Changing Rules of Delegation:
A contest for power in comitology

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Theoretical explanation

• 1 Why did change happen?

Assumptions:
• Actors boundedly rational
• Actors seek to increase their institutional power to influence policy outcomes
• Transaction costs
• Contracts incomplete
• Council, EP, Commission unified actors
Theories of institutional change:

a) Institutional design:
   • bargaining of institutional change: New formal rules

b) Interstitial institutional change:
   • Formal rules = incomplete contracts
   • Are transformed in course of application
   • Give rise to new (informal) rule
Why did informal rule emerge?

• *Functionalist* political transaction cost saving argument
• *Theory of power based distributive bargaining:*
  • After conclusion of (incomplete) contract,
  • actors seek to widen their power during application of contract
    bargaining over specifics of contract....
  • lead to transformation of contract
• Outcome determined by bargaining weight of players
• Bargaining weight or power is determined
• On players - patience /time horizon
Lisbon Treaty

Should delegated or implementing acts be used?

- Background: Lisbon Treaty TFEU distinguishes between legislative delegation (Art. 290) and executive delegation (Art. 291)
• *Delegated acts* (Art. 290)
  
  Commission is delegated power to adopt acts of general scope *supplementing or amending* certain *non-essential* elements of legislation.

• Either Council or EP may revoke or object to Commission delegated act.

• EP coequal of Council
• implementing acts (Art. 291)
• Very similar to old comitology procedure with modified committees
• Commission and m-st representatives/experts

No role of EP
• Lisbon Treaty provisions =
• Incomplete contract
• Decision making rules as to whether choose
• Delegating acts Art 290
• or implementing acts Art 291
• Ambiguous
• What is “supplementing”, “amending” exactly?
Conflicts between EP and Council and Commission over which Art. (290 or 291) to apply in view of vague terms of Lisbon Treaty

Since enforcement of TFEU delegated acts have hardly been used

• Implementing acts vast majority of acts
• 2010 of 66 directives of Commission none was a “delegated act” (Art. 290), 66 were implementing acts (Art. 291).

• Of the 589 regulations adopted by the Commission in 2010, 4 were “delegated acts” (Art. 290) and 585 were implementing acts (Art. 291).
• In Dec. 2011 600 Commission regulations which are not referred to as “delegated acts” (Art. 290),

• and

• 72 Commission directives which are not referred to as ‘delegated’
• Frequently deadlock
• Or package across various issues as to which article to be applied
• EP trading content over institutional rule
Case: Regulation on the prevention and correction of macro-economic imbalances (EU 1176, 2011)

- (based on Héritier, Moury, Bischoff and Bergstrom 2012)
- *Horizontal Institutional consequences*
- Specifying details of scoreboard regime,
- i.e. indicators used to measure and monitor macroeconomic and macro-financial imbalances on current-account balances,
• real effective exchange rates,
• export market shares,
• house prices,
• private sector debt and unemployment rates
Should delegated or implementing acts be used?

Specifying details of scoreboard regime

Commission: only Commission

EP in favor of delegated act

Council in favor of implementing act

Conflict...deadlock
• Ensuing bargaining process led to
• New institutional rule called “compromise procedure”
• Which is neither Art. 290 nor Art. 291
• Recital 12 of Regulation:
• The compromise procedure says
• Commission should closely cooperate with EP and Council when drawing up scoreboard and set of macroeconomic and macrofinancial indicators for member states.
• Committees of EP and Council *may comment* on plans to establish and adjust indicators and thresholds.
• Commission *should inform* EP and Council of any changes to indicators and threshold and *explain reasons for changes.*
• Note difference to *delegated act* applied in another six pack regulation on *budgetary surveillance*

• Where EP and Council have full right of objection and revocation,

• In short, under new transformed rule, called “compromise rule”, Commission is winner
• Conclusion

• Application of incomplete contract under Art. 290 and 291

• How does it play out in practice?