to the Court, requiring implementation by national authorities.

Finally, the intensity of the judicial review was analysed, pointing out that the Court tends to apply a limited scrutiny of the discretion of EU institutions when they are called to make complex technical or economic appraisals. Thus, in these cases, the scope of review is limited to verifying a manifest error or misuse of power or whether the institution in question has not manifestly exceeded the limits of its discretion, and the Court refrains from substituting its judgement for the institutions' assessment. However, this approach was found particularly problematic in relation to the delegation of powers to EU agencies. Indeed, the recognition of a broad discretion, which includes "political, economic and social choices", appears at odds with the prohibition of delegating wide discretionary powers to these bodies. Considering the need of providing strict judicial supervision as a condition for the legality of such a delegation, which emerges from the case law, this approach shows the limits of the existing mechanisms to fully capture the complexities of this delegation system.

Conclusion

1. Delegation of Powers in the EU

The delegation of powers represents a fundamental legal mechanism for the organisation and functioning of the EU as it is today. The analysis in this study has shown how delegation lies behind some of the most significant institutional developments which have characterised the evolution of EU governance and EU administration in the 60 years of European integration. From the rise of the comitology system to the institutional arrangements established in the aftermath of the financial crisis, the delegation of powers to non-majoritarian bodies has often provided a solution for the need of delivering effective and often technically and scientifically sound responses to the compelling challenges the EU was - and still is - facing.

Despite the undeniable advantages the delegation of powers brings, its implications are far from being unproblematic from a constitutional perspective. Outsourcing the powers from the institutions which have the ordinary competence to adopt binding measures, delegation inherently entails the risk of upsetting the balance of powers between institutional actors and of undermining the rule of law with an uncontrolled exercise of discretionary power. For these reasons, delegation of powers was embedded in specific limits and controls which aim at maintaining the exercise of delegated powers within the boundaries determined by the democratic principles and the institutional framework.

This study, therefore, examined the notion, the operation and the issues raised by this legal mechanism in EU law, trying to define and develop a legal framework guaranteeing the constitutional principles in the plurality of delegation phenomena and in the composite structure of the EU reality. In particular, the research aimed at identifying the common limits and constitutional principles to be respected for a legitimate delegation of powers in the EU legal system, investigating whether, beyond the peculiarities and the complexities of each delegation system, a coherent regime is applicable horizontally to the forms of delegation of powers identified. In this respect, the role of the delegation of powers in the evolution of EU governance was considered from a constitutional perspective, paying particular attention to the operation of the principles of the rule of law and the institutional balance.

2. Looking Back to Move Forward

In the absence of an established definition of delegation of powers in EU law, the elaboration of a precise legal notion applicable in this legal system has been necessary to define the specific scope

of the analysis. Recognising that the notion of delegation exists in public law since ancient times and that it was particularly developed in the scholarly traditions of certain State legal systems since the 20th century, the role of the delegation of powers was recognised as a fundamental legal mechanism for the organisation and management of public power, which formally justifies the exercise of certain powers by authorities which are not ordinarily entrusted with the relevant competence. In this sense, this notion identifies the unilateral transferral of the exercise of certain powers, which ordinarily pertain to one institution or body of public law according to a determined order of competences, to another institutional actor, which, thus, exercises them in an autonomous way.

Such a transferral, however, has proved to be particularly problematic in light of the democratic foundation of nation States. In this regard, entailing a modification of the constitutionally set order of competences, reconciling the delegation of powers with the rule of law in a legal system based on a rigid hierarchy of norms represented a challenge for legal scholars, who elaborated different theories on the constitutional implications of this legal mechanism. Moreover, especially in the case of the delegation of legislative powers, it causes an inherent tension with the principle of separation of powers, which assumes an ambivalent role, both as a precondition and as a limit to the delegation. With the evolution of the State in the 20th century, entailing a deeper involvement of the State in the regulation of technical and economic aspects of society, this required a conceptual reconsideration of the principle in the sense of a wider acceptance of forms of collaboration between the legislative branch and the executive branch. At the same time, the increasing importance of the rule of law, especially in its corollary of the principle of legality in its formal and substantive meanings, determined the emergence of clear limits to the delegation of powers, generally established at the constitutional level. Therefore, although generally admitted in State legal systems, the notion of delegation was greatly influenced by these constitutional principles.

Building from these considerations, the notion of delegation of powers applicable in the EU legal system thus required an examination of the peculiarities of the Union's institutional framework and of the relevant constitutional principles in this context. In this regard, the first EU constitutional principle that comes to the fore when assessing the delegation of powers is the principle of conferral, which governs the division of competences between the EU and the Member States and among the EU institutions. It is, in fact, only within the EU sphere of attributed competences that any delegation can take place. In its horizontal dimension, it also determines the powers and the procedures to be followed by the institutions for the exercise of those powers, thus framing the order of competences relevant for the delegation of powers at the EU level.

Furthermore, the delegation of powers needs to abide by the other constitutional principles which govern the EU legal system, and in particular the rule of law - in its corollaries of the principle of legality and, albeit in its peculiar and highly debated form, the hierarchy of norms. As one of the pillars of EU law, the rule of law requires the exercise of public power to be embedded within certain substantive limits and under certain procedural requirements established by a higher law and to be amenable to judicial review. The peculiar understanding of this principle in the EU legal system, however, allowed the development of forms of delegation not having an express *Delegationsnorm* in the Treaties, thus making it necessary to take into consideration phenomena occurring in the shadow of primary law.

Moreover, although the relevance of the traditional principle of separation of powers for the development of the EU institutional structure cannot be excluded entirely, the inter-institutional relationships are shaped by the specific principle of institutional balance, which requires the institutions to act within the limits of the powers conferred and respecting the role and the prerogatives of the other institutions. In particular, this dynamic principle plays a fundamental gap-filling function vis-à-vis *lacunae* in primary law, such as those that emerged in relation to certain forms of delegation. In this role, the institutional balance was identified as the ultimate yardstick for the control of the delegation of powers in the EU legal system. In particular, in this study the institutional balance was intended as comprising not only the EU institutions and bodies, but also the Member States in order to embrace the composite structure of EU governance in the analysis.

In the light of the meaning of this principle, in the EU legal system, a definition of delegation of powers requires that not only the formal transferral of decision-making powers, originally vested in a certain institution by the Treaties, to another institutional actor, be taken into account, but also the phenomena where the delegated institution or body is granted powers which, being exercised, potentially encroach upon or overtake the powers of another institution. Accordingly, it was recognised that a delegation of powers occurs not only in the situations where the institution or body enacts, in its own name, acts which, according to the order of competence defined in primary law, are the competence of the delegating authority, but comprises also forms of *de facto* delegation of powers where the formal powers may remain in the hands of the institution defined in primary law, but the real powers may be actually exercised by another institution or body. Such an institutional-balance-oriented notion of delegation, thus, gives value to the autonomy of the delegate in the exercise of the powers and to the effect it has on the other institutional actors, shedding light on the *de facto* delegations which occur in the EU institutional panorama. In this way, the notion can capture the different phenomena of the delegation of

powers at the EU level, recognising them as examples of a more general legal mechanism which permeates the evolution of EU governance.

3. The Evolution of EU Governance through the Lenses of Delegation

Applying the proposed notion of delegation, the different forms of delegation emerged in the 60 years of European integration were identified, recognising how the EU has grown into a regulatory entity, which has often resorted to the delegation of powers for an efficient and flexible regulation and implementation. Indeed, the increasing expansion of EU competences, coupled with the need to provide uniform conditions for an effective implementation of EU legislation, have pushed the institutions to delegate their powers, creating procedures and bodies not envisaged in the original Treaties.

Thus, since the establishment of the common market organisations in the 1960s, the management of the Common Agricultural Policy has required the delegation of relevant powers to the Commission, entailing the adoption of acts of individual and general application by this institution. Such empowerment, however, was counterbalanced by the establishment of a system of committees composed by Member States representatives, which ensured the control over the exercise of the powers by the Commission. Initially aimed at maintaining the control of the Council on the Commission, this idiosyncratic system has proven to be a valuable source of expertise for the Commission and of coordination with national administrations for a more effective implementation of EU law. Upheld by the Court in particular in the *Köster* case, the comitology system expanded into a countless number of committees and procedures, which acted as efficient cogs in the engine of the EU composite administration.[2577] The exponential expansion of the system, however, caused increasing inter-institutional tension, causing extensive litigation before the Court and subsequent revisions of the applicable legal framework, also addressing primary law. Such revisions, in particular, were motivated by the growing role of the Parliament as co-legislator, which entailed a mismatch between the chain of delegation and the control mechanisms in place, urging for a reform of the system.

The same evolution in the institutional role of the Parliament, which since the Maastricht Treaty became co-legislator and, consequently, co-delegator of certain powers conferred in primary law, resulted in the emergence of another form of delegation in the EU institutional panorama, namely the delegation of powers to the Council. In this respect, although the possibility to empower the Council for the adoption of implementing acts in duly justified specific cases was already

[2577] To echo the mechanical metaphor suggested by POLLACK Mark A., *The Engines of European Integration*, (Oxford University Press, 2003).

established, it is arguable that, under the original legal framework, this constituted a form of reservation of powers rather than a delegation in proper terms. Indeed, it is only in cases of the co-decision procedure (now ordinary legislative procedure) that an inter-institutional transferral of powers occurs, thus falling into the recognised notion of the delegation of powers.

An important form of delegation of powers was identified, moreover, in relation to the creation and empowerment of EU agencies, which constitutes one of the most momentous developments in the EU institutional architecture. The growing involvement of the EU in deeply complex policy domains increasingly required forms of technical and scientific expertise from the rule-maker, which the EU institutions generally lacked. Often established as a reaction to a transnational crisis, the EU agencies also represented a credible solution for the need to provide an effective implementation at the EU level when the Member States could not accept a further empowerment of the Commission. Consequently, in the last decades, the delegation of powers to EU agencies grew exponentially both in quantitative and qualitative terms.

However, created in subsequent waves, without a coherent legal framework and a sound legal basis in primary law, the EU agencies are significantly diverse, varying in their functions, structure and in the powers conferred. In particular, while executive agencies are conferred executive and operational tasks related to a specific spending programme, some decentralised agencies can adopt acts of individual or general application, and, even when they are not formally entrusted with formal powers, they may be so influential as to exercise *de facto* rule-making powers in relevant EU policy domains. Thus, in the agencification phenomenon, both cases of formal delegation and *de facto* delegation of decision-making powers were recognised. Although the founding case law - in particular the *Meroni* and *Romano* judgments - prohibited the delegation of discretionary powers to EU agencies, more recently the *Short Selling* judgment applied this prohibition in a more nuanced way. Hence, agencies are nowadays called to exercise important powers in complex and politically sensitive domains, calling for further consideration of the limits of the delegation of powers to these entities.

One of these sensitive domains is certainly represented by the financial and banking supervision where, in the aftermath of the financial crisis, the most powerful agencies were established. Indeed, the European Supervisory Agencies are delegated far-reaching powers, which range from the adoption of draft regulatory technical standards and draft implementing technical standards - which are to be formally adopted by the Commission as, respectively, delegated acts and implementing acts - to powers of direct intervention in specific emergency situations. The delegation of rule-making powers to these bodies, coupled with their empowerment in highly sensitive and contentious domains, marked a fundamental step in the development of

agencification, paving the way for a shift in their conceptualisation from mere technical bodies to potentially political creatures.[2578]

Remarkably, as a reaction to the same financial crisis, the most recent form of delegation of powers emerged. The creation of the Banking Union entailed the conferral of supervisory tasks to the European Central Bank through the Single Supervisory Mechanism Regulation, thus delegating relevant powers to this independent institution in the field of prudential supervision of credit institutions. Interestingly, the analysis of this form of delegation incidentally highlighted how the different delegation systems should not be understood in isolation, but they are often interrelated in the regulation of complex fields. Thus, in prudential supervision, the ECB is bound to act in close collaboration with the ESAs and other non-majoritarian bodies, whose margin of discretion is in turn limited by delegated and implementing acts adopted by the Commission. At the same time, the delegation of powers to these bodies affects the autonomy of the Commission in the adoption of delegated and implementing acts.[2579] Indeed, in certain cases, the Commission's discretion results remarkably constrained, earlier, by the preparatory works of the ESAs and, later, by the control exercised by the national experts or the comitology committees, thus determining a complex and multifaceted relationship between delegation systems which would deserve further scholarly attention.

Therefore, the development of EU integration was marked by extensive recourse to the legal mechanism of delegation, which represents not only an indispensable tool for the day-to-day management of EU policies and programmes, but also a solution to the most challenging technical and political impasses the EU institutions have faced. Examining these different phenomena through the lens of the notion of delegation - as defined by the analysis of the original meaning of the concept and confronted with the peculiarities of the EU institutional framework - has permitted the recognition of the identity of the legal mechanism at stake in all of these cases. Therefore, although the nature of the powers conferred may vary, these forms of delegation proved to be structurally similar, essentially entailing a transferral of powers by the legislator (the Council, or the Council and the Parliament) to a non-majoritarian body.

Arguably, this conclusion also remains valid after the reform of the Lisbon Treaty. Inspired by considerations on an enhanced separation of powers and hierarchy of norms, the innovative proposals elaborated on in preparation for the Constitution for Europe were only partially inserted into the text of the Lisbon Treaty. Indeed, in spite of the innovations of the Lisbon reform,

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[2578] EVERSON Michelle, MONDA Cosimo and VOS Ellen, "What Is the Future of European Agencies?" in EVERSON Michelle, MONDA Cosimo and VOS Ellen (eds.), *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), pp. 236-238.
[2579] CRAIG Paul, "Delegated and Implementing Acts" in SCHÜTZE Robert and TRIDIMAS Takis (eds.), *Oxford Principles of European Union Law*, (Oxford University Press, forthcoming), p. 742.

the current Treaties arguably do not provide an autonomous executive competence for the Commission, which is still conferred implementing powers through a delegation mechanism. Therefore, two regimes of the delegation of powers coexist for the empowerment of the Commission, regulated by Articles 290 and 291 TFEU, which establish different procedures and confer the control over the exercise of the powers on different institutional actors, causing significant debates on the distinction of the delegated powers from a substantive perspective. From this interpretation of the provisions relating to the implementation of EU legislation, it follows that the empowerment of EU agencies is also a form of delegation of powers, although the peculiarities of these bodies, as "interesting hybrids"[2580] and "in-betweeners"[2581] amidst the EU institutions and the Member States, remain essential in the understanding of this highly specific institutional arrangement. Indeed, the structure and the tasks performed by EU agencies show that they are expression and part of the composite EU administration characterised by intense cooperation between the different executive levels, but, from a legal perspective, it is argued that the chain of delegation recognises the delegator of the powers in the legislator.

In light of these considerations, the notion of delegation still appears to be suitable to describe the legal mechanisms underlying the new strategies of EU governance.[2582] Actually, it may serve as a unifying concept within the fragmentation of the EU secondary non-legislative rule-making and of the European executive action in general.[2583] In the composite reality of EU governance and administration, the fact that the empowerment of the Commission, the Council, the ECB, and EU agencies may be attributed by the same legal mechanism, underscoring the unitary character of these diverse institutional developments, paves the way to recognising a legal framework that encompasses all these forms of delegation.

4. Towards a Legal Framework for the Delegation of Powers

Despite the peculiarities of the different forms of delegation the EU has experienced in its evolution, it clearly emerged that they all originate from the need to ensure flexible and efficient decision-making and implementation in a legal system which evolved progressively into a

[2580] EVERSON Michelle, "Agencies: The Dark Hour of the Executive?" in HOFMANN Herwig and TURK Alexander, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (Edward Elgar, 2009), p. 131.
[2581] See EVERSON Michelle, MONDA Cosimo and VOS Ellen, "European Agencies in between Institutions and Member States" in EVERSON Michelle, MONDA Cosimo and VOS Ellen (eds.), European Agencies in between Institutions and Member States (Wolters Kluwer, 2014), pp. 3-8. See also CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution,* (Oxford University Press, 2009), p. 174.
[2582] *Contra* VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* no. 1 (2014), p. 35.
[2583] On the fragmentation of EU executive power, see CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford University Press, 2009).

regulatory entity engaged in the regulation of complex and technical policy fields. It is equally clear that they must respect the fundamental guarantees of a "Community based on the rule of law"[2584] and the democratic principles which also pertain to the European Union as a constitutional legal order of an inter-individual character.[2585] The respect for these fundamental principles, stemming not only from the express provisions in the Treaties,[2586] but also from a certain substantive concept of the rule of law, cannot allow that these non-majoritarian entities become "uncontrollable centres of arbitrary powers",[2587] which escape the procedural and judicial guarantees ensuring the democratic legitimacy of the exercise of public power and, in exceeding the powers conferred, upset the institutional balance established in the Treaties.

In this respect, also in the EU legal system, the operation of the delegation of powers is characterised by an inherent tension between the needs of an effective public action and the constitutional principles on which the Union is based. Recognising that the judicial and legislative elaborations on the limits and conditions to the different forms of delegation of powers are the response to the same normative tension between these divergent instances, it was argued that certain requirements are common to all the delegation regimes identified, thus constituting a legal framework applicable to the delegation of powers as such, beyond the peculiarities of the single phenomena. In particular, these limits are determined by the identified constitutional principles of EU law, in particular the rule of law and the institutional balance, which find different expressions in the subsequent phases in which the delegation of powers is articulated.

4.1. The Limits of the Enabling Act

Considering firstly the limits concerning the act that initiates the delegation, i.e. the enabling act, relevant commonalities in the formal and substantive requirements emerged from the analysis of the provisions in primary law and the case law of the Court on this aspect. The most salient ones, namely the so-called essential elements doctrine, the specificity and the considerations relating to the legal basis, are worth recalling.

Firstly, the analysis identified a fundamental guarantee of the prerogatives of the legislator in the so-called *essential elements* doctrine elaborated by the Court in relation to the pre-Lisbon implementing powers. This doctrine requires the legislator to establish the "essential elements of the matter", which cannot be delegated to other institutions, in the enabling act. Recent case law

[2584] Case 294/83, *Les Verts v Parliament*, EU:C:1986:166, p. 23.
[2585] CORTESE Bernardo, "A la recherche d'un parcours d'autoconstitution de l'ordre juridique interindividuel européen: essai d'une lecture pluraliste 50 ans après Van Gend en Loos et Costa", *Il Diritto dell'Unione europea* No. 2 (2015), *passim*.
[2586] Articles 2, 10 and 11 TEU.
[2587] EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), p. 183.

has, remarkably, clarified the meaning of this notion, referring to the political choices which require conflicting interests to be balanced on the basis of a number of assessments or which may interfere with fundamental rights to such an extent that the involvement of the legislature is required.[2588] Expressly mentioned in Article 290 TFEU, this doctrine is still applied not only to the post-Lisbon delegation of implementing powers, but also to the cases of reservation of powers and adoption of *sui generis* acts by the Council. Therefore, the essential elements doctrine carves out an area exclusively pertaining to the legislator in the shaping of the different policies at the EU level, preserving a reserved domain for the legislature also beyond the case of the delegation of powers. From this perspective, it is inferred that this reserved domain of the legislature is precluded *a fortiori* from a delegation of powers to EU agencies, constituting a fundamental guarantee of the prerogatives of the legislator and, thus, of the institutional balance. Despite the evolution in the interpretation, however, what precisely constitutes an essential element, and in particular what intensity of the interference with fundamental rights is needed to trigger the necessary involvement of the EU legislator, remains unclear, leaving the assessment of the notion to a case-by-case approach.

Secondly, a fundamental requirement that emerged from the case law on the different forms of delegation of powers, and is specifically spelled out in Articles 290 and 127(6) TFEU, relates to the specificity of the enabling provisions in determining the scope of the powers delegated. Although the case law of the Court presents some ambiguities in the actual enforcement of this requirement, it is important that the enabling provisions are drafted precisely, clearly identifying the boundaries of the delegated powers so that an effective control of the exercise of the powers is possible. Specific and precise enabling provisions not only reduce the risk of an arbitrary exercise of public powers by introducing *ex ante* clear limits on the exercise of the power, but it also enhances the judicial review of the acts deriving from the delegation. In this respect, the specificity of the enabling provisions plays a key role, especially in consideration of the deferential approach of the Court in relation to the review of complex economic or technical assessments of the institutions and bodies.[2589] In spite of the more intensive scrutiny of the Court in certain fields,[2590] the Court tends to limit its review to verifying that the delegate's act is not vitiated by a manifest error or a misuse of powers or that it exceeded the bounds of its discretion. In this context, thus, the more precisely the enabling provision is drafted, the more intensive the judicial

[2588] See, *inter alia*, Case C-355/10, *Parliament v Council (Schengen Border Code)*, EU:C:2012:516, paras. 76-77.
[2589] See, *inter alia*, Case 42/84, Remia v Commission, EU:C:1985:327, para. 34.
[2590] See, inter alia, Case T-13/99, *Pfizer v Commission*, EU:T:2002:209; Case C-12/03 P, *Commission v Tetra Laval*, EU:C:2005:87, para. 39.

review may be, providing it with more criteria to assess the *ultra vires* exercise of the delegated powers.

Thirdly, the issues related to the legal basis were considered, examining the evolution of the case law which has admitted the possibility for the enabling act to be based on policy-specific provisions. In this regard, the use of what is now Article 114 TFEU proved to be particularly controversial both in case of delegation to the Commission and to EU agencies, but it was finally sanctioned by the Court, most recently in the *Short Selling* case.[2591] In relation to the legal basis for the delegation of powers, it is important to observe that, according to the leading doctrine elaborated on in State legal systems, a policy-specific legal basis not expressly providing for a delegation of powers would not be sufficient for a lawful delegation of powers, requiring an express *Delegationsnorm* in primary law. Yet, problematically the Court disregarded such a requirement, allowing for a delegation of powers also in the absence of such a provision, as in the case of EU agencies. From this perspective, thus, the EU legal system appears not to fully endorse the same concept of the rule of law that some State legal systems have developed, raising relevant questions on the constitutional implications of such an approach from the perspective of legal certainty and the coherence of the system.

4.2. The Limits to the Exercise of the Delegated Powers

While the limits in the enabling act show considerable homogeneity across the forms of delegation, the subsequent exercise of the delegated powers is embedded in different procedures and it results in the adoption of acts which partially diverge in their form and in their position within the hierarchy of norms.

In particular, although common elements and converging trends can be traced, the control over the exercise of the delegated powers is carried out through significantly divergent procedures by many institutional actors. Indeed, only in the case of delegation according to Article 290 TFEU, the entitlement of the control powers follows the chain of delegation, providing the Parliament and the Council with the rights of objection and revocation. In the other cases, the control of the delegation of power is primarily shaped not according to the relationship between the delegator and the delegated authority, but it appears to reflect the institutional roles of the actors involved. This finding, however, does not contradict the identified chains of delegation[2592] nor the relevance

[2591] Case C-270/12, *United Kingdom v Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18. See also Case C-66/04, *United Kingdom v Parliament and Council (Smoke flavourings)*, EU:C:2005:743; Case C-217/04, *United Kingdom v European Parliament and Council (ENISA)*, EU:C:2006:279.

[2592] For this argument, see for instance, DEHOUSSE Renaud, "Delegation of Powers in the European Union: The Need for a Multi-Principals Model", 31 *West European Politics* (2008), pp. 789–805.

of this legal mechanism in these cases,[2593] but it is in line with the original conceptualisation of the delegation of powers, which related the control over the delegate to the constitutional principles of the legal system, rather than to a legal relationship between the delegate and the delegator.[2594] Therefore, in the EU legal system the control mechanisms for the delegation of powers should be understood as the result of the operation of the institutional principles on which the system is based, *in primis* the rule of law and the institutional balance in its Member States-oriented interpretation.

Therefore, focusing on these principles, it appears that the plurality of the institutional actors involved in the control of the exercise of the delegated powers mirrors the composite structure of EU institutional framework and the nature of the power transferred though the delegation. For instance, while the Member States expressly enjoy direct control only over the exercise of implementing powers under Article 291 TFEU, their role in the control of the implementation of EU law re-emerges in the *sui-generis* intergovernmental composition of the decision-making bodies of the ECB and EU agencies. Moreover, although not always conferred incisive rights on the procedures, the Parliament and the Council remain the ultimate referees of the political accountability mechanisms adopted in the context of all the forms of delegation. In this regard, albeit controversial in their implications, the recent developments in practice, such as the introduction of the alert/warning system and the enhanced consultation of national experts, find their bases in the logic of this composite and interlinked system of delegation controls.

In this context, the judicial control exercised by the Court constitutes an essential element of a delegation of powers in compliance with the rule of law, representing a *condicio sine qua non* for the legality of the exercise of the powers by the delegate. In this sense, the reviewability of the acts of the delegate in the EU judicial system deserved particular attention, pointing out especially the conditions and instruments empowering the individuals to protect their rights and to seek an effective remedy for abuses of powers in this specific case.

4.3 The Limits to the Delegation of Powers: United in Diversity

In the light of the described commonalities and converging trends in the rules applicable to the different forms of delegation, it is arguable that, beyond the peculiarities of each regime, an embryonic meta-system of limits and principles can be recognised in EU law, embracing all the

[2593] See, *inter alia*, VAN GESTEL Rob, "Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory", 2 *The Theory and Practice of Legislation* No. 1 (2014), pp. 33-59; CURTIN Deirdre, "Holding (Quasi-) Autonomous EU Administrative Actors to Public Account", 13 *European Law Journal* No. 4 (2007), pp. 523-541.
[2594] See, in particular, the studies of CERVATI Angelo Antonio, *La delega legislativa* (Giuffrè editore, 1972); TRIEPEL Heinrich, *Delegation und Mandat in öffentlichen Recht* (Stutgard und Berlin, 1952).

"systems for the delegation".[2595] Indeed, the analysis oriented by the principles of the rule of law and the institutional balance highlighted common patterns of formal and substantive limitations imposed on the legislator in delegating its powers, which are arguably sufficiently harmonious and coherent to be considered in these terms. These limitations, although often integrated with other specific requirements developed in relation to the peculiar phenomena, may thus be considered the lowest common denominator for a lawful delegation of powers in EU law.

However, this recognition is not to be seen as a sterile *reductio ad unum* of the complexities of the EU institutional framework, but as an acknowledgment of the common principles underpinning the legal framework for the delegation in EU law in light of the peculiarities of the institutional position of the different delegates.

5. The Problematic Application of the Limits to the Delegation of Powers

While the examination of the case law and the provisions of positive law regulating the delegation of powers presented a complex, yet clear, picture of the limits and conditions applicable to the different forms of delegation in compliance with the fundamental principles of the legal system, the analysis of their current application across the different delegation systems revealed a number of issues and a certain patchiness in their actual enforcement, shedding light on the blind spots in the democratic control of these phenomena and on the controversial tendencies emerging in practice.

Firstly, with regard to the delegation of powers to the Commission, it is hardly arguable that the simplification effort which animated the Lisbon reform has actually achieved its objective. The splitting into two halves of the pre-existing delegation system resulted in two parallel regimes, whose reciprocal scope of application and definition of the relevant powers raised more questions than answers. In this regard, while the operation of the limits and control mechanisms established in Article 290 TFEU gave room to specific controversies in the aftermath of the entry into force of the Lisbon Treaty, which the following application or - such as in the controversial case of "bundles" - the Common Understanding contributed to solve,[2596] the emerging trends in the current application appear to be more problematic. In particular, the enhanced consultation of national experts arguably compromises the autonomy of the Commission, revamping forms of

[2595] As the Court defined the delegation regimes in Article 290 and 291 TFEU in Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18, para. 78.
[2596] See Common Understanding annexed to Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123 of 12.5.2016, point 31.

control similar to the comitology procedures and, at the same time, shifting the actual balance in favour of the Council.

A similar asymmetry in favour of the Council was remarked also in the application of the new Comitology Regulation, whose simplification of the existing system, due to the multiple procedures, exceptions and qualifications, is more apparent than real. Specific issues were underlined in relation to the different procedures, in particular with regard to the appeal procedure and the problematic alignment of the RPS procedure, which the proposed amendment of the Comitology Regulation that is under examination by the legislator unsatisfactorily addresses.[2597] On the whole, the tendencies emerging from practice show a certain convergence between the two regimes, which has particularly problematic implications from an institutional balance perspective, compromising the significance of the divide between the delegated and implementing acts established in the Treaties.

Secondly, with regard to the delegation of powers to the Council, the analysis unveiled certain shortcomings in the control of this form of delegation - if not its absence altogether, at least in relation to the *ex post* parliamentary control. Indeed, while the limits in the enabling act are common to the other forms of delegation, the procedures for the exercise of the delegated powers are not distinguished from the ones applicable to the exercise of the powers directly conferred by the Treaties, thus leaving no role for the Parliament in the control of the adoption of implementing acts by the Council. This appears highly problematic for the respect of the prerogatives of the Parliament in the delegation of powers which are jointly conferred in primary law, calling for more accountability for the Council in the exercise of the powers conferred through delegation.

Thirdly, with regard to the delegation of powers to the European Central Bank, the analysis of the Regulation establishing the Single Supervisory Mechanism shows that, although formally conferred on the Governing Council, the delegated powers are actually exercised by an internal body of the ECB, the Supervisory Board. The control mechanisms in place, however, do not recognise the *de facto* delegation to this body, establishing limited accountability obligations vis-à-vis the Parliament and the Council. Moreover, the relevant powers entrusted in this institution in the field of prudential supervision appear at odds not only with the requirement of Article 127(6) to limit this conferral to "specific tasks", but also with the peculiar position of the ECB in the institutional balance in relation to the monetary policy. In this sense, the strengthening of the democratic accountability of the ECB in this field would require an improved role of the

[2597] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85.

Parliament in the establishment and control of this form of delegation and, arguably, a further separation between the monetary and supervisory tasks in the institutional arrangements.[2598]

Finally, with regard to the delegation of powers to EU agencies, its democratic legitimacy appears inevitably undermined by the absence of a specific provision in primary law regulating this system of delegation. Albeit accepted by the Court, the absence of a *Delegationsnorm* for the delegation to EU agencies has proven to be particularly problematic from a constitutional perspective. This constitutional neglect has relevant implications not only in relation to the principle of conferral, determining a delegation of regulatory powers in the shadow of the hierarchy established in primary law. The absence of such a provision is problematic also in relation to the legal certainty and the coherence of the legal system. Indeed, EU agencies lack a clear role in the institutional architecture,[2599] as well as a normative framework in primary law for their establishment, empowerment and mode of operating, determining uncertainties in their position in the institutional balance. This affects the legal framework for the exercise of delegated powers, which presents a plurality of procedures which leaves open the question on the actual procedural control exercised on these bodies and on its interplay with the autonomy of these bodies.

The controversial institutional position of EU agencies raises particular concerns in the light of their increasing rule-making and *de facto* discretionary powers, which are moving the agency model towards a "politicised depoliticisation",[2600] which shakes the traditional foundations of its legitimation and calls for a rethinking of the current accountability and independence mechanisms. As controversially recognised by the Court in *Rütgers,* the agencies today do not exercise only "mere executive powers",[2601] but enjoy "a broad discretion in a sphere which entails political, economic and social choices on [their] part, and in which [they are] called upon to undertake complex assessments".[2602] Remarkably, in these contexts, the empowerment of EU agencies is determined not only by a formal delegation of powers, but also by forms of *de facto* delegation. Especially in relation to this phenomenon, the analysis revealed the limits of the judicial system in reviewing the discretionary choices of EU agencies and in dealing with the

[2598] For similar considerations, see Communication from the Commission. A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final, p. 39.
[2599] In this sense, also the absence of EU agencies among the privileged or semi-privileged applicants in the action for annulment is significant in relation to the lack of an institutional position recognised in the Treaties.
[2600] EVERSON Michelle, MONDA Cosimo and VOS Ellen, "What Is the Future of European Agencies?" in EVERSON Michelle, MONDA Cosimo and VOS Ellen, *European Agencies in between Institutions and Member States* (Wolters Kluwer, 2014), p. 246.
[2601] Cases 9/56 and 10/56, *Meroni,* EU:C:1958:8, p. 151.
[2602] Case T-96/10, *Rütgers Germany v ECHA*, EU:T:2013:109, para 134. This judgment must be contrasted with Case C-270/12, *United Kingdom v. Council of the European Union and European Parliament (Short Selling)*, EU:C:2014:18.

specific issues posed by the *de facto* exercise of delegated powers, showing the inadequacy of the existing legal framework to capture the complexities of the powers exercised by these bodies.

6. Strengthening the Legal Framework for the Delegation of Powers in the EU Legal System

In the light of the inadequacies shown by the existing legal framework and of the uneven application of the identified limits across the different delegation phenomena, it is arguable that a careful reconsideration of the current delegation system is needed in order to address the imposing challenges ahead with a stronger democratic legitimacy in resorting to this legal mechanism. In this sense, the recognition of the existence of a meta-system of delegation of powers in the EU paves the way for a normative consideration, calling for a more coherent regulation and implementation of the limits guaranteeing the respect of the rule of law and the institutional balance in such a delicate legal mechanism.

As it was seen, the existence of the common minimum requirements is not apparent in the plurality of the legal regimes established in positive law and in the development of generally unconnected lines of case law, determining a fragmentation of the legal framework applicable to phenomena which, on the contrary, should be dealt with according to a coherent approach. What is more, the delegation of powers to EU agencies and the adoption of the related acts does not clearly emerge from the text of the Treaties, leaving this form of delegation in the shadow of the hierarchy. Arguably, considering these as major deficiencies of the existing legal framework, the strengthening of the legitimacy of the delegation of powers in the EU legal system should primarily address these aspects. Therefore, proposals for future reform will be explored accordingly, focusing, on the one hand, on the amendment of the relevant treaty provisions in order to provide a constitutionally sound legal basis for agencification and, on the other hand, on guaranteeing a consistent legal framework for the different delegation systems.

6.1. The Insertion of a Delegationsnorm for EU Agencies

Considering that the delegation of powers to the EU agencies emerged as the most problematic form of delegation among those analysed, a coherent legal framework for the delegation of powers cannot be established without a fully-fledged constitutionalisation of this form of delegation, guaranteeing that EU agencies obtain a clear position within the institutional balance and they are expressly recognised as part of the composite EU executive. In this respect, the results of this study

on delegation support the argument of the most attentive scholars, demanding the insertion of a clear legal basis for agencification in the Treaties.[2603]

In this regard, while from a strict delegation-of-powers perspective the issue might be sufficiently addressed through the insertion of EU agencies among the recipients of implementing powers in Article 291 TFEU, the analysis revealed that the constitutional neglect of these bodies is not limited to the position of their acts in the hierarchy of norms, but also concerns other areas of primary law, for instance on the active *locus standi* before the Court in annulment procedures. Reasons of legal certainty and coherence of the system suggest that, in addition to filling the identified gaps in the constitutionalisation of EU agencies, by mentioning them in Article 291 TFEU and in the list of privileged or semi-privileged applicants in Article 263 TFEU, a specific provision establishing clearer conditions and limits for the creation and empowerment of EU agencies would contribute positively to anchoring the agencification phenomenon in primary law. The insertion of a specific Treaty article expressly allowing for the delegation of powers to these entities and, possibly, establishing precise conditions to this form of delegation - such as limiting the delegation to implementing powers and envisaging accountability or control mechanisms in favour of the Parliament and the Council – would indeed constitute an essential improvement of the legitimacy of this delegation system.

Clearly, as the recent case law on the establishment of secondary legal bases demonstrates, the insertion of such a *Delegationsnorm* in primary law may entail the risk of reducing the flexibility of the system. However, it would certainly enhance the transparency and readability of the EU institutional framework in the eyes of the citizens, thus fostering the constitutional position and the democratic legitimacy of these bodies. Indeed, such an improvement appears much needed today in the light of the increasing engagement of EU agencies in political, economic and social choices in highly problematic scenarios, providing a constitutionally sound legal basis and limit for the broader empowerment of these bodies, as a matter of practice, with discretionary policy choices.

6.2. Amending the Treaty Provisions through the Simplified Procedure

Although strongly advocated by many voices, it is important to recognise that such a reform of the text of the Treaties is hardly possible in this particular historical moment where centrifugal forces

[2603] See, *inter alia*, VOS Ellen, "Reforming the European Commission: What Role to Play for EU Agencies?", 37 *Common Market Law Review* (2000), p. 1124; CHAMON Merijn, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), p. 372; VAN OOIK Ronald, "The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance", in CURTIN Deirdre and WASSELS Ramses (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005), p. 132; SCHOLTEN Miroslava and VAN RIJSBERGEN Marloes, "The Limits of Agentification in the European Union", 15 *German Law Journal* No. 7 (2014), pp. 1223-1256.

are challenging the European project, rendering the achievement of such a considerable endeavour in an Intergovernmental Conference improbable, also because it would open the Pandora's box on many aspects of the EU institutional architecture. Therefore, the proposal of alternative routes to enhance the legal framework for the delegation of powers in the EU legal system appears to be a useful exercise of realism. The simplified procedures for the amendment of EU primary law are particularly interesting to this end.

Thus, considering that the agencies which are called to exercise relevant decision-making powers are limited in number and, as in the case of ESAs, operating in clearly identified domains, it may be argued that the simplified procedure for the amendment of the EU's internal policies and actions enshrined in Article 48 TEU can be used to amend the relevant policy-specific legal bases, expressly providing for the possibility of delegating powers to these bodies according to determined conditions and limits. Probably, this would be particularly useful in relation to the controversial use of Article 114 TFEU, which, although sanctioned by the Court, remains debated in the different forms of delegation. In this regard, the express provision of the possibility to resort to indirect structural measures, such as the creation and empowerment of EU agencies, in connection to legislative acts aimed at achieving harmonisation of national provisions, would not only contribute to guarantee clearer legitimation to the established practice and the Court's interpretation, but also provide the opportunity to positively require a substantive link between these measures and the approximation of national provisions. Such a requirement - which clearly emerged in the case law,[2604] but appears to be problematically watered down in *Short Selling*[2605] - would possibly encourage the Court to enforce more significant constitutional boundaries in relation to the use of Article 114 TFEU for such institutionally relevant modifications, thus limiting the risk of EU executive competence creep.

Although this might provide flexible solutions to the most pressing problems relating to delegation, establishing an *ad hoc Delegationsnorm* in primary law for the most powerful agencies, such an approach admittedly falls short of providing a comprehensive legal framework for the operation of these bodies and for the establishment of EU agencies in other policy fields, as well as addressing the shortcomings that emerged in relation to the other forms of delegation. In this regard, it is noteworthy that certain issues remarked in relation to the other delegation systems might be addressed with a similar perspective. Thus, for instance, the role of the Parliament in the delegation of powers to the ECB could be enhanced by the use of the *passerelle* clause in Article 48(7) TEU transforming the special legislative procedure of Article 127(6) into an ordinary

[2604] See, *inter alia*, Case C-217/04, *ENISA*, EU:C:2006:279, para. 45.
[2605] Case C-270/12, *Short Selling,* EU:C:2014:18, para. 112-114. See, *inter alia*, VAN CLEYNENBRUEGEL Pieter, "Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014), p. 78.

legislative procedure.[2606] However, the ad hocery of this approach and the limited cases in which the simplified revision procedures provided under Article 48 TEU can be applied arguably determine the need to complement this with more comprehensive solutions in order to strengthen the legal framework for the delegation of powers, horizontally embracing the different forms of delegation.

6.3. An Inter-institutional Agreement on the Delegation of Powers

In addition to the described modifications in primary law, or even where leaving the text of the Treaties unchanged, it is arguable that the coherence and the readability of the legal framework applicable to the delegation of powers would be substantially improved through the formal recognition by the EU institutions involved of the fact that the different delegation phenomena analysed in this study fall within the scope of the same legal notion and that they must abide by the identified minimum requirements. To this end, the most appropriate instrument for such a cross-recognition may consist of an inter-institutional agreement according to Article 295 TFEU, establishing clearer rules encompassing all the forms of delegation.[2607]

Admittedly, the historical observations, especially in relation to agencification, show that the EU institutions often were obstinately reluctant to see their discretion reduced in these matters.[2608] Nonetheless, such an instrument would constitute a major step towards the development of a fully coherent and enforceable legal framework for the delegation of powers in EU law. Indeed, in line with a consolidated practice of EU institutions in these matters,[2609] this instrument would bind the EU legislator in the adoption of the enabling acts, at the same time being less ambitious (and more realistic) than a treaty reform. Moreover, such a measure, if adopted, would imply abandoning some inadequate modifications of the applicable legal framework, such as the proposed amendment to the Comitology Regulation that foresees an intervention of the Council

[2606] See also Communication from the Commission. A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, COM(2012) 777 final, p. 39.
[2607] As suggested also, although in doubting terms, by BERGSTROM Carl Fredrik, "Shaping the New System for Delegation of Powers to EU Agencies: United Kingdom v European Parliament and Council (Short Selling)", 52 *Common Market Law Review* (2015), p. 242.
[2608] See the failure to adopt the Draft inter-institutional agreement of 25 February 2005 on the operating framework for the European regulatory agencies, COM (2005)59 final.
[2609] Reference here is to the Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123/1, and to the Common Approach annexed to the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, signed on 19 July 2012, para. 10.

in comitology procedures,[2610] which contradict the constitutional premises and the institutional balance established by the Lisbon Treaty.

Clearly, much depends on the content of such an agreement. Arguably, the peculiarities and the complexities of each form of delegation should not be annihilated in this framework. The interinstitutional agreement, on the contrary, should be limited to setting out in positive provisions the minimum requirements developed in the case law and, possibly, introducing further mechanisms for supervision in line with the need to preserve the institutional balance. In particular, the agreement may be articulated according to the analysis carried out in this study, distinguishing among the different phases of the legal mechanism of delegation. Therefore, it should focus, on the one hand, on the enabling act, which sets forth the delegation and, on the other hand, on the exercise of the delegated powers by the relevant institutions and bodies.

With regard to the enabling act, in light of the demonstrated homogeneity of the limits and conditions developed in the different delegation systems, it appears to be important to positively state and elaborate further the identified requirements of essentiality and specificity of the enabling act.

Firstly, the fundamental role of the essential elements doctrine in safeguarding the reserved domain of the legislator should be particularly emphasised, stressing that such a limit applies not only in relation to delegated acts as required by Article 290 TFEU, but also in relation to the delegation of implementing powers to the Commission, to the Council and to the EU agencies. In this context, a positive elaboration on the notion of essential elements would be particularly advisable in the light of the debated Court's approach. Indeed, also in consideration of the problematic involvement of EU agencies in complex and politically sensitive policy domains, a clearer demarcation of the reserved domain of the legislator would be highly beneficial in relation to discretionary policy choices involving the balancing of conflicting interests, as well as in relation to the interference of the fundamental rights of the person concerned. With regard to this latter aspect, valuing the traditional fundamental function of law as a guarantee of individuals' rights in democratic legal systems, a positive listing of cases where the involvement of the EU legislator is required would arguably contribute to the legal certainty and democracy of the EU legal system, although the interpretation and application of this delicate notion remains primarily within the competence of the Court.[2611] In this sense, an elaboration of the notion of essential

[2610] See Article 1(2)(b) of Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM (2017) 85.

[2611] In this regard, it is acknoledged that a list of subjects reserved to the legislator is not a guarantee of a consistent interpretation, as the case law on the "*riserva di legge"* in the Italian legal system demonstrates. See DI GIOVINE Alfonso, *Introduzione allo studio della riserva di legge nell'ordinamento costituzionale italiano* (Giappichelli, 1969); SORRENTINO Federico, *Lezioni sulla riserva di legge* (Cooperativa libraria

elements in positive terms would probably promote greater consistency in the case law, marking a judicially enforceable limit on the increasing empowerment of the delegates in controversial and politically sensitive domains.

Secondly, enhanced consistency in the interpretation would be desirable also in relation to the specificity of the enabling act, which, as it was seen, while being similarly required in relation to all delegation systems, is unevenly enforced in the different domains. In light of the described connection with the judicial review of the acts enacted pursuant to a delegation of powers, specific and precisely drafted enabling provisions could help tackle also the issues related to the intensity of the review of the delegates' acts and to the judicial review of *de facto* delegations. This would be particularly beneficial in relation to the delegation of powers to the EU agencies since it would ease the tension between the strict requirements of the *Meroni* doctrine and the limited scrutiny exercised by the Court, for instance, in *Rütgers.*

With regard to the exercise of the delegated powers, the roles of the different institutional actors in the different forms of delegation should be clarified, seeking to develop a legal framework which could go beyond the patchiness and fragmentation of the existing one. Arguably, the guiding principle to conceive and elaborate improvements to the existing legal framework should be the institutional balance, in its Member-State-oriented interpretation, which could thus exploit its gap-filling role in the silence of the treaty provisions. The design of such a legal framework, however, is particularly complex not only in consideration of the peculiarities of each delegation system, but also due to the implications of the shortcomings of the Lisbon reform and its subsequent application.

In the context of the delegation of powers to the Commission, it was seen how in the Lisbon Treaty the reciprocal position of the institutional actors involved was intended to differ according to the nature of the powers delegated. Accordingly, in relation to acts meant to have a "legislative" content, i.e. the delegated acts under Article 290 TFEU, for instance, the role of the legislator is significantly powerful, resulting in the rights of objection and revocation of the delegation, whereas in relation to acts whose content is perceived as pertaining to implementation a more prominent control is conferred to the Member States. In the light of the results of this study, while the legal mechanism remains the same, the nature of the powers delegated arguably determines two different arrangements of the institutional balance in the control of the delegated powers. Therefore, the legal framework for the exercise of delegated powers also in the context of other

universitaria, 1980); IADICICCO Maria Pia, *La riserva di legge nelle dinamichedi trasformazionedell'ordinamento interno e comunitario* (Giappichelli, 2007).

delegation systems should be inspired and reflect the relevant balance and reciprocal roles among institutions involved in the adoption of secondary non-legislative acts.

However, in the absence of a recognised criterion aimed at distinguishing the content of delegated and implementing acts and their position in a clear hierarchy of norms, a clear-cut distinction according to the nature of the powers delegated appears to be highly controversial. In particular, although in the recent case law certain clear points have emerged, the position of the Court which leaves discretion to the legislator in the choice between Article 290 and Article 291 TFEU has problematically put into sharp relief the existence of a "grey zone" between the two categories of powers, failing to provide useful guidance in this respect. Considering the relevance of this distinction for the institutional balance and, consequently, for the design of a legal framework for the delegation of powers, it appears to be of paramount importance, for the rule of law and the democratic character of the EU legal system, that the Court develops a substantial distinction between the two delegation systems based on "clear and objective factors amenable to judicial review".[2612] A clearer definition of the boundaries between Article 290 and 291 TFEU would also positively affect the establishment of a hierarchy of norms in the EU legal system, representing a fundamental step for distinguishing the legal effects of an act in the legal system according to its democratic legitimation.

Arguably, in the absence of an active approach of the Court in this sense, the proposed interinstitutional agreement may constitute an appropriate instrument for EU institutions, in line with the principle of loyal cooperation, to develop a suitable criterion. In this regard, however, previous attempts have remained substantially unachieved and also the recent commitment of the Parliament, the Council and the Commission to enter into negotiations on this aspect remained only on paper.[2613] Moreover, the analysis of the legal theories elaborated in State legal systems has shown that alternative substantive criteria, such as the discretion, the degree of detail or the "spirit" of the rules, are equally controversial and do not provide legal certainty.

Yet, despite the remaining uncertainties on a neat distinction between the two categories, considering the position of the Court on the acts of individual application and the acts which clearly flesh out the details of a legislative act, the analysis has shown that, in the current panorama, what is delegated to the Council, the ECB and the EU agencies can be assimilated to the powers delegated to the Commission under Article 291 TFEU. Thus, for instance, the decision-making agencies generally adopt acts of individual application, whereas the ECB can adopt acts of

[2612] Echoing the approach adopted by the Court in the cases concerning the choice of the legal basis, affecting the institutional balance, see, *inter alia*, Case 45/86, *Commission v Council*, EU:C:1987:163, para. 11.
[2613] See Interinstitutional Agreement between the European Parliament, the Council and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, para. 28.

general application "only to the extent necessary to organise or specify the arrangements" of the Single Supervisory Mechanism.[2614] Therefore, in this context, it is arguable that the adoption of these atypical implementing acts[2615] should respect the institutional balance established in relation to the implementation of EU law.

Clearly, such a conclusion does not amount to pleading for the application of the comitology procedures to the acts of institutions or bodies other than the Commission. On the contrary, what is argued here is that the roles of the institutional actors should be guaranteed without compromising the peculiarities and the complexities of the different delegation systems. Thus, on the one hand, considering the role of the Member States, it was seen how they do already exercise a relevant degree of control over the activities of the relevant delegates. For instance, in the case of the ECB, their control is guaranteed not only through peculiar mechanisms such as the "Banking dialogue", but also through the composition of the Supervisory Board. Similarly, the Management Boards of the EU agencies already reflect the need of intergovernmental control of the agencies' activities, characterising this peculiar institutional arrangement as "in-between" the EU and the Member States. On the other hand, reasons related to the safeguard of the legislator's prerogatives against the *ultra vires* exercise of delegated acts, led to recognise to the Parliament and Council a role in relation to the implementing powers of the Commission, despite the silence of the Treaties. Similarly, in most delegation systems the analysis has unveiled the need to guarantee and enhance the institutional position of the Parliament when acting as a co-delegator of the relevant powers.

Consequently, it appears to be in line with the principle of institutional balance and with the objective to enhance the democratic character of the EU decision-making procedures to strengthen the role of the Parliament in these cases. This can be achieved through the extension of the "right of scrutiny" on the delegates' acts, which the Parliament and of the Council enjoy under the comitology procedures, to the other delegation systems. Accordingly, they would be able to react in case of the *ultra vires* exercise of the delegated powers, requiring the delegate to review its acts taking into account the position expressed by the legislator. At the same time, this control mechanism would not amount to an actual right of veto, thus arguably preserving the independence of the ECB and the EU agencies, and avoiding the risk of "accountability overload".[2616]

The effective exercise of this right would require certain modifications in the procedures for the adoption of the relevant acts. Firstly, it would entail the creation of differentiated procedures for

[2614] Article 4(3) of the Single Supervisory Mechanism Regulation.
[2615] In the sense described in Chapter 6, para. 3.
[2616] For the concept of "accountability overload", see BOVENS Mark, SCHILLEMANS Thomas and 't HART Paul, "Does Public Accountability Work? An Assessment Tool", 86 *Public Administration* (2008), pp. 227-230; BUSUIOC Madalina, *op. cit.* (2013), p. 264.

the exercise of powers received by the Council through the specific legal mechanism of delegation. In this sense, it would pave the way for the introduction of mechanisms of accountability vis-à-vis the Parliament also in this form of delegation, whose legitimacy would thus be remarkably improved. Secondly, it would determine a reformulation of the alarm/warning system, which was introduced with a similar purpose but whose institutional design presents significant weaknesses. By attributing directly to the Parliament and the Council the possibility to react to abuses in the exercise of the delegated powers, it would relieve the Commission from the described uncomfortable position and from the controversial implications it entails. Thirdly, considering that access to information on the acts is a key prerequisite for an effective exercise of this right of scrutiny, it may be advisable to establish a register containing the acts of the Council, the ECB and the EU agencies, like those existing for Commission's implementing and delegated acts. Such a register would also guarantee greater transparency and participation, as complementary means of enhancing legitimacy, addressing the shortcomings incidentally highlighted in this study in this respect.

Finally, it is clear that the right of scrutiny may be coupled with the introduction of other procedural constraints which could further enhance the control of the other institutions over the delegate's activities. In this respect, it is important to underline that, in line with the *Short selling* judgment and with the specific rules established in the Single Supervisory Mechanism Regulation for the adoption of regulations by the ECB, these procedural requirements appear to be particularly suitable in case of acts of general application. Indeed, these acts, which may fall into the scope of the abovementioned "grey area", appear to be more problematic from a democratic perspective. Accordingly, the legal certainty and the rule of law would be enhanced, without losing the flexibility and the benefits the different forms of delegation developed in the EU institutional panorama currently offer.

7. Concluding remarks

While stressing the importance of strengthening the legal framework for the delegation of powers, it is acknowledged that the legal issues arisen and the guiding principles identified in this study may shed a light on different phenomena, which go beyond the discussed forms of delegation of powers. This analysis has focused on the inter-institutional delegation of powers, i.e. the transferral of public power from one EU institution to another institution or body.[2617] However, its results may be relevant also when the powers are delegated to bodies which are not part of the recognised EU composite administration, but nonetheless are called to exercise powers and roles

[2617] The definition has admittedly considered outside the scope of the research, in particular, the so-called delegation to private bodies, to international law bodies and to the Member States.

which affect the rights of individuals. Indeed, the need to respect the rule of law and the democratic character of EU rule-making arguably apply also to phenomena, such as the delegation to private bodies,[2618] which generally fall outside the scope of traditional constitutionalism,[2619] but which appear to play an increasingly relevant role in the European regulatory panorama.[2620]

Therefore, this study discloses new avenues for the analysis on the legitimacy of other delegation systems, thus paving the way for further research on these issues. Possibly, the results of this study may constitute a foundation for the future development of academic debate more generally on the outsourcing of decision-making powers, eventually recognising an even broader and possibly coherent legal framework encompassing further phenomena.

On a final note, it is important to underline that the analysis on the evolution of EU governance through the lenses of the delegation of powers has incidentally unveiled many issues and trends which arise in connection with the phenomena considered, but which pertain more broadly to the development of the EU legal system as a whole. Some of these issues pose significant questions on the way the institutional framework and the constitutional principles are conceived in the EU legal system, thus requiring answers which go beyond recognising and strengthening the legal framework common to all the forms of delegation.

Most remarkably, the analysis has highlighted the incompleteness and incoherence of the Lisbon reform, which was meant to simplify the existing framework for legislation and implementation in the sense of enhancing the separation of powers and the hierarchy of norms. Arguably, almost ten years after its entry into force, such objectives appear far from achieved, casting a shadow not only on the coherence with which such ideas were translated into the text of the Treaty, but also on the application and interpretation adopted lately by the EU institutions.

[2618] Reference here is in particular to the New Approach to technical harmonisation and standards. See Commission of the European Communities, *Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, COM(85)310 final; Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, O.J. 1985, C 136/1; Council Resolution of 21 December 1989 on a global approach to conformity assessment, O.J. 1990, C 10/1; Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, O.J. 2012, L 316/12.

[2619] Arguing for an approach going beyond "the obstinate state-and-politics-centricity of traditional constitutionalism" and comprising private actors within the constitutional sphere (i.e. the so-called societal constitutionalism), see, *inter alia*, TEUBNER Gunther, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford University Press, 2012).

[2620] See, for instance, Report from the Commission to the European Parliament, the Council and European Economic and Social Committee, the Operation of Directive 98/34/EC in 2009 and 2010 COM (2011) 853 final. On some recent developments, see SCHEPEL Hans, "The New Approach to the New Approach: The Juridification of Harmonised Standards in EU Law", 12 *Maastricht Journal of Comparative and European Law* (2013), pp. 521-533; VOLPATO Annalisa, "The harmonized standards before the ECJ: James Elliott Construction", *Common Market Law Review* (2017), pp. 591-603; COLOMBO Carlo and ELIANTONIO Mariolina, "Harmonized technical standards as part of EU law: Juridification with a number of unresolved legitimacy concerns?", *Maastricht Journal of European and Comparative Law* (2017), pp. 323–340.

On the one hand, certain issues, such as the incompleteness of the categorisation of legal acts, which in particular does not mention the acts of EU agencies and the ECB, or the formalistic character of the notion of legislative acts, clearly stem from the inconsistencies of the constitutional design already elaborated in the Convention for Europe. In this respect, the ambiguous divide between delegated and implementing acts is also primarily related to the vagueness of Article 290 TFEU in defining the powers involved, in particular what constitutes a power "to supplement" non-essential elements of the legislative act. What is more, the text of the Treaties did not address important issues raised by substantive phenomena - of which the *de facto* delegations of powers to EU agencies represents only an example - whose political and judicial accountability remains highly problematic in the current legal framework.

On the other hand, other issues are the result of the interpretation and application of the Treaty provisions in the case law and in the practice developed more recently. In this regard, the general picture emerging is that, like Penelope with her shroud, EU institutions appear to un-weave the innovations that the Lisbon Treaty did bring to the framework for the implementation of EU law, progressively undermining the significance and the implications of this reform. Thus, the proposed amendment of the Comitology Regulation and the enhanced consultation of national experts tend to bring back pre-Lisbon schemes in the implementation of EU law. At the same time, the elusive position of the Court on the divide between delegated and implementing acts, the revamping of a "weak comitology" in relation to the delegated acts and the difficulties related to the so-called cascade of delegations arguably put into question the meaning and the reasons for distinguishing these categories of acts, blurring the line between the regimes in Articles 290 and 291 TFEU.[2621] In this sense, the three-tiered idea of the hierarchy among them appear progressively lost in the day-to-day adoption of non-legislative acts which struggle to find a clear hierarchical collocation in the system of legal sources. The implications of such a development for the hierarchy of norms demands profound scholarly attention, arguably calling for a rethinking of the conceptualisation of this fundamental aspect of the rule of law in the EU legal system.

Interestingly, this un-weaving of the innovations of the Lisbon Treaty can also be read between the lines in relation to other aspects of EU governance, as for instance in the discussed step back from the *Spitzenkandidat* process for the appointment of the President of the Commission.[2622] However, considering that the fundamental *ratio* of these different innovations was in particular enhancing the democratic legitimacy of the EU through the adoption of certain democratic

[2621] See also VAN GESTEL Rob, "European Regulatory Agencies Adrift?", 21 *Maastricht Journal of European and Comparative Law* No. 1 (2014), p. 196.
[2622] See Remarks by President Donald Tusk following the informal meeting of the 27 heads of state or government on 23 February 2018, available at http://www.consilium.europa.eu/en/press/press-releases (last accessed 06/04.2018).

principles and values of State legal systems, this general tendency raises fundamental questions on the actual institutional framework and, more in general, on the future of democracy in the EU. Especially today, when the EU is facing unprecedented crises which pose serious challenges to the very foundations of its existence and legitimation, the democratic legitimacy of its legal mechanisms and rule-making activities represents a crucial theme which deserves serious attention in relation to the direction the EU is taking in its evolution.

In this context, the empowerment of non-majoritarian bodies and the adoption of acts pursuant to the delegation of powers, balancing between the need for an effective response to these challenges and the respect for the democratic principles, may still play a fundamental role in solving the political and institutional impasses that the forthcoming crises may determine. However, the inherent tension between effectiveness and democracy characterising the delegation requires careful consideration since, depending on how the legal framework is designed, this legal mechanism may constitute an added value in delivering the common policy objectives of the Union or, conversely, create technocratic procedures destined to widen the gap between EU institutions and EU citizens. Therefore, the operation and application of the limits to the delegation of powers should be assessed in a broader context, ideally integrating the considerations developed in this study with empirical findings and considering also the reciprocal interplay between the different delegation systems in order to have a more comprehensive understanding of the non-legislative rule-making activities by EU institutions and bodies. Clearly, these aspects require further examination, also in the light of the evolution of EU governance and of the emerging issues, reflecting on the choices and methods with which the EU is tackling many of the pressing challenges facing Europe. From this broader perspective, strengthening the legal framework for the delegation of powers represents just one of the many filaments composing the shroud of the rule of law and the democracy of the EU legal system.

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