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978-0-521-68932-8 - The Powers of the Union: Delegation in the EU

Fabio Franchino

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## 1 Introduction

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“The European Union: centralised, bureaucratic, unaccountable and corrupt, eroding our independence and dictating policies that we would never vote for in an election.”<sup>1</sup> The charge is serious and the response is too frequently a laconic nod of compassionate understanding. Some academics share these concerns. According to Alesina and Wacziarg (1999), Europe has gone too far beyond an optimal degree of centralization on most issues. Its policy makers, regardless as to whether they are ministers, parliamentarians or commissioners, have a strong vested interest in this outcome (see Vaubel, 1994). For Siedentop (2000: 216–7), “the élites of Europe have fallen victims to the tyranny of economic language at the expense of political values such as the dispersal of power and democratic accountability.” European liberal democracy has become hostage to economic thinking and, since the mid 1980s, Europe has been inexorably propelled towards a model of unitary state with concentrated power and authority, betraying the intrinsic values of federalism and precipitating a crisis of democracy. While, curiously, for Gillingham (2003), the ill-fated, and failed, centralizing campaigns of the abhorred European bureaucrats, and their national supporters, are instead the product of a deep misunderstanding, and mistrust, of the market mechanism.

Some of these works are speculative, broad-brush analyses that fall well short of systematic empirical investigation. Others are comprehensive, but essentially atheoretical and, therefore, nonanalytical, fact-listing stories. None is value neutral, or attempts to separate, at least somewhat, the positive from the normative.

This book investigates the central tenets of these arguments by explaining the distribution of powers to implement the policies of the European Union (EU)<sup>2</sup> across supranational institutions and levels of governance.

<sup>1</sup> Extract from the June 2001 General Election manifesto of the UK Independence Party.

<sup>2</sup> Although this study is centered on the European Community pillar of the Treaty on European Union, I will use the terms European Union and EU throughout the whole book.

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## 2 The Powers of the Union

It analyzes why, and the extent to which, EU law constrains national governments and administrations. Why do our political leaders delegate powers to, presumably unaccountable, supranational bureaucrats? Why do they decide to adopt EU laws that limit their own policy autonomy and room for maneuver? What are the underlying trade-offs that our politicians face when they choose to shift powers to the supranational level and to constrain their own national authorities?

We need to answer these questions if we want to understand much of what the EU is today, how it operates and “who does what and why.” And we need to concentrate our analysis on how EU law is designed because it is via this legislation that national governments establish policy criteria and impose limits on each other and on their own national bureaucracies. It is via these measures that EU legislators confer powers upon supranational institutions and set the conditions under which those powers must be exercised.

More broadly, these issues go to the core of the study of legislative–bureaucratic relations in modern democracies. Indeed, they are linked to important normative considerations about the quality of European democracy at both national and EU level. As the argument for representative democracy goes, periodic and competitive elections give citizens the opportunity to depose politicians who have not delivered on their policy commitments. When in office, policy makers therefore have the incentives to make good on their electoral pledges, carry through their policy proposals and ensure that bureaucrats comply with their policy prescriptions.

Member states are still the predominant sources of democratic legitimacy in the EU, and we should recognize that the EU political system severs this national chain of accountability because a change in a single government is rarely a sufficient condition for the reform of EU policies. Any new government is constrained in implementing its agenda, because some policy options may be proscribed under EU law and some policy tools may be delegated to supranational institutions. But excessive delegation to supranational bureaucrats could be troublesome even from the perspective of EU-level democracy since the actions of these officials is notoriously hard to sanction by EU legislators. These issues raise normative questions: is the EU too centralized? Are EU laws and policies overly prescriptive and bureaucratic? Although we cannot provide value-free answers, we can assess the extent of centralization and bureaucratization in the EU and unveil the imperatives and trade-off facing our politicians when taking these decisions.

This book provides the first systematic application of the theory of delegation to the day-to-day operation of a supranational political system and frames this contribution within the comparative literature on delegation. It explicitly models the choice between a national and a supranational path

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of policy implementation – a choice between administrators and levels of governance – that EU legislators have to confront on a routine basis. It unveils how key factors, such as bargaining conflict and decision rules, shape this choice. In doing so, the book provides a more complete understanding of the patterns of delegation in the EU and their interaction with variables such as conflict among member states and legislative procedures. It also challenges and qualifies some of the expectations about the causes and consequences of bureaucratic autonomy in democratic systems.

**Centralization and bureaucratization**

This study explains centralization and bureaucratization in the EU. Centralization refers to the administration of a policy by a central authority. For my purposes, it implies extensive reliance for policy implementation on the European Commission, the EU supranational executive and bureaucracy.<sup>3</sup> In popular parlance, the adjective “bureaucratic” has the negative connotation of overly detailed, constraining or prescriptive. The choice of the administrator that will be in charge of implementation and the degree of prescription guiding policy execution are decisions that are taken frequently by politicians of representative democracies and are openly stipulated in legislative statutes. Consider the following provisions extracted from EU laws.

Where a worker has been subject to the legislation of a Member State and where he satisfies its conditions for entitlement to benefits [. . .] the competent institution of that Member State shall [. . .] determine the amount of benefit corresponding to the total length of the insurance periods to be taken into account in pursuance of such legislation.<sup>4</sup>

A Member State shall approve all vehicle types which satisfy the following conditions: (a) the vehicle type must conform to the particulars in the information document; (b) the vehicle type must satisfy the checks listed in the model, referred to in Article 2 (b), of the type approval certificate.<sup>5</sup>

Where short-term capital movements of exceptional magnitude impose severe strains on foreign-exchange markets and lead to serious disturbances in the conduct of a Member State's monetary and exchange rate policies [. . .] the Commission may, after consulting the Monetary Committee and the Committee

<sup>3</sup> In the EU context, centralization may also mean the shift of law-making powers from national legislatures and governments to the Council of Ministers and the European Parliament, but this book studies only the centralization of executive powers.

<sup>4</sup> Article 46.1 of Regulation 1408/71 on the application of social security schemes to employed persons and their families.

<sup>5</sup> Article 4.1 of Directive 70/156/EEC on the approximation of the laws relating to the type-approval of motor vehicles.

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of Governors of the Central Banks, authorize that Member State to take [. . .] protective measures the conditions and details of which the Commission shall determine.<sup>6</sup>

Where preliminary examination of the matter shows that there is dumping and there is sufficient evidence of injury and the interests of the Community call for immediate intervention, the Commission, acting at the request of a Member State or on its own initiative, shall: having due regard to the provisions of Article 19(3), fix an amount to be secured by way of provisional anti-dumping duty.<sup>7</sup>

The first two provisions specify that the award of social security benefits and the approval of vehicle types are measures to be taken by national authorities. They also stipulate the conditions which national administrations should abide by. The third provision indicates that member states can suspend the free movement of capital, but only upon approval and under the conditions set by the Commission. The last provision confers upon the Commission the power to set anti-dumping duties and the principles that it should follow. These clauses illustrate increasing degrees of centralization of power and different levels of prescription in the exercise of those powers. This study introduces and tests a theory that explains the relative reliance on national administrations and on the Commission (centralization) and the degree of formal autonomy, discretion or room for maneuver (one could say bureaucratization), that these actors enjoy in the implementation of EU policies.

**The argument of this study**

This study argues that the choices of delegation and the degree of discretion that EU legislators confer upon administrators in secondary legislation are affected by: the availability and characteristics of two types of administrators (the Commission and national administrations), the decision rules, the complexity of the policy, the severity of conflict between the Commission and the Council, and between the Commission and Parliament, the bargaining environment (or conflict) within the Council and between the Council and Parliament, and the availability of nonstatutory control mechanisms.

I show that ministers of the Council have a strong bias in favor of national implementation, ample discretion, and limited or no involvement of the Commission. They prefer to be in control of implementation, at least within their own country, and to rely on the extensive expertise that

<sup>6</sup> Article 3.1 of Directive 88/361/EEC for the implementation of Article 67 of the Treaty.

<sup>7</sup> Article 15.1(a) of Regulation 459/68 on protection against dumping or the granting of bounties or subsidies.

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resides in national bureaucracies. These administrations play the predominant part in EU policy implementation. However, conflict within the Council is likely to generate concerns about the correct national implementation of the relevant measures and some ministers will prefer more detailed laws, limiting national room for maneuver, and greater reliance on the Commission. Qualified majority voting in the Council facilitates these outcomes because these objectives are likely to be shared by the Commission, which proposes new laws, and by the pivotal member state in the Council, whose support is necessary to adopt a proposal. Additionally, in majority voting, more constrained national implementation and greater delegation to the Commission occur as conflict in the Council intensifies because greater divergence increases the cost of national relative to supranational implementation for the decisive member states of the Council.

Two factors operate against excessive reliance on the Commission, however. Conflict between this institution and the Council is likely to narrow the executive discretion of the supranational bureaucracy. Additionally, highly complex policy measures require technical expertise that is more easily available in national bureaucracies than in the Commission. This institution is likely to be used only for measures requiring generalist and managerial skills at the supranational level.

Two important changes occur when the Parliament is involved in the adoption of a measure (in the codecision procedure). In the case of national implementation, members of the Parliament are likely to prefer lower national executive discretion because they face higher costs of ongoing control than Council ministers. This situation is heightened when the Council and the Parliament do not share similar views. In the case of Commission implementation, the Parliament would prefer greater discretionary authority of this institution than the Council, to the extent that the Parliament and the Commission have more similar preferences.

In the next two sections, I review the growing comparative and EU literature that studies processes of delegation, highlighting gaps and biases. I provide only a concise overview of the state of the discipline. Where necessary, works will be analyzed in greater depth in the substantive chapters. I conclude outlining of the structure of the book.

### **The study of delegation: distant origins and the modern agenda**

In a stimulating review, Huber and Shipan (2002) illustrate how issues of centralization and bureaucratization were the concern of illustrious scholars. They trace the uneasiness about these processes, which the

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UK Independence Party so clearly and powerfully articulates, back to Montesquieu's *The Spirit of the Laws* and Tocqueville's *Democracy in America*.

Indeed, most of the classical thinkers had a problem with despotism but, perhaps surprisingly, these worries were also aired in the most unlikely quarters. In *The Prince*, Machiavelli exhorts the aspiring leader to base his power on the people rather than on the elite (*grandi*).<sup>8</sup> In the *Discourses*, he investigates, sometimes freely interprets but clearly admires, the popular mechanisms used in the Roman republic for controlling elites, such as elite selection, public accusations and popular appeals.<sup>9</sup> The centerpiece to his analysis is how the republic managed to distribute power between the people and elites to ensure control and accountability (but not complete subjugation) of the latter. These concerns arise from Machiavelli's deep distrust of elites, because of their appetite for domination, power and aggrandizement, and his appreciation for the people whose only desire is to avoid oppression.

If we take a modern read of elites as entrenched bureaucrats and government officials, we realize how strikingly familiar these themes are. Euroskepticism originates from strong resentment and misgivings about the motivations and objectives of European elites. It advocates greater control over the bureaucratic excesses and centralizing tendencies of the (EU) government and more freedom for its citizens. This thread emerges in many writings of successive political thinkers, but the modern agenda of bureaucratic–political relations is clearly set by Weber. In his essay on *Bureaucracy*, Weber recognizes both the tension between an expert bureaucracy and a politician who lacks in-depth understanding of the administration and the immense opportunities that control of the machinery of government generates for political leaders. The contemporary literature hence predominantly concentrates on the rationales for relying on the bureaucracy, the risks that this delegation entails and the mechanisms of control used by politicians to ensure that bureaucrats implement policies faithfully and correctly.<sup>10</sup> Since Huber and Shipan

<sup>8</sup> “Therefore, one who becomes a prince through the favor of the people ought to keep them friendly, and this he can easily do seeing they only ask not to be oppressed by him. But one who, in opposition to the people, becomes a prince by the favor of the nobles (*grandi*), ought, above everything, to seek to win the people over to himself, and this he may easily do if he takes them under his protection.” Chapter IX.5 On Civil Principality.

<sup>9</sup> See the acute analyses of Skinner (1981, 1993) and McCormick (2001).

<sup>10</sup> Similar problems of delegation, asymmetric information, incentive compatibility and control have been intensively investigated in relation to many economic activities. Analyses date back to illustrious scholars such as Adam Smith and Chester Barnard, see Laffont and Martimort (2002: 7–27) for a recent excursus into the study of incentives in economic thought (see also Laffont, 2003).

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(2002) have written the most comprehensive review to date, hereafter I will follow their analysis. To avoid unnecessary repetition, I will summarize this scholarship and highlight gaps and biases.

A common concern of the early literature was the dominance of bureaucrats and the administrative state in policy making. Complex, modern societies were seen to be generating increasing demand for governmental services and the administrative state emerged from the need to rely on the technical expertise of public administrators, to reduce workload and to enhance efficient decision-making (e.g. Crozier, Huntington and Watanuk, 1975; King, 1975; Putman, 1975). Related studies have emphasized alternative strategic reasons for delegation. The work of Fiorina (1977, 1982), for instance, represents a break from the earlier literature. In his view, the US Congress delegates to the executive in order to shift blame for unpopular policies and to reap the credit for making things right when problems arise. Contemporaneously, Kydland and Prescott (1977) have published a highly influential work that shows how electoral imperatives could prejudice a politician's commitment to some policy objectives. One implication is that the delegation of powers to an independent bureaucracy secures credibility to such a commitment.

Scholars have disagreed about the consequences of the administrative state. Some, especially students working in the fields of public policy, administration and management, have emphasized its benign implications. Extensive reliance on a "neutral" bureaucracy was seen as an efficient method to achieve the best outcomes with minimal mistakes (e.g. Kaufman, 1956; LaPalombara, 1958; Heclo, 1974; Mashaw, 1985). Others were far more critical. They expressed concern about the lack of accountability and the elitist and conservative bias of the public administration (e.g. Strauss, 1961; Offe, 1972; Wright, 1978; Hall, 1983). Along similar lines, later scholars assume that bureaucrats have specific policy, budgetary or work-related preferences which may not coincide with those of politicians (Niskanen, 1971; Dunleavy, 1985; Bendor, Taylor and Van Gaalen, 1987; Horn, 1995). This dissonance is the key source of bureaucratic drift, a mismatch between politicians' intent and policy outcomes that is biased toward bureaucratic objectives.

However, the all-encompassing view of an administrative state has been challenged on both methodological and empirical grounds. In a groundbreaking article, Weingast and Moran (1983) assert that the key empirical observation used to support the bureaucratic dominance view, the lack of oversight activities, is also equivalent to a view of political dominance whereby bureaucrats are perfect agents of their political superiors. This crucial remark has led to a series of studies that has tried to establish the extent to which policy outputs and bureaucratic actions reflect politicians'



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objectives. Most of them have found a degree of responsiveness both in presidential (e.g. Weingast and Moran, 1983; Moe, 1985; Wood, 1988; Wood and Waterman, 1991; Shipan, 2004) and in parliamentary systems (e.g. Budge, Hofferbert and Klingemann, 1994; Bawn, 1999; Tsebelis, 1999; Swank, 2003).

The end result is a more refined understanding of politico-bureaucratic relations. The all-or-nothing view that underpinned the debate on bureaucratic dominance has been gradually replaced by an assessment of the circumstances under which bureaucrats and politicians shape policy outcomes, the varying degrees of control that politicians exercise on bureaucratic actions, and politicians' choice of institutional mechanisms for bureaucratic control. Scholars have studied appointment and promotion power, ombudsman offices, budgetary incentives and sanctions, and departmental and jurisdictional reorganization.<sup>11</sup> More relevant for our purposes, the literature on American politics has recognized early on the central role that laws play in influencing bureaucratic actions. McCubbins and Schwartz (1984) argue that, instead of centralized, direct, resource-intensive hearings (police-patrol oversight), the US Congress can opt for decentralized, reactive and indirect forms of control of the bureaucracy (fire-alarm oversight). These are procedures inserted into statutes that facilitate control by interest groups close to Congress. In one of the most influential works on this topic, McCubbins, Noll and Weingast (1987, 1989) show how a bureaucracy, once it has been delegated powers, could exploit conflict among politicians to shift a policy closer to its position.<sup>12</sup> In these circumstances, *ex-post* monitoring and sanctions seldom are credible strategies to redress bureaucratic excesses. It is for these reasons that politicians are likely to resort to administrative procedures<sup>13</sup> which reveal politically important information prior to bureaucratic decisions, stack the deck in favor of groups benefiting from the policy and ensure durability even when the policy environment has changed. Along similar lines, Moe (1989, 1990a, 1990b) and Horn and Shepsle (1989) argue that overly cumbersome agency structures could be the result of politicians' desire to preserve policy objectives beyond their tenure in office, by making these agencies hard to reform.

These works have spurred an impressive array of sophisticated theoretical analyses followed by systematic empirical tests. With regard to theory, Tsebelis (1995, 2002: 2–5, 236) has generalized the insight of

<sup>11</sup> For an extensive review of these works see Huber and Shipan (2002: 26–38).

<sup>12</sup> This point was originally made, less comprehensively, by Hammond, Hill and Miller (1986).

<sup>13</sup> Examples of administrative procedures are public disclosure requirements, evidentiary standards and appeal procedures.



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McCubbins, Noll and Weingast (see also Hammond and Knott, 1996; Steunenberg, 1996). He argues that an increase in policy stability gives more discretion to bureaucrats. In a political system, high policy stability results from the presence of many legislative veto players that have heterogeneous preferences and, if collective, are internally cohesive. More relevant for us, Epstein and O'Halloran (1994, 1999a, 1999b), have developed a model where the legislator's choice variable is agency discretion, intended as a segment of a one-dimensional policy space. They show that discretion increases with uncertainty and decreases with conflict between the legislature and the agency.<sup>14</sup> Volden (2002b: 124) generalizes this model and shows that conflict between an agenda-setting legislature and an executive with veto power results in greater discretion of an independent agency. Finally, Huber and Shipan (2002) develop a model that is applicable to both parliamentary and separation of powers systems. They argue that, during times of divided government, the discretion of the executive is likely to be greater if the two legislative chambers do not share the same preferences.<sup>15</sup> These works do not analyze how different decision rules operating within the same legislature could affect discretion. Equally, they disregard the fact that legislators may have the opportunity to rely on different agencies for policy implementation. The features of these agencies could shape the choices of delegation.

As far as empirical analysis is concerned, some tests have reported mixed results (e.g. Balla, 1998; Spence, 1999a, 1999b; Balla and Wright, 2001) but two important works stand out as the most comprehensive and systematic investigations of the theory of delegation. Epstein and

<sup>14</sup> In an earlier formal work, McCubbins (1985) covers a similar topic but his article, very advanced for his period, is not based on what later became standard modeling principles. Calvert, McCubbins and Weingast (1989) assess the conditions under which an agency enjoys discretion. Discretion, however, is not a choice variable. Banks and Weingast (1992) analyze the conditions under which agencies are likely to be created. Their model, however, assumes budget maximization as the agency's objective function. Finally, the works of Gilligan and Krehbiel (1989, 1990) on the organization of the US Congress could also be construed as models of delegation.

The roots of these works also rest on the principal-agent model in economics, as they investigate information problems of adverse selection, moral hazard and nonverifiability. Classic economic contributions are Spence and Zeckhauser (1971), Ross (1973) and Jensen and Meckling (1976). See Laffont and Martimort (2002) for the latest treatment of the literature.

<sup>15</sup> In a related literature, models evaluate the effectiveness of and the circumstances under which a legislature relies on police-patrol and fire-alarm oversight (Lupia and McCubbins, 1994a, 1994b; Bawn, 1995, 1997; Epstein and O'Halloran, 1995; Hopenhayn and Lohmann, 1996; de Figueiredo, Spiller and Urbiztondo, 1999). The most recent formal works on delegation are by Huber and Lupia (2001), Huber and McCarty (2004, 2006), Bendor and Meirowitz (2004) and Epstein and O'Halloran (2006).

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O'Halloran (1999b) have coded a large data set of important post-war US legislation with regard to the amount of discretion that these acts have conferred upon agencies. Discretion is measured as the share of legal provisions delegating powers, net of the procedural constraints placed on agencies. Epstein and O'Halloran demonstrate how Congress delegates more policy authority during times of unified rather than divided government and in informationally intense, or complex, issue areas. They also show, in common with Volden (2002a), that independent agencies enjoy greater discretion under divided government. In testing their comparative theory of delegation, Huber and Shipan (2002) concentrate more on policy rather than procedural details inserted into legislation as means to influence bureaucratic autonomy. They study the design of Medicaid laws in US states and of labor legislation in European parliamentary democracies.<sup>16</sup> In line with the existing literature, they find systematically lower discretion during divided government in separation of powers systems. Additionally, they show that, during times of divided government, the discretion of the executive is likely to be greater if there is bicameral conflict in the legislature. For parliamentary systems, Huber and Shipan illustrate how coalition and minority governments tend to adopt more constraining laws than single-party majority governments. They also reveal how discretion decreases when nonstatutory control mechanisms, such as an *ex-post* legislative veto and corporatism, are unavailable. Along similar lines, Bawn (1997) shows that legislators who are not members of the relevant congressional committees, face higher costs of ongoing non-statutory oversight and are likely to prefer more restrictive provisions to be inserted in the relevant statutes.

The majority of these studies have been confined to the American political system. Scholars have only recently started to apply the theory of delegation to parliamentary systems and, as I will argue below, studies of the EU are also rather sparse. However, there is no reason to expect that factors such as conflict, policy complexity, nonstatutory control tools and bargaining environment should not play an important role in shaping the distribution of powers in the EU. Moreover, its institutional framework shows strong similarities with a separation of powers system and the law plays an important role in determining the distribution of policy competencies among EU institutions and levels of governance. The EU appears to be an ideal candidate for testing the robustness of the theory of delegation. Additionally, EU institutional peculiarities, such as the possibility of

<sup>16</sup> Discretion is operationalized as the number of new words inserted in an existing statute in the case of the US and as a standardized measure of page length for parliamentary systems.