DELEGATION OF POWERS IN THE EUROPEAN UNION:
THE NEED FOR A MULTI-PRINCIPALS MODEL

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The creation of autonomous administrative structures is one of the most interesting developments of the past 15 years in the European public administration. Whereas only two semi-autonomous agencies had been created prior to the 1990s, their number reaches 27 today, if one includes the various bodies set up as 'agencies of EU' in the second and third pillars, such as the Institute of strategic studies, EUROPOL or EUROJUST, and a few additional ones are in the process of being established. Nearly 2500 A Level positions have been affected to agencies [1]– a significant number when compared to the overall size of the EU Commission, and even more in comparison of the number of similar positions created within that body over the same period of time. It has been calculated that the cumulated budget of EU agencies amounted to … million Euros. Several among the most recent structures enjoy powers that were explicitly denied to their fore-runners: the European reconstruction agency (EAR) has been entrusted with the task to distribute EU money in former Yugoslavia, whereas the air safety agency (EASA) enjoys in practice a degree of regulatory autonomy.

With the benefit of hindsight, it is tempting to regard this development as a long-term trend inspired by the will to reform European public administration, and to gloss on the reasons that have prompted such a shift. Reality is however much more complex. As those who have been following the situation for some time know well, the creation of European agencies was a fairly haphazard development. None of the main institutional actors deliberately planned it or defended it as *the* way forward. Proposals to establish an agency often met with resistance on one side or the other; they usually gave rise to fairly intense inter-institutional bargaining.

So far, the movement that led to the establishment of EU agencies has been analysed mostly along functional lines, resorting to adaptations of the Principal-Agent model developed in American literature to analyze delegation of powers by the Congress to administrative agencies. The necessity to bring expertise in the public policy process or to ensure its credibility feature prominently in the motivations attributed to those who promoted

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[1] Rapport d'information sur les agences européennes déposé pour la délégation de l'Assemblée nationale pour l'Union européenne par M. Christian Philip, Député, N° 3069, 3 mai 2006.

this new trend at the European level. However, despite its relevance, which is not questioned here, this model, in its standard form, is inadequate analytically as it does not take into consideration some peculiarities of the EU setting. The most important of these is the absence of a clearly defined "principal", as European institutional architecture has been carefully designed to avoid any concentration of power whatsoever. For instance, according to a simple understanding of the Principal-Agent model, it is difficult to explain the recurrent tensions between the Commission and the Council of Ministers over the composition of agencies' administrative board, or the ambivalence of the Commission, which has long appeared reluctant to accept delegations of power, and yet has kept proposing the establishment of new agencies. Nor can one understand the multiplicity of controls to which European agencies are subjected. The main contention of this paper is that in order to make sense of both the decision to delegate powers to, and the institutional design of, EU agencies, one has to keep in mind the absence of a clear hegemon in the EU, which is itself a by-product of the multi-level character of that system.

The paper is organized as follows. Section I reviews the two kinds of Principal - Agent models that have been used so far to analyze the delegation of powers either to supranational bodies in general or to European agencies in particular. Section 2 addresses the central issue of who can be regarded as "principal" in the EU setting, and discusses the need for a 'multi-principals' model. Section 3 highlights the explanatory potential of this model.

I.   DELEGATION OF POWERS TO SUPRANATIONAL INSTITUTIONS

Two basic models, both inspired by a rational choice approach of political institutions, seem to be relevant to examine the process whereby specific powers have been entrusted to EU administrative agencies.

A number scholars have examined the reasons that have led states to transfer more or less extended powers to supranational actors. Adopting an international relations perspective, they argue that delegation is a way to reduce the transaction costs associated with adoption and implementation of transnational policies. More specifically, supranational agents may solve problems of incomplete information by providing decision-makers with technical information they need, in particular when complex technical issues are at stake. They may also contribute

to ensure the credibility of commitments adopted at supranational level by monitoring state compliance with jointly agreed decisions, enforcing the latter in case of need, or by exerting independent regulatory powers over powerful economic actors (in the case of competition policy) or over strategic policy sectors, such as monetary policy (Majone, 1996; Moravcsik, 1998, Pollack, 2004). In this perspective, EU Member States are naturally regard as principals, and the key question is to what extent supranational agents may take advantage of their discretionary powers to pursue their own policy preferences, for instance to promote integration against the wishes of national governments – an issue which, as is known, occupies a central place in European integration literature. Extrapolating from this perception, one may of course ask oneself about the reasons that have led the same actors, i.e. national governments, acting in their capacity as members of the Council of Ministers, to transfer a growing number of powers to EU administrative agencies.

That reading of delegation problem is however confronted with radically different alternatives. Adopting a comparative politics perspective, other analysts have suggested that delegation was to be regarded as a process whereby directly-elected legislatures can transfer policy-making authority to non-majoritarian structures for reasons akin to those that have been mentioned above. To the extent that this model can be applied to the EU, the principals are EU institutions: the Council of Ministers, acting together with the Parliament where co-decision is required (Kelemen, 2002). A variant of that model has been put forward by the European Commission: in its White Paper on governance, it has – implicitly, but nonetheless clearly – presented itself as the principal which has to appreciate the opportunity of delegating a share of its powers to autonomous bodies: (quote)

That vision has been forcefully defended by the Commission's legal service, invoking a celebrated ruling in which the European Court of Justice had narrowly defined the range of powers that could be delegated to other actors: delegation, the ECJ said, is permissible only when "it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority", whereas delegation of "a discretionary power, implying a wide margin of discretion" is to be excluded in all cases.[2] Unsurprisingly, the legal community therefore tends to reason as if the creation of autonomous administrative agencies was to be looked at mainly as a transfer of authority

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[2] *Meroni v. High Authority*, [1957-58] ECR 133, at 151-52.

from the Commission to those bodies (Chiti, Géradin and Petit, 200. ; Lenaerts, 1994; Yataganas).

Confronted with alternative models, one may be tempted to solve the contradiction by arguing that both of them may be relevant, but in distinct cases. Thus, the 'intergovernmental' model is clearly helpful to make sense of 'constitutional' decisions, such as the establishment of the Commission itself, the ECJ or the European Central Bank; whereas the 'comparative politics' version might be used to analyze the problems surrounding the establishment of administrative bodies by the EU legislator. However, that option has obvious limits.

First, the proposed distinction between the scope of application of the two models is far too simple. As a matter of fact, more often than not, the powers entrusted to European agencies were previously held by national authorities, rather than by the Commission. Prior to the establishment of EMEA or OHIM, marketing authorizations for medicinal products were delivered, and trademarks were registered, by national bodies rather than the Commission. To the extent that there was a delegation, it entailed a vertical transfer of powers (from the national to the EU level) rather than a horizontal one (from Community institutions to specialized agencies). Outside of the 'executive agencies' created in the wake of the Kinnock reform to relieve the Commission form routine executive tasks, instances of actual transfers of powers from the Commission to bureaucratic structures remain very rare.[3] The European Reconstruction Agency is an exception, in that it enjoys budget implementation powers that are normally vested in the Commission, according to the EC Treaty. Conversely, the role of the European Commission in the agency-creation wave of the 1990s cannot be ignored. It proposed their establishment, greatly shaped their structure and powers, and often provided them with their first director.[4] And in recent times, Parliament's influence greatly shaped the politics of agency design (Kelemen, 2002). In other words, contrary to what a purely intergovernmental model would suggest, supranational institutions have played a very substantial role in that process.

Consequently, drawing a clear line between the two strands of analysis would lead us to miss an important part of the story. The fact is that agency creation required a meeting of wills between actors of various types, each with their own interests. Their establishment had

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[4] See e.g. the creation of the EMEA as told by Hauray 2005

to be proposed by the Commission, accepted by national governments and, to an increasing extent, by the European Parliament. Failing to acknowledge the variety of actors that have partaken of the final decision would make it more difficult to account for the manifold tensions that have surrounded their establishment. It would also render the current debate on the inter-institutional agreement on agencies, proposed by the Commission in 2005, quite obscure. What sense does it make for a single principal to codify delegation practices? In contrast, I would argue that recognizing the multiplicity of principals is necessary to understand some key structural features of the bodies that have been established and the variety of controls to which they have been subjected.

The difficulty one may face when trying to identify precisely principals and agents have been perceived in the literature. Thatcher and Stone Sweet (2002) have stressed that principals are not always unified, which increases the complexity of dealing with changes in preferences. 'Composite principals', they write,'-that is, a principal comprised of multiple actors whose collective makeup changes periodically through, for example, elections, -- may not possess stable, coherent preferences over time. Instead, they may be competitive with one another over some or many issues, as when member states in the EU disagree on matters of policy that fall within the agent's mandate.' (at 6). They also discuss the case of multiple agents, i.e. where 'the initial act of delegation may parcel out – among multiple actors – the functions normally associated with the principals' (ibid.). Interesting as they may be, neither of these hypotheses actually correspond to what takes place when autonomous administrative structures are set up at EU level. The problem here is not the time consistency of principals' preferences, but rather the fact that different principals, each with their own preferences, have to agree for the new body to be set up. In Kelemen's words, the puzzle is to understand 'how conflicts between the EU's primary legislative actors – the Council and the Parliament – and its primary executive actor – the Commission – have influenced the design of new bureaucratic agencies' (at 93).

2. A POLITICAL SYSTEM WITHOUT A PRINCIPAL

The delegation issue cannot be analyzed without consideration for the basic principles underpinning the European Union's institutional architecture.

European integration is an unprecedented attempt at building a form of continental order without re-creating the hierarchical power structure of states. Balance and compromise are the main features of this system. Balance among the various countries that have joined the Community, and later the Union, was a key concern for the Founding fathers: no country, large or small, was to be in a position to impose its own views. Hence the elements that made for the originality (and arguably the effectiveness) of the European model: delegation of significant powers to an independent executive and to an independent judiciary, the composition of which is however conceived in such a way that national interests cannot be ignored; weighted votes in the main decision-making body, the Council of Ministers, with a high majority threshold, that makes consensus decisions near unavoidable. Balance among the institutions is another way to foster the same goal. For many original features of EU decision-making are inspired by the same, anti-hegemonic objective: the much-criticized monopoly of initiative bestowed on the Commission, for example, was demanded by smaller member states to counteract the influence of larger countries in the Council of Ministers (Küsters, 1990). Equally important, if one intends to preserve the decentralized character of the system, is the fact that national governments, through their role in the European Council and the Council of Ministers, play a central role in EU decision-taking: there is, in other words, a direct link between the distribution of powers at the EU level, and its nature as a system of multi-level governance. As the institutions of the Union have been deliberately designed to represent different kinds of interests, preserving the distribution of power effected by the Treaty of Rome was necessary to avoid any kind of capture by specific interests. The attention given to the principle of 'institutional balance' in the case-law of the Court of Justice therefore appears quite justified (Majone, 2005).

To sum up, the absence of a principal in the EU institutional setting is not accidental: rather, it is the corollary of the spirit which inspired the whole construction. Even today, with a directly-elected European Parliament, it would be wrong to regard the Commission as enjoying some kind of popular mandate to implement a political mandate of some sort. European elections campaigns remain dominated by national issues, and despite the steady

growth in the Parliament's role in the appointment of the Commission since the Maastricht Treaty, the composition of the executive still seems to owe more to national governments' preferences than to the decisions of the legislature. [5] The implications of this situation on the delegation issue are twofold. First, the multiplicity of principals should not be viewed as an anomaly, or a transitional situation, quite the contrary: it is perfectly in tune with the central, anti-hegemonic principle which is the cornerstone of European institutional architecture. Secondly, our reading of the principal-agent model must be adapted to this (admittedly peculiar) situation. As a rule, delegation decisions will require the support of several principals, each with their own preferences, and each anxious to exert some degree of control over the agent . The control problem will therefore present itself in an atypical fashion: Given the variety of principals' preferences, the linkage between the former and the agent's performance, and the principals' capacity to control the agent, are likely to be diluted. Our attempts at understanding the politics of delegation and at evaluating their outcome must take these elements into account.

3. THE POLITICS OF DELEGATION IN THE EU

How does the multiplicity of principals affect delegation issues? I would argue that the alternative model proposed here may enable us to understand a number of features which are at odds with the 'standard' delegation model, in which there exists in principle a clear chain of command, leading to governments and political parties, at least in Europe, where parliamentary government is the rule. Tensions among principals explains the rather haphazard process that has led to the mushrooming of agencies of various kinds. It has affected both decisions to delegate and the institutional design of agencies. In such a context, the creation of strong regulatory agencies is rather unlikely. Further, the necessity to give accounts to several principals also has implications on how the accountability debate must be framed.

The multiplicity of principals explains the politics of agency creation. Each of them is generally somewhat reluctant to relinquish powers (as all principals generally are). But their main concern is not what the P-A literature describes as 'agency drift', that is the fact that an

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[5] See however Hix 2006 for a contrary view.

agent would pursue a political agenda different from that of its principal; what they fear most is a variant of the 'political drift' in which agencies would be somehow 'captured' by one of their rivals in the leadership contest. Thus, as a rule, even when national governments accept the necessity to enhance European cooperation, they tend to oppose granting more significant powers to the Commission. The Commission, naturally inclined to maximise its own power like most bureaucratic structures (Majone, 1996), fears the emergence of potential rivals that will be more exposed to member states' influence. In its view, delegation is often but a second best alternative, which it will accept only if convinced that an extension of its own powers is not likely to be accepted by the Council.[6] This view is often shared by the European Parliament, which fears being deprived by those bodies of legislative powers that it has long fought for, whereas its own influence over the Commission has been growing over the last decade (Magnette). In a nutshell,

Those tensions explain:

- The fight over the heads of agencies (appointment key element of control in P-A literature: a) governments' presence on the administrative boards, except for EFSA where the Commission successfully invoked the necessity to enhance the agency's independence to ensure its credibility b) dispute over directors' appointment
- The reluctance to delegate rule-making powers; even the authority to take individual decisions remains an exception (ex. EMEA)
- The messy character of agency creation: no single model has emerged[7]
- The emergence of strong European regulators is unlikely

On the control side:

- the multiplicity and variety of controls to which agencies are subjected (political; legality; budgetary; judicial)
- multiplicity of accountability lines: to the Commission, the governments, the EP, the ECJ, the Court of Auditors (for those that are financed by the EU budget); the Ombudsman
- Conclusion: no single chain of control but agencies can be said to be 'accountable' (Bovens)

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[6] See the account of the Commission's attitude in the discussions leading to the creation of the EFSA in Kelemen, 2002
[7] citicized Hermange; Philip

Problems

- Dilution of control → dilution of responsibility? Who's in charge (EMEA)
- Multiplication of checks and balances may make it more difficult to decide: Risk of Regulatory Gaps