

Ius Commune Conference 2017

Workshop: The Legitimacy of the Delegation of Powers Mechanisms in the European Union: a Constitutional Perspective

Friday, 24 November (09.00 - 12.00)

Building: Aristo Utrecht

Room: 301

Participants

Introduction In the last decades, in order to respond to the needs of an increasingly complex society, the delegation of powers to non-majoritarian bodies has become a widespread phenomenon both at the national and European level (MAJONE Giandomenico, "Europe's Democratic Deficit: A Question of Standards", 4 *European Law Journal* (1998), p. 15). In this regard, EU law has experienced different forms of delegation, which have entailed the involvement of public and private actors in the regulation of a wide array of policy domains. What is more is that the delegation of not only regulatory but also enforcement powers has been happening in order to ensure compliance with EU law. However, in spite of its undeniable benefits, this outsourcing of rule-making and enforcement powers vested in certain institutions by the Treaties needs clear constitutional limits according to the principles of democracy and rule of law as enshrined in art 2 TEU. The recent evolution of the legal framework governing these forms of delegation calls for a novel assessment of the limits of the delegation of powers in the light of the relevant judgments of the Court of Justice.

Firstly, the delegation of powers to the European Commission, which has resulted in the establishment of the comitology system, has been reshaped with the introduction of the delegated and implementing acts in the Lisbon Treaty. The distinction between these acts, however, is still controversial both in literature (*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. 243-258. CHAMON Merijn, "Clarifying the Divide between Delegated and Implementing Acts?", 42 *Legal Issues of Economic Integration* No. 2 (2015), p. 175-190) and in the case law, (*In primis*, C-427/12, *Commission v. Parliament and Council (Biocides)*, EU:C:2014:170) requiring further reflection on the meaning of the notions of delegation and implementation in EU law.

Secondly, the limits of the delegation of powers to the decentralised agencies, which were traditionally enshrined in the Meroni doctrine, (Case 10-56, Meroni, ECLI:EU:C:1958:8.) have been redefined in the Short Selling judgment, (Case C-270/12, *UK v. Council of the European Union and European Parliament (ESMA)*, EU:C:2014:18) paving the way for the conferral of more relevant powers to these bodies. In the resulting fragmentation of the EU executive power, (CURTIN Deirdre, *Executive Power of the European Union. Law, Practices and the Living Constitution*, Oxford University Press, 2009) the acts of these bodies require to be analysed in the light of the constitutional principles and the hierarchy of norms established in the Treaties (*Inter alia*, EVERSON Michelle and VOS Ellen, "European Agencies: What about the Institutional Balance?", *Maastricht Faculty of Law Working Paper* No. 4 (2014), p. 1-17; EVERSON Michelle, "Independent Agencies: Hierarchy Beaters?", 1 *European Law Journal* No. 2 (1995), p. 180-204).

Thirdly, the rise of EU enforcement authorities has been identified. However, the question is to what extent the 'Meroni+' delegation doctrine fits the delegation of enforcement (not rulemaking) powers.

Fourthly, from the 1980s, according to the "New Approach" strategy for the completion of the internal market, the European standard-setting organisations have played a fundamental role in the issuing of harmonised technical standards for the safety of products since the compliance with them confers a presumption of conformity with the EU directives. However, the legitimacy and accountability of the private actors involved has been contested in literature (See, *inter alia*, R. VAN GESTEL and H.-W. MICKLITZ, "European Integration through Standardisation: How Judicial Review is Breaking Down the Club House of Private Standardisation Bodies" (2013) 50 *Common Market Law Review*, p. 145-181) and is only partially compensated by the involvement of societal stakeholders, such as organisations representing consumers and environmental and social interests, in the standard-setting process. Recent developments in EU and national case law, as well as in EU legislation, have shown a tendency towards the "juridification" of harmonised standards (SCHEPEL Hans, "The New Approach to the New Approach: The Juridification of Harmonised Standards in EU Law", 12 *MJ* (2013), p. 521-533), reigniting the debate on the issue on the legitimacy of the delegation of powers to private bodies.

In the panel proposed, the legitimacy of the delegation of rulemaking and enforcement powers to public and private bodies will be analysed from a constitutional perspective. On the one hand, the panel will begin with a broad reflection on the doctrine of delegation of powers in the light of the requirements of *Meroni*, as interpreted in the *Short Selling* judgment. In particular, the notion of delegation in EU law will be explored and put in relation to the one of implementation, reflecting on the distinction between the two notions in an historical perspective and on their application to non-legislative secondary acts and to the New Approach. Moreover, the delegation of enforcement powers to two different institutional actors, namely the ECB and the OLAF, will be discussed. On the other hand, the implications from the delegation of powers will be approached from different perspectives. Firstly, the implications of the delegation of powers for judicial review will be discussed. In light of the recent *James Elliott* case (Case C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited*, EU:C:2016:821), particular attention will be paid to the judicial review of harmonised standards. Secondly, how the delegation affects the protection of fundamental rights in EU law will be discussed. Thirdly, the implications for the accountability of the rule-making and enforcement authorities will be considered. Finally, an overall discussion on results of the presentations will be conducted in an effort to give a comprehensive understanding of the phenomenon of the delegation of powers in EU law.

- Chair:** Ellen Vos (Maastricht University)
- 09.00 – 09.10 *Introduction to the topic by the chair*
- 09.10 – 09.30 **Annalisa Volpato** (Maastricht University)
Delegation of powers: ancient notions, current issues
- 09.30 – 09.50 **Merijn Chamon** (Ghent University)
Delegation doctrine in the EU – rulemaking and enforcement powers?
- 09.50 – 10.10 **Argyro Karagianni** (Utrecht University)
Delegation of enforcement tasks in the case of the ECB
- 10.10 – 10.30 **Koen Bovend'Eerd** (Utrecht University)
Delegation of enforcement tasks in the case of OLAF

- 10.30 – 10.45 **Coffee break**
- 10.45 – 11.05 **Mariolina Eliantonio** (Maastricht University)
Implications from the delegation: for judicial review
- 11.05 – 11.25 **Michiel Luchtman** (Utrecht University)
Implications from the delegation: for the protection of FR
- 11.25 – 11.45 **Miroslava Scholten** (Utrecht University)
Implications from the delegation: for accountability
- 11.45 – 12.00 **Rob Widdershoven** (Utrecht University)
Discussion and conclusion