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THE DELEGATION OF ADMINISTRATIVE DECISION-MAKING POWERS: A TOOL FOR BETTER PUBLIC PERFORMANCE

Francisco Cardona
SIGMA/OECD

Abstract

The delegation of administrative decision-making powers is explored in the following pages as a legal technique to enhance co-operation between politics and administration, both within the policy-making and in the domains of implementation of policy and law. Delegation, as a legal instrument, also has organisational and managerial consequences insofar as it suggests certain organisational patterns in terms of administrative structures and behaviour if it is to promote more effective and efficient decision-making processes while keeping lines of accountability within the administration clear and known. Administrative delegation, consequently, is a legal and managerial instrument that is able to bring about more quality both in policy-making and in administrative decision-making. Ultimately, delegation is able also to improve the quality of management and to increase administrative efficiency of public institutions.

1. Why is this Issue Relevant for Central and Eastern European Countries?

In most, if not all central and Eastern European countries, as a distinct legacy from the past, there is a still strong lingering concentration of decision making responsibilities at the top of the hierarchy in ministries and other public institutions. This has been labelled as “dominance of verticalism”¹ to indicate the fact that the disappearance of the Communist Party from the administrative system left public administrations virtually without horizontal management systems and that little has been done to replace the Communist vertical systems with new instruments. This situation is coupled with a crisis in politico-administrative relations that has been conducive to a long lasting lack of trust between politicians and civil servants in many countries. As a result, politicians are in general loath to delegate administrative decision-making powers to the state administration.

This situation has several negative effects such as:

1. A tendency to politicise administrative decisions, i.e., decisions tend to be based more on political convenience than in what is established in legislation so that it encroaches negatively on the principle of legality and legal certainty that must preside over administrative decisions.
2. This also promotes the blurring of political and administrative responsibilities and a clear distinction of either field.
3. Crowding the organisational top with any, big or small, administrative decision creates bottlenecks and overloads at the top that are inimical both to efficiency in administrative decision-making and to the development of strategic approaches to policy-making (politics becomes devalued and administration becomes miserable).
4. Civil servants at lower ranks in the hierarchy tend to inhibit themselves from participating in administrative decision-making unless personally required to do so because they do not see it as constituting part of their jobs.
5. Weak participation, or lack of it, tends to produce de-motivating effects and in the end it is an impediment towards developing a more professional civil service.
6. It makes the scepticism of many reasonable regarding the ability of the forthcoming new Member States’ administrations to participate appropriately in the EU decision-making processes.

In organisational theory it is well accepted that the essential principles for any administrative organisation to work appropriately are efficiency, effectiveness, economy, adequate distribution of work and responsibilities (competency), while ensuring internal and external co-ordination and co-operation, all this in pursuit of a common purpose (or mission) mainly through a more or less tight hierarchical control. Several Constitutions in Central and Eastern Europe state efficiency and effectiveness as well as the notion of rule of law and of service to the public or to the State are seen as principles that must shape administrative behaviour and therefore administrative organisational design. All constitutions also state that the government directs the administration or some other similar wording.

However, one major problem is that the still prevailing culture is based on command and control (verticalism) and makes it not easy to translate these constitutional principles into real administrative practice. A co-related problem is that certain administrative legal techniques that could contribute to efficiency and effectiveness of public administration are either conceptually underdeveloped or not sufficiently regulated in legislation or, what is even more worrisome, not applied in real practice of organisational behaviour in public administration. On occasions, functional reviews or similar instruments have been used in attempts to overcome these shortcomings. Functional reviews are useful in identifying certain causes (in essence

¹ See, among others, “Rebuilding State Structures: Methods and Approaches. The Trials and Tribulations of Post-Communist Countries”. UNDP Regional Bureau for Europe and the CIS. New York and Bratislava, 2001.

they are research instruments) of organisational malfunctioning and in classifying institutional or organisational functions, but they alone cannot provide real and durable solutions to the problem. To tackle the problem effectively it is necessary to work in at least two mutually reinforcing and complementary directions. One is on administrative law legislation in order to create an enabling legal environment for a more rational distribution of responsibilities while preserving accountability. The other one is to promote informed debates and training aimed at producing changes in the prevailing politico-administrative culture referred to above.

Along with these shortcomings other problems occur: The consequences of inefficiency are not accounted for. The accountability mechanisms for damages caused out of inefficient performance are in general weak or non-existent and responsibility is difficult to demand from politicians and civil servants.

This paper intends to address a number of basic concepts that could be useful for developing, through legislation and managerial practice, the notion of delegation in central and eastern European administrations, a development that could contribute to fostering efficiency and responsibility as well as accountability. The focus of the paper is twofold. On the one hand, it centres on the legal arrangements that, while preserving the principle of legality, enable an orderly and accountable delegation of responsibility within the administration as a condition for good administration and for sound management values and practices to emerge. The value of efficiency cannot take root if legislation is not appropriately designed. The paper is based on broadly accepted notions of delegation in different EU Member States and provides comparative information for legal and organisational design. On the other hand, the paper shows how difficult it would be to promote a senior civil service, i.e., public management values like efficiency, if at the interface between politics and administration the instrument of delegation does not occur.

2. The Instrument of Delegation in Administrative Law

2.1 The Legal Doctrine on “Administrative Organs”

In order to better grasp the rather complex legal meaning of delegation in the functioning of public law organisations, one needs to dwell first on the notions of competence and administrative organ. The reason is that delegation is a decision whereby an organ transfers certain of its responsibilities to another organ or administrative unit and enables this latter to take decisions on its behalf.

The most common definition is that an organ is a differentiated unit of the administrative apparatus of a public body that has legal personality to which a number of functions or competences are attributed by legislation. Thus an organ is legally shaped as a set of attributions entrusted to it that are completed by a set of resources (financial, personnel and others) and a head of the organ (*titulaire*, incumbent), i.e. a physical person whose will and decisions are imputed to the administrative body itself. The organ may also be collegiate. In this case the will of the organ will be formed in accordance with the legally foreseen mechanisms for decision making (quorums, majority votes and so forth). The notion of imputation is a key one here. To impute means to assign vicariously to a person or other entity the legal responsibility for the acts of another, because of the defined legal relationships between the person so made liable and the actor.

However, not all public administration organs are entitled to impute their will to the administrative body in which they are integrated. The Italian administrative law doctrine, based on ecclesiastical canon law distinctions and in the German theory of the State, developed an organ theory in which distinction was made between administrative organs and administrative units (or *uffici*). The basic difference lays in that administrative organs’ will obliges (imputes), vis-à-vis third parties, the body in which they are located², whereas the expression of will by administrative units obliges at best only internally (working instructions), not with regard to third parties. In principle, only organs can produce administrative acts. The organ theory, however, has been debated over historically and has many critics mainly because it appears to be an excessively artificial juridical construct. Nevertheless it has the positive aspect of setting out certain organisational distinctness and rationality in public administration and of identifying the subject (owner) of the competence, jurisdiction or responsibility.

² A concerned citizen could invoke the estoppel doctrine to ascertain such imputation before court (at least in British law where the estoppel is a means to create exceptions to the *ultra vires* doctrine in public law when a legally incompetent authority creates the appearance whereby it could be understood by third parties that the authority was indeed competent), but this could not be possible in most EU continental systems where the lack of competence of the administrative authority is a cause for the act being null and void *ex tunc*.

2.2 The Notion of Administrative Act

Generally speaking, the notion of competence entails the notion of an administrative act, i.e. an organ has the competence or jurisdiction to dictate administrative acts. “Administrative act”, particularly the one known as the unilateral administrative act, is one of the most fundamental concepts developed by administrative law. No single and uncontroversial definition exists of the administrative act. It is mainly an elaboration by national courts’ jurisprudence and legal doctrine. One could say, however, that a unilateral administrative act is a decision or action of the administration that creates or modifies an individualised juridical situation. We will put aside other definitions of administrative acts, such as, for example, those acts through which the administration creates or modulates general, not individual, legal situations (also called *pouvoir réglementaire*). The notion of an administrative act is almost purely formal: an act is administrative because it is a measure taken or an action decided, while exercising public powers, by a public authority that is different from a judge or from the parliament (even judges and parliaments could also make administrative acts concerning their internal structures, i.e. when they act not as constitutional bodies but as organisational entities).

Administrative acts in order to be legally valid need to be produced by following a legally established procedure (administrative procedure), i.e. they are rule-bound as opposed to discretionary, even if in rule-bound acts discretion is not only possible but also necessary on many occasions, as laws cannot foresee all real-life situations. This is the reason why discretion has to be based and shall take inspiration from general administrative law or constitutional principles that are value-loaded. Otherwise discretion becomes arbitrariness.

In fact, legislation on administrative procedures and, in general, administrative law aims to confine and structure discretion in administrative decision-making and to prevent arbitrariness. Confining discretion involves setting the limits of discretion by the use of rules which rigidly and strictly define the area in which the decision-maker’s choice is to operate. Structuring discretion involves controlling the way in which the choice is made by the decision-maker. *Confinement* relates here to the notion of competence and *structure* relates to the notion of procedure. A public authority has to take decisions within the limits of its competence and by following a pre-established procedure (“due procedure”). Both competence and procedure are defined by law. Many judicial review cases of administrative decisions centre on assessing whether the authority acted within its competence limits and whether it followed the right procedural path.

2.3 The Notion of Competence (jurisdiction or responsibility or potestas)

From a legal point of view competence refers to the legitimate decision-making power the law confers upon an authority. From a managerial point of view, competence refers to the strategic management capacity or expertise to ensure effective performance. These two concepts, though related, are not identical. The same word ‘competence’ has different meanings when used within the domain of administrative law from when used in the management field. The former defines the right to manage, i.e. the right to decide. The latter defines the capacity to manage, i.e. the management capacities and skills for ensuring that results are achieved³.

The legal competence of an organ or administrative authority is established in legislation and defines the breadth of its powers in dealing and deciding over a given matter or policy domain and to produce administrative acts. Competence, a notion mainly coming from EU continental administrative law, may be likened to the notion of *ultra vires* and *intra vires* that in British law defines the notion of jurisdiction. The competence or jurisdiction of administrative authorities is founded in Constitutions and derived legislation issued by parliaments or established in “delegated legislation”.

The main obligation of a competent authority is to exercise its jurisdiction. The administrative authority cannot refuse that exercise or abstain from it, even if certain doubts could appear about whether an authority has or does not have jurisdiction over a given matter. In these cases the authority must act and, if a third party disputes the jurisdiction (be it an individual person or another administrative authority), legislation foresees mechanisms for conflict resolution (“conflict of attributions”) among administrative authorities or judicial review if the challenger is a third party.

³ See Les Metcalfe: “Law, Conservatism and Innovation: A Management Perspective” in European University Institute (EUI), Department of Law, Working Paper Law N0. 2001/12 on “Law and Public Management: Starting to Talk”. Workshop held at the EUI on 11-12 May 2001.

The criteria for determining the competence may be classified according to three elements: territory (*ratione loci*), time (*ratione temporis*) and contents (*ratione materiae*):

1. Territory: An administrative authority has competence only upon a given territory or circumscription.
2. Time: An individual becomes a competent administrative authority as from time he is appointed and up until he is removed. Temporary gaps may occur between the removal of an administrative authority and the appointment of his/her successor. As, notionally, no temporary void of responsibility may exist, the ceasing authority continues acting up until his/her successor takes office or someone else is appointed “ad interim”. Those acting or those “ad interim” can only decide upon ongoing ordinary business (*expédition des affaires courantes*, or *resolución de los asuntos de trámite*).
3. Contents: It is determined in legislation. Sometimes and for certain authorities it is the Constitution that delimits the competence. In any case the competence represents a sphere of matters defined by law (or secondary legislation) within which an authority can make legally valid decisions (administrative acts). A legal instrument shall define the limits of the jurisdiction attributed to an administrative authority. Although the elements of territory and time are important, the competence *ratione materiae* is the most relevant one for the notion of delegation, as delegation is delegation of parts (never all) of the contents of the competence to be exercised upon a given territory (all or parts of the national territory) and for a given period of time (not necessarily determined a priori).

Thus the competence:

1. Is established and delimited in a legal instrument;
2. Cannot be relinquished by the authority that owns it;
3. Its exercise is transferable (delegable) by that authority on its own decision (with the exceptions and within the limits established in legislation, if any);
4. It enables the holder of the competence to issue legally valid administrative acts; and
5. It is a condition for the validity of decisions.

2.4 Different Categories of Competence

Two broad categories of competence can be identified by looking at who is the owner of the competence: subjective and organic. The subjective competence refers to the attributions given by legislation to a public entity (for example, to central administration or to municipalities) that becomes the subject or owner of the competence whereas the organic competence refers to the distribution of the subjective competence of the entity among the different administrative organs within it (distribution of responsibilities among the different organs within the central administration or among the different organs within a municipality). The notion of organic competence refers mainly to an internal distribution of functions. The notion of decentralisation operates at the level of subjective competence. The notions of de-concentration and hierarchical delegation operate at the level of organ competence.

The above categories of competence admit variations so as to make it possible to establish a list that would include⁴:

- Exclusive competence: solely the organ that owns the attributions can decide, not others, not even via appeals. This competence cannot be delegated.
- Alternative competence: decisions can be made by two or more organs within the same entity.
- Shared competence: is the competence attributed to different organs regarding different phases of the decision-making process.
- Concurrent competence: it appears where different organs or different entities have competence on the same matter because of different legal entitlements, e.g. where different authorisations from different organs or administrative authorities are required for undertaking an economic activity. This is one of the issues that most disturbs efficiency in

⁴ This classification has mainly an Italian origin

the administrative decision-making process and where most criticisms arise against red-tape and overregulation. Most countries are attempting to overcome this by creating so-called “one stop shops” and regulatory reform policies.

- Substitution competence: the competence of a given organ cannot operate unless the organ that has the primary competence fails in acting.

2.5 The Notion of Administrative (or Hierarchical) Delegation

The delegation of competence from a public entity to another non-subordinated authority entails specific problems that are not the object of this paper (e.g. a central government institution delegates certain of its responsibilities to a local government authority). The same is true for the so-called “delegation of public services” in France or similar arrangements in Australia, Canada and New Zealand, an institution that overlaps and includes elements both of administrative delegation and contracting out the delivery of public services.

This paper focuses on the notion of delegation to different organs within an entity, because this is the kind of delegation that interests us in terms of improving performance of public institutions and in terms of overcoming the drawbacks described earlier above. One could call it “managerial” delegation insofar as it is intended to solve management problems without negatively affecting the legal certainty in the administrative decision-making process and without blurring the necessary clarity of the lines of accountability.

Delegation has a wide range of usages in common language, but in legal terms it has a more precise meaning. Within the legal domain we also need to distinguish its meaning in private and in public law. In this paper we will refer to the delegation in the field of public law and, more specifically in the field of administrative law, a meaning that is different from that in constitutional law. The delegation referred to here is a public administrative law notion, even if notionally it could be related to the “contract of agency”, a private law notion, with which the notion of delegation keeps similarities. The administrative delegation is also different from the constitutional delegation whereby a constitutional body (e.g. the parliament) delegates certain rule-making powers to a ministry or to the government as a whole to produce “delegated legislation”.

Traditionally the notion of administrative delegation was embedded into the notion of hierarchy, as delegation was a relationship that could only operate if those delegating and those delegated were linked by a relation of subordination of the latter to the former.

The notion of delegation also relates to the notion of competence, jurisdiction or responsibility of a given administrative authority, called in some national legal orders as “administrative organs” (their decisions are binding for the State and for third parties) so as to differentiate them from “administrative units” (their decisions are not binding except internally for those working in the organisation). Delegation means delegation of competences, i.e. delegation of decision-making powers in a given field.

The delegation to hierarchically subordinated organs presents several defining juridical features:

- 1) It is an entitlement established and delimited by legislation whereby an organ or authority is enabled to transfer, partially, the exercise of its competencies to a subordinated organ (notionally also to a non-subordinated organ); obviously, the delegating authority cannot transfer the totality of its competences to those it has delegated.
- 2) It is contingent regarding the specific domains upon which the competency is delegated, i.e. the delegating authority may choose to delegate certain domains of its competence, but not others, or certain procedural phases, but keeping the final decision for itself;
- 3) It is general, i.e. the delegated authority cannot delegate the resolution of a specific case in say procurement, but shall delegate completely a general power to carry out public procurement (be it below or above a certain monetary threshold);
- 4) The owner of the competency continues to be the authority legally bestowed with the competency, not the delegated one, which only can exercise the competency. Consequences of this are, for example, that the delegate cannot delegate, that the delegation is revocable at any time, and that decisions are considered to have been made by the

delegating authority. Most EU countries embrace the general public law principle against sub-delegation whereby *delegata potestas delegatur non potest*⁵ because given the fact that the person delegated has only a right to exercise the delegation, but he is not the “owner” of the competence, he cannot dispose in turn of the competence and sub-delegate it to someone else. This rule has exceptions if a law expressly permits sub-delegating certain decisions; another consequence is that the delegating authority can no longer exercise the delegated competence unless the delegation is revoked or recalled, as from the very moment that the delegation is published, the delegating authority becomes incompetent to take decisions.

- 5) Administrative acts that shall be dictated only on the basis of administrative discretion cannot be delegated (general rule) unless the law establishing the competence so permits (exception). This applies mainly to the capacity to issue regulations of general application and less so to unilateral individual administrative acts, which are rule-bound;
- 6) Certain national legal orders may require that delegation be justified and grounded on reasons such as technical, political, economic, social, etc⁶;
- 7) The delegation shall be published in the Official Gazette where the scope of the delegation shall be exactly and clearly set; the publicity of the delegation is essential as it is to have effects on the rights or interests of third parties. The competence is not delegated if it is not published. In public law appearances are irrelevant and cannot make good a lack of actual authority. In British Law, however, certain limited exceptions to this rule may be indirectly invoked via the institution of the estoppel (see above).
- 8) The competence to solve administrative recourses cannot be delegated.

2.6 Delegation of Competence and Delegation of Signature

The difference between delegation of competency and delegation of signature is also to be noted. The delegation of signature is not a real delegation of competence because the delegating authority retains the decision-making powers whereas the delegated person solely signs, on behalf of the delegating body and under his control, a decision already taken by the latter. Unlike in the delegation of signature, delegation implies transferring a legal and real power to decide. Unlike the delegation of competence, the delegation of signature can be sub-delegated to someone else.

2.7 Some Additional Practical Questions on Administrative Delegation

There are a number of additional practical questions that could be raised when it comes to making administrative delegation operational. For example:

- Can a proposed delegate refuse the delegation? Civil servants have their duties defined in legislation whereby, among others, it usually appears that civil servants have to accept any duty imposed lawfully on them by superiors. The acceptance of a delegation of powers or duties would appear to fall within that clause. If civil service legislation does not foresee such a clause, it may be established in secondary legislation or even in the relevant civil servants’ job description. It may also appear in the relevant field legislation (e.g. Public Procurement Act, Financial Management Act, Civil Service Management Regulations, Environment Act and so forth).
- Is the delegate obliged to sign his acceptance of the delegation? Normally he is not if the delegation is foreseen in legislation. If not, different practices appear in different countries.
- Is a superior organ obliged to delegate its powers to a subordinated one or to a civil servant? Normally not, as to delegate or not is a prerogative of a superior or, in other words, of that one who is the owner of the competence.

⁵ Powers delegated cannot be delegated in turn to someone else.

⁶ E.g. Spanish Law on administrative procedures of 1992 before being amended by a Law of 1999. In the current Spanish legislation it is no longer necessary to justify the delegation.

- In which fields can delegation be more functional? In principle, in any administrative field delegation may play a decisive role in speeding up administrative decision-making. In fact it is used in the majority of administrative settings. However, administrative delegation will work better in fields where there are pre-established norms and decisions are rather mechanical because of the fact that they are rule-bound. On the contrary, decisions on policies shall not be delegated, though policy-preparation actions usually are.

3. Contribution of Delegation to better Policy-Making and better Public Management

3.1 Administrative Reforms on the Politics-Administration Interface

Democratic public administration and reliable civil service entail striving in two senses. On the one hand, towards more structural-type changes aimed at building up democratic institutions ruled by law and able, at the same time, to provide the citizenry with a minimal standard of public services. On the other, towards more functional-type changes aimed at consolidating acceptable professional and ethical behaviours in public life, and at putting in place efficient public management methods. Both structural and functional aspects are intertwined as both pursue strengthening the public legitimacy of the State.

It is in the structural domain where the necessity of distinguishing between politics and administration appears more sharply, along with a number of equally important issues like the set of values linked to the rule of law principle, the representation of the general or public interest, the respect of civil rights, the equality before the law, etc., because all these aspects always demand direct policy interventions upon the structural elements of the State in order to be effective. Structural changes require policy design.

In the functional domain, in the domain of behaviours and efficiency of public management, it is not always necessary to intervene upon the structural elements of the State, even though it may be sometimes unavoidable. Functional changes require mainly managerial interventions on processes and working procedures, but they are directly dependent on sound policy prior interventions upon state structures and on enabling legislation on organisation and functioning of the administration and on administrative procedures.

The creation and development of the public administration system belongs principally to the structural domain of the State. The institutional development of the civil service is an essential part of the public administration system, because it entails creating a new power within the State, i.e. a bureaucratic, professional or technocratic power which has to enjoy a certain degree of autonomy with regard to the political power in order for the administration to work properly. The other essential part of the democratic State is, of course, the structural arrangements for democratic representation. In other words, the arrangements for politics as an expression of the societal pluralism. Therefore, the distinction between politics and administration, even though they often have common blurred boundaries in practice, belongs to the structural field of public life.

One major problem that Eastern European countries face when attempting to develop a professional civil service is to design an accepted and balanced borderline between the political levels of the administration and the professional ones whilst finding ways and means for making them work together in co-operative and constructive ways. Arbitrary politicised management of key administrative systems like the civil service and others has to be changed, although leaving room for the government to steer the public administration. This challenge has been addressed differently in different EU Member States⁷ whilst EU acceding and candidate countries are still striving to find an adequate way ahead.

In the context of needed reforms taking place or envisaged at the politics-administration interface, it would be a positive development if administrative legislation and practices were promoting instruments such as the delegation of administrative decision-making towards lower levels in the administrative hierarchy.

No administration can work effectively if all the decision-making power is wielded only by the top of the organisation. For an organisation to work smoothly it needs to delegate power down the hierarchical ladder. This delegation is also a condition of

⁷ For example, through cabinets either purely political or including seconded professional civil servants; through political appointments to clearly defined posts within the hierarchy; through appointing politically associated civil servants; by using a “pure” administrative model; through ‘delegation’ mechanisms, etc.

developing necessary policy-making capabilities and administrative management skills and responsibility that will not emerge otherwise.

Public administrations that want to evolve towards more effective and efficient problem-solving approaches need to strengthen the institution of delegation as a part of their institution building effort, which should run alongside the development of civil service professionalism and other administrative arrangements such as orderly policy-making procedures. Delegation should facilitate sound management and optimise the use of resources. Government takes policy decisions in order to bring about change. The effectiveness of policy depends on how well it has been designed. Quality considerations include: cost to the budget and the economy; whether implementation can be assured and controlled/enforced; interaction with other policies; legal quality criteria in the case that the policy leads to a legal instrument that the text responds to. All this needs the expertise that a professional civil service is meant to input into the policy-making process.

It is worth remembering here that a basic reason for creating a civil service system is to establish the status of those to whom the authority of the government is delegated, define their duties and accountability as well as their rights and protection against unwarranted pressure. This is a key element of democratic reforms. Staff who participate in policy development should have an appropriate professional level and be trained in impact analysis techniques. Staff who participate in law or policy implementation should have a clearly defined status protected by legislation. In either case, good legal arrangements for delegation may promote improved administrative practices that in turn may have positive operational consequences in organisational design and in developing an efficiency-oriented managerial culture and that may ultimately contribute to:

- An organisation of ministries whereby Ministers and policy staffs are freed from the day-to-day implementation of policies and can instead concentrate on devising policies, drafting statutes and overseeing their implementation.
- A public sector which, in the areas in which it operates, is given specific tasks to fulfill with a degree of management autonomy, within the framework of clearly laid out legal structures.
- An administration where an accountable and committed professional management takes root.

3.2 Policy-making and Administration

Politics and administration make inroads into each other. Should this be seen as having negative connotations? Perhaps it is worth remembering here that policy-making and administration are two different but convergent processes. In general, in EU Continental Member States, which have rather strong traditions in administrative law, policies are expressed formally through a law passed by parliament. In the traditional understanding of the separation between politics and administration, when a policy becomes law, it should be quite easy to delegate administrative decision-making powers down the hierarchical ladder in order to enable the administration to apply, enforce and implement the law (i.e. the policy). There is administrative legislation defining how these administrative decisions have to be taken and a clearly established legal scheme for delegating authority.

Does it mean that before a policy becomes a law the administration has no role? Does it mean that only politicians prepare and decide on policies? “Policy” describes political goals in operational terms. Many languages do not have separate words for “policy” and “politics”. In accepted usage in Europe, “policy” means “a course of action adopted and pursued by the government”. Policy is the expression of a political decision to guide the actions of public administration. A decision on policy will contain goals, a general framework for administrative action and decisions concerning “policy instruments”. “Policy instruments” are the tools that the government will employ to achieve the policy goals, such as law or regulation, public information, public services. All government activity has to be grounded in law, and in countries with a strong tradition in administrative law, policies are often expressed and discussed in legal terms. Thus policy making is closely linked to the process for the production of legal norms.

Policy is decided by politicians, not by the administration. Usually, constitutions designate Ministers, individually and collectively in the Council of Ministers, as decision-makers. Ministers decide on the content of the policy. However, the problems faced by Ministers are so complicated and technical that they have to rely on professional experts to assist them in making policy. When a problem is identified, Ministers set general guidelines for their professional experts who analyse the situation and provide Ministers with options for policy. Ministers decide which policy option will be adopted, but the procedures for policy-making are technical and administrative and subject to “design”.

It is vitally important to sustain the reality that Ministers and the Council of Ministers decide policy. But the necessary symbolism surrounding Government decision-making should not obscure the practice, common to all European Union Member States, that government policy-making follows a preordained administrative procedure. This is often a regulation of the Council of Ministers with concrete administrative components such as standard forms, standard circulation lists, fixed timing relative to meetings of the Council of Ministers, standards for the quality of analysis (e.g. estimation of budgetary cost, environmental impact statements etc).

One specific principle, common to all European Member States, and embedded in their procedures of policy making, is that cross-ministerial discussion of policy should be carried out before policy is decided by the Council of Ministers. Usually there is a principle that cross-ministerial discussion takes place at the lowest possible level; only when it proves impossible to reach an agreement is a question elevated to the next highest level. Leadership for this process is either assigned to the “originating” Ministry (e.g. in Germany), who has responsibility for piloting the issue through to Government agreement or is vested in the General Secretariat of the Government (e.g. in France). Cross-ministerial discussions can involve Ministerial “cabinets” where there are particular political sensitivities. Eventually all decisions reach the Minister or Council of Ministers, but in nearly all cases prior cross-ministerial discussion means that only a formal decision of approval is required. Government decision making is underpinned by administrative procedures. These procedures are consciously designed and maintained. When the performance of Government in making policy is considered weak, Member State Governments reform their policy making systems.

Numerous actors, both political and administrative, are required to play a role in developing and deciding on policy. Because today’s policy issues are so complex and technical, European Members States are strengthening the capabilities of these actors. In Member States, Ministers and State Secretaries are given some assistance through seminars and party channels. The resources available to Ministers can be enhanced (e.g. budgets for awarding contracts to study a problem, budgets for policy advisers). But, in EU Member States, civil servants usually make the most important contribution to Ministers for policy development. This is because civil servants:

1. Have most technical expertise and can best interact with other civil servants and experts; most European policy is decided at this bureaucratic level;
2. Provide continuity, which is especially important in the European context because European policy-making does not coincide with national political cycles; and
3. Supply expertise on implementation considerations so that policies are designed to be effective and efficient, and above all implemented.

The capabilities of civil servants to contribute to policy-making can be enhanced through improving skills (e.g. training, staff selection and recruitment), ensuring organisational specialisation (e.g. creation of policy units or “*chargés de mission*”), increasing budgets or strengthening intra-ministerial co-operation) or setting up administrative instruments such as delegation of responsibilities.

3.3 Politics and Management in EU Member States

The separation between politics and administration, though acknowledged as a goal in classical public administration organisational design, is not always recognisable in administrative (and political) practice. Democratic politics is a response to dilemmas of order and diversity. It is also an argumentative practice where public discussion and criticism, opposition, regulated competition, and conflict are tolerated, even encouraged, and institutionalised⁸. In contrast, the public administration is strictly focused on creating a public order that guarantees stability and continuity of the State and that is able to channel conflicts and solve them through legally established instruments. Within the administration conflict and dysfunction are deemed as pathologies, whereas orderly and clear distribution of responsibilities, the performance in keeping with pre-established rules and the subjection to a hierarchical ladder are considered as positive values.

⁸ Johan P. Olsen and B. Guy Peters: “Lessons from Experience: Experimental learning in Administrative Reforms in Eight Democracies”. Scandinavian University Press. Oslo, 1996.

This only shows that politics and administration are two different social realities that ideally must keep themselves separated from each other while developing mechanisms for a loyal co-operation that retains the subordinate character of the administration to democratic politics. Without good administration the legitimacy of democratic politics will be jeopardised insofar as democratic politics needs to produce policy results (among others, legal certainty, rule of law and satisfactory public services) that are not possible without a developed and professional administration. Democratic politics requires legitimacy by origin (free elections) but must complete its legitimacy by results. Both origin and results-based legitimacy need to be present. The administrative machine may lose its legitimacy too if it is not directed by democratic politics. That is why there is a need to establish co-operative working mechanisms between these two social realities.

Administrative systems in EU Member States shape the politico-administration relationships in different ways. Although they are difficult to classify, two basic models have been suggested⁹ for that interaction:

1. An *osmosis model* in which the political and administrative spheres are interwoven and the political and administrative elites are regularly interchangeable. By weighting together the differences and similarities, France, Germany, Sweden, Spain, Belgium and some other countries would be included in this model.
2. *Insulated compartment model* whereby politicians and administrative elites keep themselves rather strictly separated from each other with minimal mutual intrusions. For different reasons, the United Kingdom, Ireland and Italy would fall within this model, the UK out of a strict legislation that prevents civil servants from being involved in politics and Italy out of a traditional unwritten pact¹⁰ whereby civil servants will not encroach in politics and politicians will leave civil servants alone.

In either of these models, however, the frontier between politics and administration is a turbulent one where the interaction between these two different realities is constantly under strain and where inroads into either camp are commonplace, either openly or in a disguised way. Public management reforms during the past two decades in some OECD countries have produced results that are accounted for in opposite ways depending on who does the analysis¹¹. Some have seen management invading politics and taking over slices of political territory. Others suggest, on the contrary, that management reform has been a vehicle by which executive politicians have gained a tighter grip on their officials. Pollit and Bouckaert¹² suggest the convenience of examining that frontier more closely and they draw attention to the fact that the frontier between politics and administration is related to, but not necessarily identical with, the boundary between civil servants and politicians. If politics is defined, not by the people involved (elected or appointed politicians or civil servants), but by the processes involved, then both politicians and managers concur on the same field of activity or processes. Political (or better policy) activity, is not necessarily the same as party politics, but it involves the mobilization of various kinds of resources in order to achieve a chosen set of policy goals in a situation where the interest of the various parties concerned may potentially or actually conflict.

Public managers frequently have to be involved in such policy processes, even if they are and should be “politically neutral” in terms of party politics. In some cases this policy activity takes a great deal of management time. It is not self-evident in the experience of most OECD countries that politicians are willing to “confine” themselves to the role of “strategic steering heads” of their portfolios or that operational public management can be radically de-politicised. It is not self-evident either whether the development of bureaucracy has seen an ineluctable progression towards increasing political power for senior bureaucrats because it is genuinely difficult to measure the power of a group like the senior civil service¹³ because, for example, while organisational and policy entrepreneurship skills of bureaucrats in France and Germany appear to be more highly appreciated than in Belgium, Greece, or Italy, this might well be because of the character of the political systems and the framework of law, statutes, and organisations within which they operate.

⁹ See Yves Mény : « Politique comparée ». Montchrestien, Paris, 1987 . Also Jacques Ziller: “Administrations comparées: Les systèmes politico-administratifs de l’Europe des douze ». Montchrestien. Paris, 1993. Also Salvador Parrado Diaz: “Sistemas administrativos comparados”. Tecnos. Madrid, 2002.

¹⁰ Sabino Cassese: “L’Amministrazione pubblica italiana. Un profile”. Il Mulino, Bologna, 1994.

¹¹ See Christopher Pollit and Geert Bouckaert: “Public Management Reform: A Comparative Analysis”. Oxford University Press, New York, 2000.

¹² Op.cit.

¹³ See Edward C. Page and Vincent Wright: “Bureaucratic Élites in Western European States: A comparative Analysis of Top Officials”. Oxford University Press. New York, 1999.

What seems to be clear, however, is that in OECD countries when a policy becomes a law the application and implementation of the law becomes the major and almost exclusive responsibility of the professional civil service that operates within the administration, not of the politicians. The decision-making process becomes mostly or exclusively an administrative decision-making process, not political, by using several legal instruments among which the delegation of responsibilities appears in a prominent place.

3.4 Administrative Delegation in the workings of the European Communities

It is worth noting, as Ziller¹⁴ suggests, the multiplying effects derived from the European construction over the influence of the administration in politics. The Community decision-making process gives more powers to civil servants than to politicians (political administration or technocratic politics) and raises the need of adapting national administrations to the Community decision-making processes. The non-founding EU Member States quickly realised this and reacted consequently, whereas old Member States reacted more sluggishly. UK, Ireland, Denmark, Spain and Portugal soon realized that the Community politico-administrative system is polycentric and in networks¹⁵. This represents a major challenge not only for the European Commission, but particularly for the administrations of Member States. As Ziller pointed out, Weber-inspired hierarchical administrative mechanisms perhaps continue to be appropriate for national administrations whereas to play in the European context, new models and administrative cultures need to develop as Community policy negotiations are not essentially political negotiations (these take place mainly at the Council), but rather management networks or partnerships.

Effectively, decentralised implementation of Community policies has been the feature that has characterised the European Communities from the outset. This implies that national administrations of Member States are the administration of the common Community interests and the implementers of Community policies and Community law in the relevant territory. This requires that the actors involved in the implementation process all behave consistently. In so doing the capacity of information sharing by exchanging comparable data and trying to define problems similarly and adopting similar implementation procedures of the solutions agreed upon becomes crucial. This is the first step for confidence-building among national administrations, which is one of the Treaty obligations too. By bringing together various groups of national experts and officials, *comitology* already represents a case of administrative decision making by networks and cross-fertilisation among national administrations¹⁶.

If seen from a legal perspective, this administrative decision making process in networks might be deemed as presenting a legal gap because classical administrative procedures do not foresee such an approach. The problem then is how to ensure “due process” in decision making within a broader framework governed by the rule of law, a notion that refers here, among other things, to clearly established hierarchies in terms not only of hierarchy of norms, but also in terms of hierarchised administrative structures. It has been suggested¹⁷ that the above mentioned gap is not such a gap because there are legal responses to the problem due to the fact that at the centre of the network notion lays the notion of delegation, a well developed notion in classical administrative law that might perhaps need only some adaptation. Delegation is a must for any action within networks, but the classical balance among Community institutions struck in the Treaty design would, in principle, prohibit any delegation of powers.

The European Court of Justice¹⁸ (ECJ), however, in lieu of sticking to a strict literal approach in interpreting the Treaty, has adopted a functional approach to solve the problem by enabling delegation under two conditions

1. Delegation needs to be bestowed to organs (or agencies) dependent on the Commission, not the Council or others; and

¹⁴ Op. cit.

¹⁵ See also Carlo Nizzo: “National Public Administrations and European Integration” in SIGMA web site: www.sigmaweb.org

¹⁶ See R. Dehousse: “Regulation by Networks in the European Community: The Role of European Agencies” in *Journal of European Public Policy* 4 (2) of 1997, pages 246-267.

¹⁷ See Loïc Azoulay: “La régulation juridique d’une administration en réseau : Le cas de la Communauté Européenne » in European University Institute Working Paper No 2001/13 on « Law and Public Management : Network Management ». Workshop 11-12 May 2001.

¹⁸ See *Commission vs. Lisrestal*, C-32/95 P, Rec. [1996] I-5373, in particular the conclusions of the advocate general Antonio La Pergola.

2. These organs are supposed to carry out a cooperative action between the Community and the national administrations.

The ECJ makes a link between organisations that from a formal legal point of view could and should be treated as autonomous entities (i.e. the administration of the Commission and the administrations of Member States). In doing so the Court constructs a line of reasoning based on administrative science and organisational theory, which opens a legitimate way towards an administration that is multileveled, polycentric and functions via networks as opposed to hierarchical and self-contained (or autarchic). The question is now whether or not sufficient legal guarantees exist for these networks of administrative actions to be kept at the service of the public interest and to make them respect the guarantees of individual rights and legitimate interests or expectations. Perhaps these guarantees could be grouped under the general legal principle of “good administration”, which relates basically to procedural setups that take into consideration the demands of mutual confidence, transparency, impartiality and equity as well as the classical established by the ECJ jurisprudence on hearing the interested parties and giving reasons.

The ECJ goes beyond these ‘classical’ procedural guarantees by giving a new meaning to the obligation of giving a hearing to the interested party¹⁹. For the Court it is mandatory to hear the interested party not only because the party is entitled to be heard, but because the deciding authority (in this case it was the Commission) is obliged to inform itself adequately (“*examiner, avec soin et impartialité, tous les éléments pertinents du cas d’espèce*”, as the Court puts it, as something close, but different from “*le droit d’être entendu*”) before issuing an administrative act, particularly when the deciding authority has a great deal of free appreciation of the merits of the case (administrative discretion). Therefore, the hearing includes not only a dimension of protecting the rights of the party but it should also be understood as a source of information. This suggests a participatory scheme whereby certain partners shall be associated to specific decisions, a thing which ultimately echoes notions shaping good public management. Participation is relevant here insofar as it is directly linked to expertise or competence.

However, even if classical administrative law approaches could be modulated in order for them to support administrative procedures based on organisational networking, the problem of accountability in fragmented, non-hierarchical networks still remains to be adequately addressed and solved. In fact it is this accountability issue which is the one from which the majority of the troubles affecting the European Commission originate. This could perhaps be represented by the image of a building still under construction in which the idea of delegation is accommodated, but in which the accountability side that must accompany any delegation is still underdeveloped.

3.5 May “Delegation” as a legal instrument contribute to better performance in Central and Eastern Europe?

A common historical feature in Central and Eastern European countries in transition, including many acceding and candidates to the EU, was the lack of clear boundaries between party, administration and government. This fact meant that the State, public administration and political party apparatus melt into one. Such kind of amalgamation was challenged by social, political and economic forces leading finally to the collapse of the political system.

Although the transition in many social, economic and political realms is virtually completed in most of these countries, it is still incomplete in the field of state administrative structures and administrative instruments. In this field, the necessary disentanglement and differentiation between state, administration, government and political parties is not sufficiently advanced. The consequences of this are a rather considerable politicisation of the administration and, as pointed out above, a concentration of all kinds of powers at the (political) apex of the administrative structure, which is the thing that carries the negative consequences already enumerated above in this paper.

All European Commission reports on candidate countries, starting with the 1997 Opinion and followed by all progress reports subsequently released, have reiteratively pointed out a common insufficiency in these countries, namely the necessity of more reliable and professional State institutions and civil services, which implies a clear separation between political and professional personnel, each with clear and transparent regulations. There is a still unaccomplished goal in most countries: that of constructing efficient and reliable public administrations and professional and stable civil services under the rule of law which are able to perform efficiently internally and in the European context.

¹⁹ See Technische Universität München vs. Commission, C-269/90, Rec [1991] i-5469

Even if the boundaries between politics and administration in Member States are affected by the problems referred to above, in all of them the administration has reached a certain degree of professionalism and legislation and administrative practice guarantees certain clarity in the distribution of responsibilities between politicians and civil servants. In most acceding and candidate countries, however, political personnel, both elected officials and non-elected appointees, are often covered by weak and unclear regulations. This leads to unclear distribution of roles and competencies and to confusing interactive patterns between the two systems.

Some examples of dysfunctions resulting from such a situation include: political advisors taking decisions in the name of the administration or preventing professional advice reaching ministers; ministers delegating powers to political appointees who have weak clout over and scarce knowledge of the functioning of the administration; political advisers and politicians tending to act as line managers over the administration so disturbing the regular administrative operations. In many cases the status, role and attributions of political advisers are insufficiently or not regulated at all. In other cases, they are *de facto* or *de jure* assimilated to professional civil servants, a fact that may undermine the efforts that most countries are undertaking to build up merit-based civil service systems in which the principle of equal access to the civil service is also embraced. These dysfunctions in the emerging personnel management systems threaten to undermine the progress in developing adequate and accountable public management schemes and also negatively affect the functioning of administrative performance.

The conclusion would be that the delegation of administrative decision-making powers is a legal technique which may be able to enhance co-operation between politics and administration, both within the policy-making and in the domains of implementation of policy and law. Delegation, as a legal instrument, may also lead organisational and managerial consequences insofar as it suggests certain organisational patterns in terms of administrative structures and behaviour, namely because it is necessary to promote more effective and efficient decision-making processes while keeping lines of accountability within the administration clear and known. Administrative delegation, consequently, is a legal and managerial instrument that is able to bring about more quality both in policy-making and in administrative decision-making. Ultimately, delegation is able also to improve the quality of management and to increase administrative efficiency of public institutions.