

Achievement of Institutional Balance in Disparity of Competences of the European Union Institutions

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Abstract

Post-Lisbon initiatives to address the democratic deficit that attempted to reach greater institutional balance was not synchronous with overall framework, and coexistent with the provisions reminiscent of the diminished role of the European Parliament in the past. Fostered intergovernmental drift lead to the weakening of the Commission vis-à-vis the Council and the European Parliament. Progressive loss of supranationalism tends to shift at another end of this process, offering loss of viability of the union. This is especially detrimental at the time of challenges which necessitates reinstating the role of the Commission. This can be done by providing the right of legislative initiative to the Parliament, preventing it from further encroachment, and by integration of the Council formed of executives with the executive Commission allowing to reach traditional separation of powers. This can potentially mitigate the intergovernmental drift and turning the union into intergovernmental organization.

Keywords: Democratic deficit; Intergovernmental organization; European integration

Introduction

Post Treaty of Lisbon the balance of powers aimed at eliminations of democratic deficit in the European Union has endeavored to enhanced enablement and the principle of subsidiarity, rendering equal regard to the interests of the member states and its representatives. However, the quest for the balance does not signify its completion or fostered traditional concerns on the potential overreliance on the EU institutions in either intergovernmental or supranational form. This is followed by the persistence of underlying debates of further reshuffling the inter-institutional and intra-institutional balance of powers within the EU.

From the perspectives of American scholar's institutional balance is "based on overlapping jurisdictions: the legislative, executive, and regulatory powers are shared by many institutions, so much so that the distinction itself between legislative and executive acts is blurred". Arguably divergence of perceptions on European integration and sovereignty are based on the varying secular histories, institutions and wars and differences in views of the European integration between dirigiste inherent to the Southern and Continental Europe and a more Anglo-Saxon laissez faire approach [1]. However, the obvious distinction of the EU institutional balance seems to be more influenced by continued attempts to align the multiple interests of ever evolving structural complexity. The distinctiveness of the institutional balance from the division of powers, its legal perception in particular is inherently pertaining to the separation of powers. "From a legal point of view, the principle of institutional balance is one manifestation of the rule that the institutions have to act within the limits of their competences" [2]. The Article 7(1) EC Treaty each institution acts within the limits of the powers conferred upon it by the Treaties, and lays the ground for the legal meaning of the separation of powers.¹ However, there are range of disparities of the constitutional structure of EU with the traditional model of republic under the separation of powers. For instance, Council that is somewhat outlandish in the triad of powers, made of executives but performing the legislative role. Also, the obvious distinctive feature of EU is in the power of legislative initiative given to the Commission as essentially executive body. However, it is arguable

that originating legislative proposals from the executive institution is completely alien to contemporary legislative practices. Designing the law by the authorities possessing the expertise on the subject matter is a popular practice in the parliamentary practices of modern states. Delegating legislative initiative to the body that is responsible for its subsequent implementation also adds persuasion to this state of affairs.

Literature Review

Recent rebalancing of competences was preceded by supranational course evolving from the emergence of the union, and initially was prerequisite for giving necessary impetus to its establishment as a fully-fledged institution. Therefore, the initiatives to address the democratic deficit was reasoned by supranational move in balance of powers of the union and its institutions. The trend can be exemplified by expansion of the matters under the exclusive competence of the Union, adoption of double majority voting system that allows to surpass the national vetoes, and most prominently by extension of the European Parliament competences. Formal co-decision procedure introduced by the Treaty of European Union giving the European Parliament the right of amendment of the law and veto power in second reading, became the default ordinary legislative procedure. "Each successive treaty amendment has transferred further powers to the Union, with a corresponding loss of sovereignty in those areas as agreed by the member states" [3].

Discussions and Analysis

The status of the Commission, as an essentially EU institution, is aimed towards alienation from the member states, ensured by

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¹Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37

exclusion of holding any other position by the Commissioners (Article 245 TFEU),² in contrast to the Council and European Council, where it is factually necessitated. One of the legal mechanisms enabling that alienation is the mutual responsibility of the Commissioners for pursuing the national interests (Article 17(3) TEU),³ as well as the member states for influence on their Commissioners (Article 245 TFEU).⁴ Arguably, the independence of the European Commission is necessitated by the concentration of exorbitant executive functions of this union institution, supported by necessary enforcement mechanisms provided in the constitutional treaties. However, conversely the alienation from the member states may itself be a rational basis for the extended power of this particular institution, as independence of the Commission through the distancing from the influence of member states, is required for the performance of extended power, inherent to the role of this supranational entity.

The monopolistic power of legislative initiative that rests with the Commission alone is based on Article 17(2) TEU,⁵ but without a viable mechanism to enforce it, can be considered to be an exaggerated reliance on the executive bodies in the legislative process. "The Commission possessed the right of legislative initiative, which enabled it to function as an "engine room" of the Community, and to set its agenda" [4]. Allegedly the power of the Commission and the Council was balanced by the freedom of the Commission to modify the original proposal any time before the vote for approval, which is came up from the Rome Treaty [5].

Despite the substantial reduction of supranationalism of the Commission and elevated status of the European Parliament, there are still discrete relics of previous state of affairs. For instance in the approval of the amendments proposed by the Parliament, the rejected amendments can still be adopted by the Council acting unanimously (Art 294(8) and 294(9) TFEU).⁶ Absence of response of the European Parliament at the commencement of the second reading leading to the adoption of the measure in question, is another reminder of insignificant role of the European Parliament (Art 294(6) TFEU).⁷ In the case of adoption of the law with participation of the Parliament, under Art 64(3) TFEU the possibility to override the opposition of the European Parliament by unanimity of the Council,⁸ is also a symbolism of disequilibrium of the powers of the Parliament in relation with the Council originated in the past. Herewith the initiatives to equilibrate the competences of the EU institutions, necessitated to be synchronous with overall state of the competences of the EU institutions, based on the holistic view of its statuses.

Arguably the monopolism of the Commission to some extent can be relaxed by with the special legislative procedure, allowing adoption of the law by the European Parliament with the Council's involvement, or by the Council with European Parliament's participation (Art 289(2) TFEU). However, the limited scope of these procedures indicates the narrow occasion of the application of these procedures. When the

adoption of the law by the European Parliament with the Council's involvement in the special legislative procedure require the act to be adopted jointly by the European Parliament and the Council, the procedure of the Council with participation of European Parliament requires ordinary consultation with the parliament (Art 289(2) TFEU [6]. The consultation right of the European Parliament was emphasized in Isoglucose case as essential element of the institutional balance,⁹ along with requirement for genuine cooperation with the parliament emphasized in *Roquette Freres v Council*.¹⁰ However, in non-binding effect of the Parliament's opinion on the Councils seems somewhat an illusory incentive. "In general, when controversial issues need to be resolved by the consultation procedure and unanimity voting in the Council, the preferences of the Commission and Parliament are of limited relevance in determining the final policy outcomes" [4]. "Parliament cannot demand that its amendments be accepted. The Parliament ultimately either has to accept the proposal in totality or reject it in totality. It is therefore a negative power rather than a true (positive) legislative power" [6].

Monopoly of the Commission in the legislative initiative is institutionally diminished by the number of contra factors. Legislative role of the Commission can be limited by initiating the proposal rather than its complete elaboration, which requires listening to many other actors, with subsequent detailed scrutiny of the proposal in the Council and European Parliament. "In large part, the legislative process was one in which the Commission proposed, and the Council disposed." [2]. The only mechanisms to ensure the forthcoming effect of the Council was in setting the obligation on the Commission to state the reasons of non-intention to follow a Parliament's request to submit a legislative proposal adopted in Treaty of Lisbon under art 225 TFEU,¹¹ that is also not viable instrument. There are also inner factors that are having effect in increasing the view that the power of the Commission is being sourced from the Committees consisting of representatives of the member states, which form the Commission. External factors suggest that the power of the Commission in legislative initiative overall can be diminished by the policy making role of European Council, giving the general political impetus to the Union and settling the legislative direction and priorities. Maintaining its own course by the Commission remains rare and can be susceptible to criticism of the Council for not fulfilling its obligations [7].

Delegated power of the Commission to adopt non-legislative acts under Art 290 TFEU,¹² can be considered as laying the ground for the encroachment of the executive institutions into legislative. However, the ante and post conditions are at narrowing down the application of this power. Ante condition requires that it shall be applicable when legislative act envisage that in question, obviously to achieve the flexibility required for the purpose of regulation. In terms of Post-condition, application of the delegated power is being jointly monitored by the Commission and Parliament, and can potentially be revoked under the conditions given in act (Art 290 2(a) TFEU).¹³ However there is a popular belief that delegated power is entitling the European Parliament the legislative limited function, against the power of the Commission to initiate the law. However, the skepticism on that

²Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

³Consolidated version of the Treaty on European Union, OJ C 326/13-47

⁴Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

⁵Consolidated version of the Treaty on European Union, OJ C 326/13-47

⁶Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

⁷Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

⁸Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

⁹Joined cases 138 & 139/79, *Rocket and Maizena* [1980] ECR 3333.

¹⁰Case 138/79 *Roquette Frères v Council* [1980] E.C.R. 3333

¹¹Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

¹²Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

¹³Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47-201

regard concerns the ability of the Parliament to fully utilize this tool in policing role of the Commission over the delegated power.

Supranational role of the Commission can also be diminished by the constitutional grounds over its formation, as principle of representation 'one commissioner per member state' cannot exclude the national interests in decision making. "From a political point of view, one cannot prevent the Council from withholding its support from proposals made or decisions taken by an institution which are composed intergovernmentally, when – in the Council's view – that institution's majority does not reflect the general interest, but reflects a compromise between national interests reached without the weighting (demographic or otherwise) in the Council." [2]. In this regard, the formation of the Commission with overall number less than the member states, envisaged in original treaties, was aiming at the stronger Commission less dependent on the member states.

Accountability of the Commission to the Parliament and its formal approval, also becoming the point of influence on the Commission, due to election of the Commissioners by the European Parliament, no despite of the assignment of the Commissioners by the member states. In intra-institutional level, marginalization of the Commission is going on through the proliferation of the agencies performing the competences of the Commission that have external accountability, which is leading to the dispersion of its functions.

Reduced supranational role of the Commission, resulted on power struggle between the Council and the Parliament over its control, is also a struggle between supranational and intergovernmental methods. "Two different ideas about the role of the Commission are evident: the latter can be conceived as an independent and strong proactive institution or, on the contrary, as a sort of Super-secretary of the European Governments [7]. "If one regards the relations within the institutional triangle, the history of the Community is marked by the progressive growth of the powers of the Parliament to the detriment of those two other institutions." [2]. "The Commission, considered in the original EEC system as the pivot of the Community method, has along the years progressively lost its political leadership, becoming an eminently technical institution." [8]. Herewith the post Lisbon shift of the competences towards the intergovernmental institutions can be associated with the movement to another side of this pendulum. Weakening the supranational role of the union and the Commission threatening with the loss of its viability that is especially detrimental in inner and external challenges to the union, that needs to be mitigated.

Relations of the law-making trio Council, Parliament and Commission have long known for the competition going out of the constructive. "The draft Agreement already negotiated between the EP and the Commission seems to very much trouble the Council, according to which it tries to modify the institutional balance between the institutions by giving prerogatives to the European Parliament which are not provided for in the Treaties. Furthermore, it tries to affect the autonomy of decision of the Commission [8]. In paving the ways to compete, Council and Parliament seemingly finding more unregulated or broadly regulated grounds, evidencing that constitutional treaties still leaving the space for maneuvers. As a response to this contradictions in Wybot case Court of Justice is ought to note that "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".¹⁴

¹⁴Case 149/85, Roger Wybot v Edgar Faure [1986] ECR 2391.

One of the concepts, the breadth of which is giving way to compete, it's the subsidiarity. "...it is hard to clearly operationalise and scrutinize subsidiarity. Due to its narrow legal dimension, the decision on who should do what in the EU is ultimately left to the political arena."¹⁵ The balance of power scheme is designed to be best worked for the cooperation instead of contradiction, and not completely immunizing the institutional encroachment. In contrast with contradictory interaction by limiting the encroachment of concurring institutions envisaged in separation of powers, the cooperation schemes in EU proved to be indispensable. Specifically, exemplary here are the joint delegations from the Commission and Councils secretary for the conclusion of the agreements for international cooperation. The underlying framework of the union is tailored to the inter-institutional cooperation. "At the inter-institutional level, the Council and the European Parliament, despite their different representational roles, are interacting intensely through a variety of fora such as dialogues, the conciliation committee and many other forms of informal cooperation" [8].

Findings

Presence of general (Art 352 TFEU) and specific residual powers (Arts 114, 115 TFEU) of EU in enacting the law, was widely replicated as a reserving by the Union the pathways to the encroachment on the interests of member states. The legal inconsistency concerns the possibility of enacting the law in the absence of competences on the areas concerned in the constitutional treaties. In imbalance signifies the ordinary consent of the parliament necessary when the Council is acting under the agenda of approximation of the laws under arts 114, 115 TFEU. This led to the finding lawful the decisions of the European Parliament and the Council in finding the tobacco advertisement ban as a measure adding uniformity to the national laws, in existing controversies on reasonableness of the application of this measure in Swedish Match case,¹⁶ and Tobacco Advertisement case,¹⁷ while the measure concern different ground on the protection of human health.

The key role of Council and the Commission in the legislative process is not free from criticism. The law-making process in these bodies is being subject to the expensive reliance on ministerial bureaucracy of the Directorate Generals in the Commission, and the COREPER in the case of the Council. "Directorate-General, assisted by a large number of specialist advisory committees drawn from the appropriate industrial, commercial and other sectors in the Member States, take an active part in drafting new provisions" [6]. While it is crucial that the law is subject to wider discussion with participation of every person affected by the decision pursuant to the principle of subsidiarity. Actions of the national parliaments on attainment of one third threshold to instigate redrafting of the law is often futile. Herewith the law making is widely left to the bureaucracy of the COREPER and Directorates, and being significantly shaped by the executives of consecutive ministries. Perhaps due to bearing the executive mark, the laws are often tending to overregulate and encroach in wider aspects of the EU citizen's life.

The Robert Thomson's question on, who has the power in the European Union, the Council-centric view in the balance of powers among three institutional actors in legislative decision making, was allegedly found as the more relevant finding [5]. However rising

¹⁵Simona Constantin, Rethinking Subsidiarity and the Balance of Powers in the EU in Light of the Lisbon Treaty and Beyond, CYELP 4 [2008] 152

¹⁶Case C-210/03 R v Secretary of State for Health, ex p Swedish Match?

¹⁷C-380/03 Germany v European Parliament and Council?

influence of the Council can also be regarded as the victory of the European Council, as the former is considered to be working on the political leadership of the European Council. "Furthermore, the European Council plays an increasing role in policy formulation and overall steering of the Union, in particular now very formally following its elevation to a full EU institution by the Lisbon Treaty" [3] Without prejudice to the expert capacity of the Council, the justification of its legislative role of the Council is in rendering legitimacy to the Union decision from the competent authorities of the member states, and balance it with the super power of the Commission. On the way towards the further integration and rising competence of the union, potential elimination of this body is not excluded, which signified the return to the conventional tripartite structure of separation of powers.

After initiatives to address the democratic deficit, the balance of powers of the union institutions is still allegedly considered as unachieved. The spread of the influence of the European Parliament seems to attempt to compensate discomfort over the legislative initiative, by extending the control over the Commission, including its attempts to influence on the legislative initiative itself. While the Commission has control over the form, Parliament is still lacking the power over the substance. Herewith elimination of the democratic deficit still leaves the question about political deficit [7]. The essential nature of this power for the European Parliament rests on its representation of people of the member states and the union, without prejudice to separate European citizen's initiative. Rendering the legislative initiatives to the European Parliament though can lead to the reconsideration of the powers previously given to the European Parliament on the way to progressive elimination of the democratic deficit. "The European Parliament needs to share not only the legislative role (with the Council) but also the political impetus and the setting of priorities (with the European Council). At this stage of the European integration the European Parliament does not need more powers; it needs to develop a vision of Europe which also offers to the EU citizens the ground for a European identity" [7].

Conclusions

Post-Lisbon balance of competences clearly signified the union's intergovernmental drift, whereas the extension of the European Parliament powers lead to the reduction of it in the Commission. Political dynamic showing the change of the legal disposition exemplifying priority of the political agenda over the legal disposition, resulting in views to further rebalance the system. In this regard, the legal institutional balance is subject to the persisting political dynamic. In contrast with the doctrine of separation of powers, the model of EU law that is also disregarding the traditions of European Parliamentarism, was reasoned by representation and aligning the multiple interests. This is the reason by proliferation of the sub-institutions and committees, which are adding overall complexity to the system. No matter what shape the institutional balance takes, it is always possible to argue that European Union is sui generis formation and in a state of flux, striving to achieve higher concordance with the democratic principles. However in reality the institutional balance is often seeming to be more concerned with the necessity of settling the contrasting interests and conflict prevention between the institutions. In expanded union, the ultimate challenge is in reaching the genuine institutional balance with proper regard to the interests of the member states in lowered institutional complexity. Preservation of subsidiarity without overreliance on the officials of the member states, with maintaining the autonomy and operability of the union are the ultimate goals in the contemporary shape of the union.

Institutional balance ideally aimed at the continued dialogue often taking the forms of institutional struggle over the influence and control. In this regard, the institutional balance may not be a very good substitute for the separation of powers, as this signifies never ending dissatisfaction of the institutions with the status quo. Extension of Parliamentary powers and elimination of democratic deficit turned the institutional balance at another end of the pendulum, on progressive weakening of the Commission and strengthening the intergovernmental bodies over the supranational. Overturning the equilibrium away from the Commission can lead to the weakening of the Union's functionality, in attainment of its goals and diminishing its role to an interstate organization.

Dependence on the authorization of the member states is an essential feature of the European Union, and important symbolism of non-federalist nature. However, whenever the dialogue turns into non-constructive forms and confrontation, it harms the operability of the union, which requires to reinstate its supranational role by rebalancing the powers of institutions. Perhaps the legislative initiative of the Commission, positioned as supranational institution, may act in detriment to its role. Currently the Commission is in between two encroaching institutions, the Council and the European Parliament. Herewith post-Lisbon calls of institutional rebalance reappearing in the contrary form. Without prejudice to the importance of the Council, its role may be seen as temporary and eliminated at the higher level of integration giving way for the Commission. The special value of the Counselors, possessing expertise of their respective national legal frameworks can be substituted by non-governmental think-tank groups not represented by territorial principle.

Merging the Council to the Commission cannot lead to the substantial political vacuum due to similarity in the nature of these bodies, as the executive role of the Commission can correlate with the subsistence of the Council represented by executives. Integration can be seen in combination of senior level executives in the Council with lower level executives in the Commission, as a chamber structure without unnecessary hierarchy. This can lead to inter-institutional balance and mitigation of the political influence of the European Council on the Council, and preclude the struggle between European Parliament and Council regarding the control over the Commission. This could also prevent the tendency of the Council to unite with national parliaments against the European Parliament for the purpose of influence over the Commission.

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