

Eljalil Tauschinsky and Wolfgang Weiß (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law. Walking a Labyrinth*, Cheltenham: Elgar Publishing, 2018, 272 pp, £85.50

The introduction of executive rulemaking powers of the European Commission was one of the most relevant innovations of the Lisbon Treaty. These powers express and develop the hierarchy of sources of law, as they were originally established in the Constitution for Europe. Executive rulemaking, in fact, is a tertiary source of law as it is subordinate to the legislative choice to confer regulatory powers on the European Commission. The Lisbon Treaty distinguished between the delegated acts under art. 290 of the Treaty on the Functioning of the European Union (TFEU) and the implementing acts under art. 291 TFEU, but it failed to provide an explicit legal rationale to guide the EU legislative institutions in the decision between different rulemaking instruments. Ever since, legal scholarship has engaged in the search for the meaningful distinction in the executive rulemaking by the Commission.¹ This search has been hindered by the deferential case law of the Court of Justice (CJEU). As Robert Schütze pointed out, “the judicial minimalism on the legislative choice between Article 290 and 291 is to be regretted”.²

By focusing on the issue of legislative choice, the volume edited by Eljalil Tauschinsky and Wolfgang Weiß addresses the reasons of such regret at its roots. Although the allocation of executive powers to the Commission is not designed as a matter of legislative choice, but as the rational consequence of occurrence of specific conditions, practice has shown the central role of legislative discretion. In the words of the editors, “the legislating institutions are responsible for constructing the concrete criteria for differentiating between delegated and implementing acts” (p. 13). The volume thus revisits the theoretical constructions of executive rulemaking, in light of the practice. Its accurate and thorough analysis “has set out to navigate the labyrinth that is the differentiation between delegated and implementing acts” (p. 250). On these grounds, the volume aims at identifying “certain trends on how arts 290 and 291 TFEU are used in the practice” (p. 14).

Besides the introduction and the conclusions by the editors, the volume includes 8 chapters authored by international scholars and practitioners. The volume is divided into three different parts. The first part engages in “a deconstructive exercise that has as a subject the failure of the legal theory, the courts and institutional specifications to clarify the relationship between delegated and implementing acts” (p. 15). The chapter by Attila Vincze emphasises that the deeper roots of such failure lie in the uncertain hierarchy of the sources

¹ Among others, see P. Craig, ‘Delegated Acts, Implementing Acts and the New Comitology Regulation’ (2011) 36 *European Law Review* 671; C.F. Bergström and D. Ritleng (eds), *Rulemaking by the European Commission - The New System for Delegation of Powers* (Oxford University Press 2016).

² R. Schütze, *European Union Law* (Cambridge University Press 2015) 320.

of law and in the fact that neither the textual interpretation of the Treaty nor the judicial interpretation of the Court of Justice reflect a significant constitutional structure. “Hence, the whole debate around implementing and delegated powers is a symptom of a much greater problem: the unsolved political constitution of the EU” (p. 36). Beyond the technical question, substantive accountability issues are hidden and need to be addressed.

The chapter by Dmitri Zdobnõh elaborates on the fact that the case law of the Court of Justice has not explicitly engaged in any meaningful distinction between delegated and implementing instruments, showing that articles 290 and 291 TFEU are not about acts nor the allocation of powers, but “they are catalogues of mechanisms for control over the exercise of the power granted” (p. 45). This means that they trigger a system of control which can apply to any kind of act that is adopted following those procedures. The distinction is thus to be considered procedural, rather than a substantive one.

The chapter by François Lafarge shows that the procedural innovation under the Better Regulation policy does not support any consistent categorisation of delegated and implementing acts. Better Regulation is flexibly used when it favours efficiency. Insofar as Better Regulation creates “longer, more complex, time consuming and expensive, at least in terms of workforce involvement” (p. 85), the Commission adopted “a triple proportionality check” (p. 86) to decide whether delegated and implementing acts should be submitted to the Better Regulation procedure: the importance of the initiative as assessed by the Commission with wide discretion, the exclusive application of the necessary BR sequences, that is, planning, impact assessment, and consultations, and the possibility not to submit a major initiative “to the full regime of the sequence” (p. 86).

The second part builds upon this theoretical, judicial and pragmatic framework and aims to reconstruct the taxonomy of executive rulemaking in specific sectors. By illustrating the functioning of sectoral regimes, this part shows the different objectives that the flexible use of rulemaking powers by the Commission can pursue. The chapter by Jens Karsten explores the area of food and farm law and shows inconsistencies in the use of art. 290 and 291 TFEU. Through a rich illustration of cases, the chapter highlights how institutional conflicts for power and control as well as avoidance of difficult choices and responsibility (like in the case of the prorogation of the authorisation of the glyphosate pesticide) pragmatically affect the choice for delegated or implementing acts. This may also generate a “creeping re-nationalisation” of decisions (p. 100).

The chapter by Sabrina Röttger-Wirtz focuses on the pharmaceutical sector and analyses the role of subsidiarity in the choice between delegated and implementing acts in pharmacovigilance and falsified medicines. The author emphasises that although the division of competence between Member States and the EU is mentioned in the allocation of executive rulemaking powers, in practice it does not prove to be “an influential factor” (p. 144). The distinction between delegated and implementing acts seems to rest on different grounds that

identify some trends in the use of such instruments. Implementing acts provides details on a specific discipline (e.g., the information that needs to be covered by the pharmacovigilance master file on the performed activities and the quality of the data)³, defining procedural rules or adjudicating specific cases, whereas delegated acts better frame the regulatory framework by specifying additional conditions (e.g., additional scientific studies on the efficacy of medicinal products after authorisation).⁴

The chapter by Matteo Ortino investigates the executive rulemaking in the field of financial market regulation. The author emphasises that the weak constitutional foundation of the distinction between delegated and implementing acts, both in the Treaties and in the case-law, grants flexibility in the use of delegation instruments, which is beneficial for the efficient and effective regulation of the financial sector. The flexible legal framework allows delegation to the institution that is considered the most appropriate based on its “specific characteristics”, “the interests involved” and the existing constitutional boundaries (p. 158). EU institutions have developed this rationale in the definition of some non-binding criteria for delegation in the 2016 Inter-Institutional Agreement on Better Law Making and its Annex on the Common understanding on Delegated Acts. Additional negotiations on the use of delegated and implementing acts started in 2017 and this codification should provide “smooth institutional relations”, while providing “more clarity and transparency in the allocation of regulatory tasks among the different actors involved (institutions, agencies, etc.), to the overall benefit of stakeholders and thus of the EU legal system” (p. 173).

The last part of the volume reflects on the Commission’s executive rulemaking in the wider framework of EU law and regulation, analysing such powers in the fragmented context of EU executive rulemaking powers. The chapter by Merijn Chamon contrasts the Commission’s powers with the implementing powers of EU agencies. The author points out the risk that greater empowerment of EU agencies, especially after the *ESMA short-selling* case,⁵ may circumvent the use of art. 290 and 291 TFEU. For this reason, the study of delegated and implementing acts shall be analysed in context, distinguishing not only the two sub-categories of executive rulemaking by the Commission, but also the Com-

³ Commission Implementing Regulation (EU) No 520/2012 of 19 June 2012 on the performance of pharmacovigilance activities provided for in Regulation (EC) No 726/2004 of the European Parliament and of the Council and Directive 2001/83/EC of the European Parliament and of the Council, art 2, art 15(1)(a).

⁴ Commission Delegated Regulation (EU) No 357/2014 of 3 February 2014 supplementing Directive 2001/83/EC of the European Parliament and of the Council and Regulation (EC) No 726/2004 of the European Parliament and of the Council as regards situations in which post-authorisation efficacy studies may be required.

⁵ Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] EU:C:2014:118.

mission's powers from the EU agencies' rulemaking powers. By elaborating on the limits to delegation developed under the Meroni doctrine as revisited in the *ESMA short-selling* case, Chamon identifies "the third demarcation line distinguishing Commission implementation from Agency implementation" (p. 188), which lies in the professional profile and expertise of EU agencies together with the recognition of a certain margin of discretion on the EU legislative institutions within the constitutional boundaries set by the Meroni doctrine.

The chapter by Andrea Ott analyses the practice of the Commission to conclude international agreements in the form of financial, technical and cooperation agreements that are not based and do not follow the procedure under art. 218 and 219 TFEU, but are much more in line with the structure of executive rulemaking under art. 290 and 291 TFEU as they find their legal basis in secondary law. With no explicit legal basis in the Treaties and no inter-institutional agreement on their use, the institutional balance of powers and sincere cooperation remain open issues.

The volume meaningfully explains the trade-off between legal uncertainty and flexibility in the use of delegated and implementing acts as the structural consequence of wider issues that characterise EU law and regulation. Firstly, the absence of a substantive distinction between legislative and non-legislative acts is recognised as the key problem of delegation. This issue is related to the distinction between political and technical choices. The EU case law identified in the non-delegation principle the rule according to which EU institutions shall exercise the functions that the Treaties conferred upon them, strongly circumscribing the cases for delegation. Yet, the recognition of "the basic elements of the matter" to be reserved to the legislative choice under the *Köster* case law⁶ or of the "clearly defined executive powers" that can be delegated under the *Meroni* case law⁷ cannot be effectively outlined in the abstract. Secondly, the Lisbon treaty and the post-Lisbon case law did not clarify the notion of implementation. Thirdly, the competition of EU institutions in the exercise of executive powers contributed to blurring the differentiation.

Enhanced ex ante controls and institutional dialogue aimed at rationalisation of the current framework are identified as key instruments that can contribute to reducing legal uncertainty. By elaborating on the findings of the chapters, the recommendation of the editors is thus to justify the legislative choice on delegated and implementing acts on the distinction between procedural and substantive matters. On these grounds, the editors invite the CJEU to control the delegation criteria more seriously and the EU institutions to "deliver on the promise of simplification under which the distinction between legislative and

⁶ Case C-25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co.* [1970] ECR-1161, para 6.

⁷ Case C-9/56 and C-10/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR-53, para 152.

non-legislative acts, and thus delegated and implementing acts, was originally developed” (p. 250).

The volume offers an accurate overview of the main issues in the use of tertiary sources of law, which makes it a recommended reading for researchers, practitioners and policymakers interested in interpreting the complexity of executive rulemaking by the Commission. The volume also reaches the additional goal of contributing to the broader understanding and characterisation of EU executive rulemaking powers. It thus valuably enriches and supports the development of EU administrative law scholarship in this area.

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