**The Role of the European Parliament in the Implementation of Trade Agreements: Treaty Bodies and Parliamentary Control**

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1. Introduction

The role of the European Parliament (EP) in EU legislation and in the conclusion of international agreements has incrementally expanded in the wave of EU treaty reforms, which considered increased parliamentary involvement as a route to strengthening the democratic legitimacy of EU decision-making[[1]](#footnote-1), and in response to CJEU case law amending the powers of the EP.[[2]](#footnote-2) The Lisbon Treaty brought about the equal role of the EP besides the Council in ordinary legislation, and established a requirement of EP consent to the conclusion of certain international agreements, including – and this was new - international trade agreements (Art. 218 (6) a) v) i.c.w. Art. 207 (2) TFEU), in addition to its long-established right of being informed in all stages of the treaty-making procedures (Art. 218 (10)). Augmenting the EP´s role in the conclusion of trade agreements is particularly welcome given the proliferation of EU Free Trade Agreements (FTAs) Fsince the adoption of the Global Europe Strategy of the European Commission (COM) in 2006.[[3]](#footnote-3) Due to its enhanced competences in the conclusion of trade agreements, the EP made itself become actively involved in the negotiations. Thus, the EP became an active actor in trade policy, besides the executive actors of the EU, i.e. Council and the COM. The Lisbon Treaty´s rearrangement of the executive-legislative relationship brought about a rebalancing to the advantage of the EP in legislating and treaty making.

In contrast to negotiation and conclusion of trade agreements, the role of the EP in the implementation and operation of free trade agreements (FTAs) once concluded is low. Primary law does not provide for a function of the EP insofar, except with regard to adopting the framework for the agreements´ implementation, which the EU legislative is capable of adopting in the ordinary legislative procedure (Art. 207 (2) TFEU). Particularly with regard to the institutions established by FTAs for their operation and implementation, the EP is not involved. FTAs entail the establishment of common bodies, usually joint committees that are entrusted with certain tasks in order to amend, implement and adjourn the agreement. Decision-making powers transferred to common bodies facilitate the agreement´s implementation and application.[[4]](#footnote-4) These powers, however, go beyond mere executive implementation. They become increasingly comprehensive and include decision-making on significant issues and even rule-making and treaty changes. Nevertheless, the EP has no say in the decision-making process of these bodies, nor is it represented there, nor does it have meaningful, specific powers of scrutiny. The Union´s position to be represented on the EU´s behalf in the treaty bodies is adopted by the Council only (see Art. 218 (9) TFEU). This imbalance between a strong position of the EP in legislating and treaty-making and its weak position with regard to significant decisions adopted by treaty bodies raises concerns as to the democratic legitimacy of such decision-making and the respect of the institutional balance between the executive and the legislative in the EU. In most cases, the Commission represents the EU in these bodies, and the bodies´ decision-making is only steered by the position adopted by the Council on behalf of the EU.

The EP´s limited role in the decision-making of such executive institutions is in tension with its otherwise strong position in the negotiation and conclusion of trade agreements. In view of the fact that these executive treaty bodies are becoming increasingly important in the implementation of free trade agreements, the balance between the executive and legislative branches in trade policy is shifting back in favour of the executive branch. This chapter will therefore explore this change in the balance between the executive and the EP in more detail and develop ways in which the role of the EP in the implementation of trade agreements could be strengthened also insofar, in accordance with its power in treaty-making and as legislator.

This chapter therefore analyses and compares the functions of the EP in the negotiation and conclusion of FTAs to those in their implementation and operation (II.). To demonstrate the strong executive dimension of treaty bodies and the power shift to the benefit of the executive implied with them, the chapter then explores the role and decision-making powers of treaty bodies under the perspective of delegation (III.) as the exercise of public powers by treaty bodies results from a delegation of public powers to them.[[5]](#footnote-5) It will be shown that treaty bodies exercise significant public powers that have been conferred on them by broad mandates enshrined in trade agreements. Their increasing use strengthens the role of the executive to the detriment of the powers of the EP, as this use has repercussions to the EP's powers to amend treaties and to legislate. The final sections determine ways of protecting the prerogatives of the EP and recalibrating the balance between the executive and the legislative in the EU again: One is to constrain the use of delegation of powers to treaty bodies. The constitutional boundaries to delegation of powers in light of democratic legitimacy and institutional balance in the EU therefore be explored (IV.). The other way is to introduce mechanisms that safeguard the necessary parliamentary control, in order to offset the shift in balance (V.).

1. European Parliament´s Role in the Birth and Life of Trade Agreements
2. Preparation, Negotiation and Conclusion

The EP has substantially gained significance in the conclusion of international agreements through Lisbon, even though there still are areas of mere consultation. The distinction between a consent or a mere consultation requirement under Art 218 (6) TFEU mirrors the powers the EP has with regard to internal (legislative) decision-making. Accordingly, Art. 218 (6) a) v) TFEU stipulates a need for consent in case of agreements covering fields to which the ordinary legislative procedure (Article 294 TFEU) applies, or the special legislative procedure where the latter requires consent of the EP. Additionally, Art. 218 (6) precludes the EP from participating in the conclusion of agreements relating exclusively to the Common Foreign and Security Policy. Hence, Article 218 (6) reflects the internal division of powers between Council and EP (in legislating) and transfers it to the treaty making in external affairs. Thus, the EP and the Council have symmetrical powers in legislating and treaty making; they “enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties”.[[6]](#footnote-6)

Specifically, the EP enjoys two types of powers in treaty making: the right to be informed (Art 218 (10) TFEU) and the right to give or deny consent. The details of the information rights have been hammered out in the interinstitutional Framework Agreement on relations between the European Parliament and the European Commission of 20 October 2010[[7]](#footnote-7) (hereinafter Framework Agreement) with a view to accomplish equality between Council and EP regarding access to information.[[8]](#footnote-8) The right to be informed under Art 218 (10) “is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union’s external action and, more particularly, to verify that its powers are respected specifically as a result of the choice of legal basis for a decision.”[[9]](#footnote-9) These rights enable the EP to exercise not only ex post control functions, but also to play a significant political role from the very beginning of the negotiation process.[[10]](#footnote-10) The EP is given opportunity to respond even to the Commission´s or the High Representative´s draft of negotiating authorization or directives[[11]](#footnote-11), which requires the EP to have access to them, as stressed by the Court[[12]](#footnote-12). The EP, when assessing the functioning of the Lisbon Treaty, called for a sincere and active implementation of the right to be informed under Art 218 (10), to the effect “that Parliament be immediately, fully and accurately informed at all stages of the procedures for concluding international agreements, including agreements concluded in the area of CFSP, and be given access to the Union’s negotiation texts, subject to the appropriate procedures and conditions, so as to ensure that Parliament can take its final decision with an exhaustive knowledge of the subject matter”. It also emphasized “that for this provision to be meaningful, the committee members concerned should have access to negotiation mandates and other relevant negotiating documents“.[[13]](#footnote-13) As expected from the beginning[[14]](#footnote-14), the EP uses its position as a veto player and its information rights effectively to enter into a constant dialogue with the Commission, in particular via its Committee on International Trade (INTA committee), and to express its political preferences and ideas by resolutions from the start. Accordingly, the EP enjoys the right to “express its point of view”, and the COM is challenged to “take Parliament’s views as far as possible into account”.[[15]](#footnote-15) The Commission must keep Parliament regularly and promptly informed of the negotiations until the agreement is initialed (usually done by way of regular meetings with the ad hoc groups in the INTA Committee whose majority views the COM takes into account[[16]](#footnote-16)), and must explain whether and how the views and comments were incorporated in the texts and if not why.[[17]](#footnote-17) As a result, the EP contributes to policy formation also in informal ways and influences the content of a treaty under negotiation, in particular with regard to linkage of trade with social, labour, sustainability and environmental issues.[[18]](#footnote-18) The EP has on several occasions already denied to give its consent to international treaties.[[19]](#footnote-19) Since the EP has the capacity to influence the substance of agreements, its willingness to deny consent might, however, be reduced, considering the political costs of a veto for the EU ´s external credibility after sometimes protracted negotiations.[[20]](#footnote-20)

Thus, at least in preparing and concluding trade agreements, the EP has a considerable political function almost equivalent to the Council. This applies also to the decision-making on the provisional application of a treaty. Even though Art 218 (5) attributes the decision to the Council only, it is political practice nowadays that the Council will only activate a provisional entry into force of an agreement if the EP previously has consented also to this.[[21]](#footnote-21)

1. Operation and Implementation on International Level

In stark contrast to this decisive political and legal function of the EP in negotiating and concluding trade agreements, its part in the operational phase of such agreements once (provisionally) entered into force is very low and has hitherto not been the object of further demands by the EP, even though, as far as the internal implementation of international obligations resulting from such agreements is concerned, the EP is responsible in case their implementation requires change or adoption of secondary EU law. But on international level, the EP hardly participates in the daily life application and implementation of a trade agreement. Basically, of course, this is not to cause concern as the EP is not an executive or administrative institution. Applying and implementing rules is not the work of a parliament, neither on EU level nor on domestic level. Parliamentary function, however, pertains to controlling executive institutions also in their implementation of agreements as legislatures want to ensure that the executive does not exceed its powers and that policies obtain their objectives and meet citizen´s expectations.[[22]](#footnote-22)

The effective control the EP may exercise with regards to the operation of trade agreements is limited. The information requirement in Article 218 (10) does not apply in the implementation phase (with one exception). There are, of course, informal channels of information about the implementation of FTAs (like exchange with stakeholders, delegations, in-house research and workshops)[[23]](#footnote-23), and the EP expanded the task of the specific monitoring groups for the new, post Lisbon FTAs also to be important fora for discussing FTA implementation[[24]](#footnote-24), but these instruments of monitoring merely enable ex post control. A formal influence of the EP in the course of implementation, comparable to its position during the negotiation phase, is not foreseen. An extremely limited control capacity of the EP exists in particular with regard to the decision-making by treaty bodies established by trade agreements. According to Article 218 (9) TFEU, the decision that sets the EU position in the decision-making of treaty bodies is adopted by the Council only. The European Parliament is not involved, nor does it participate in the decision-making of the treaty bodies. It is only informed of the Council positions under Article 218 (10) TFEU. This rule provides for information “at all stages of the procedure”, which includes information on the positions taken by the Council in preparation for a decision of a treaty body, but may also include information on the Commission draft**.** In the past, the immediate disclosure of the Council´s common position to the EP was provided explicitly in Article 300 (2) ECT Amsterdam/Nice.[[25]](#footnote-25) Accordingly, the practice was to inform the EP about the Council decision mainly ex post facto**.**[[26]](#footnote-26) Even though the Lisbon Treaty no longer explicitly mentions the provision of information on decisions under Art 218(9), the level of information the EP gets about Council positions is the same as prior to Lisbon. The general information rule in Article 218 (10) TFEU aimed at increasing the information given to the EP, not at reducing it.

In any case, the EP assigns itself a right to information already on a draft Council decision under Article 218 (9). In Article 109 of its Rules of Procedure, it gave itself the right to have a debate and to issue recommendations once the Commission proposes a draft Council decision. This appears to be the EP´s response to the fact that the EP does not have a formal say in the adoption of such Council position, as the Council decides without participation of the EP, and as the EP is not present on international level when the treaty bodies subsequently adopt their decisions. Treaty bodies consist of representatives of the parties.[[27]](#footnote-27) Members of the EP are not present, nor do they have an observer status. The Framework Agreement foresees EP members as observers at international conferences, as part of the EU delegation[[28]](#footnote-28), but not in bilateral negotiations, nor within treaty bodies. Furthermore, even if the EP adopts a resolution giving recommendations to the Council, there is not agreement between Council, Commission of EP which could guarantee that the recommendations are taken into account. The rule provided in Article 109 of the Rules of Procedures is only binding for the EP; it is a unilateral act. The Framework Agreement entered into between the Commission and the EP does not provide for a right of the EP to follow up on its recommendations with regard to Commission´s drafts to a Council position under Article 218 (9) TFEU. The Framework Agreement only provides such a right with regard to the recommendations of the EP during the negotiating phase of an agreement.[[29]](#footnote-29)

The COM and the EP agreed in their Framework Agreement that the Commission keeps the EP systematically informed about meetings of treaty bodies set up by “multilateral international agreements involving the Union”; and the COM will “facilitate access as observers for Members of the EP” as part of EU delegations to meetings of such bodies. But both participatory rights are limited to multilateral as opposed to bilateral agreements and only apply if the treaty bodies “are called upon to take decisions which require the consent of the EP or the implementation of which may require the adoption of legal acts in accordance with the ordinary legislative procedure.”[[30]](#footnote-30) Hence, these procedures do not apply to treaty bodies established in bilateral FTAs[[31]](#footnote-31), and even if they did, due to their restricted ambit, they would not provide a general participation of the EP in the decision-making of treaty bodies established in bilateral Trade Agreements.

Another simplified procedure of entering into international obligations inherited from pre-Lisbon times is provided in Article 218 (7) TFEU. [[32]](#footnote-32) Under Art 218 (7) the Council may authorize the Commission to approve on the EU´s behalf amendments to an agreement where it provides for their adoption in a treaty body.[[33]](#footnote-33) Again, the EP is not involved in the Council ´s decision-making even though it concerns the change of an agreement that was subject to the EP´s approval. The EP is only informed by the Commission before the latter approves modifications to agreements.[[34]](#footnote-34)

In conclusion one can summarize that, when it comes to the EP´s control of the implementation of a trade agreement, there are no formal mechanisms which could ensure effective ex ante control by the EP. In international relations, ex ante control is particularly important as rules agreed with a third party cannot be changed unilaterally. The EP´s position in the operation of trade agreements, in particular as regards the decision-making of the treaty bodies does not allow the EP to have any meaningful influence on the substance of their decision. Effective control of the EU executive by the EP even ex post is not ensured. Whereas in the preparation and conclusion of a FTA the EP is fully involved and may be able to enforce its ideas and preferences (not least by threatening to deny consent to the agreement), once the FTA entered into force, its operation hardly can be accompanied in a meaningful, decisive way by the EP. The EP can raise concerns as to the implementation of an agreement only ex post and can take sanctions insofar within its general accountability mechanisms (e.g. inquiries, Art. 230 (2) TFEU, or the ultima ratio of a motion of censure, Art. 17 (8) TEU i.c.w Art. 234 TFEU).

This does not cause concerns as long as the powers of the treaty bodies only relate to executive implementation. Treaty bodies, however, are increasingly entrusted with rather political functions of discretionary rulemaking, treaty amendment and decision-making on quite substantial, essential issues. Their use insofar has expanded considerably with the new generation type of comprehensive Free trade Agreements since the EU-South Korea Agreement. Thus, one can perceive a strengthened position of the executive in the implementation of trade agreements, against which the lack of effective control powers of the EP insofar proves problematic. An increase of executive powers, in particular by empowering with more important powers, like general rulemaking or treaty amendment, raises the level of democratic legitimacy required as the necessary level of democratic legitimacy of exercise of public powers depends on the importance, relevance and legal effects of the specific tasks, functions and powers transferred to an executive institution.[[35]](#footnote-35)

Therefore, the next section will explore the considerably strengthened power of executive institutions in the implementation of trade agreements with the advent of the new generation of EU-FTAs in more detail, the cornerstone of which is the empowerment of treaty bodies, which has been expanded in scope and reach.

1. Strengthening the executive by delegating powers to treaty bodies
2. Treaty Bodies Implementation Powers: Amending and Expanding FTAs´ Regulatory Frame

Treaty bodies are executive institutions established in EU trade agreements, but also in association agreements and the like. One of the earliest and best-known treaty bodies is the Association Council in the Association Agreement with Turkey that - based on an explicit mandate in the Additional Protocol of 1970[[36]](#footnote-36) - lays down binding rules for the labour market access of Turkish nationals in the EU. The EU FTAs provide similar treaty bodies. Their use and the scope and breadth of their competences has been increased particularly with the EU FTAs of the new generation. The EU FTAs establish such bodies ever more frequently, in reflection of the international move towards delegation of authority to international actors.[[37]](#footnote-37) A trade committee has been set up in the FTA with Korea[[38]](#footnote-38) whose binding decisions concern customs duties[[39]](#footnote-39), but may also provide for treaty amendments and authoritative interpretations.[[40]](#footnote-40) The FTA with Canada (CETA), provides for a Joint CETA Committee and a system of specialised Committees to which are granted many functions. The same applies to the FTA with Singapore or Japan.[[41]](#footnote-41) These treaty bodies are authorized to make binding decisions on very diverse, even on rather fundamental issues. Their decision-making powers cover merely technical-administrative implementation of obligations already enshrined in the FTA, but they may also decide rather fundamental issues or issues of far-reaching significance, which may include adopting general rules that may interfere with fundamental rights of traders.[[42]](#footnote-42) Thus, treaty bodies may exercise regulatory and even legislative powers (i.e. powers to adopt general rules). Rule-making is implied e.g. in the CETA Joint Committee´s mandate to set out administrative and organisational aspects of the functioning of the Appellate Tribunal, including procedural issues[[43]](#footnote-43), or the Committee on Services and Investment´s mandate to establish a code of conduct for the investment Tribunal members that may address issues of disclosure, confidentiality, impartiality and independence, and procedural and transparency rules.[[44]](#footnote-44) The treaty bodies may also modify or amend the FTAs texts and their annexes[[45]](#footnote-45) and issue binding interpretations of the FTAs.[[46]](#footnote-46) Finally, the treaty bodies may also change the institutional architecture of the FTAs by dissolving or establishing further special committees that alter or take over the powers of the special committees already provided in the FTAs.[[47]](#footnote-47) This overview of the decision-making competences of FTA treaty bodies demonstrates their rather diverse functions, from mere administrative implementation, to adjudication[[48]](#footnote-48) and to decision-making on fundamental issues, and rule-making by generating norms and treaty amendments.

1. The executive nature of treaty bodies

The treaty bodies consist of representatives of the parties to the FTAs. For the EU, it usually is the Commissioner responsible for trade.[[49]](#footnote-49) Consequently, the treaty bodies are not actors which are independent from the parties´ will, but they exercise their powers autonomously, as their decisions are binding on the FTA Parties. Decisions taken by the FTA committees immediately become binding on the Parties under international law and must be implemented by them. Only in very few cases, due to special arrangements in the FTAs explicitly indicated there, treaty bodies´ decisions must be ratified or otherwise subsequently accepted or approved by the Parties in order to become binding on them.[[50]](#footnote-50)

The rules relevant for the preparation of this autonomous decision-making of the treaty bodies within the EU are Art 218 (7) and (9) TFEU. These rules again empower executive institutions, i.e. the Commission and the Council with the preparation and adoption of the EU decisions preparing the decision-making of treaty bodies on international level. As already shown, the EP is not involved. Hence, the decision-making competences of the treaty bodies constitute public powers transferred to the Committees by the EU (and, in case of mixed agreements, by the Member States) with the (provisional) entry into force of trade agreements. These powers are the object of delegation from the Parties to an international treaty to international institutions (i.e. FTA treaty bodies) as they are bestowed with powers of amending and implementing the international treaty that otherwise would have been the competence of domestic institutions of the Parties. The deliberate inclusion of rules for decision-making in treaty bodies in Article 218 (9) TFEU, the binding effect of their decisions simply by virtue of their adoption by the treaty bodies, and finally the wording in Article 218 (9) TFEU, according to which these bodies are responsible for the adoption of “acts having legal effects” (and not for the acceptance of an EU treaty offer), argue in favour of the adoption of legal acts as an expression of a genuine transfer of public powers to the treaty bodies by virtue of a delegation. Delegation in this context is understood as a transfer of decision-making powers to institutions on the basis of a legal act that forms its legal basis. The wording of Article 218 (9) entails a very broad notion of the type of powers that can be delegated to treaty bodies. Hence, Article 218 (9) and Article 218 (7) constitute special regimes for the EU internal adoption of secondary law from international organisations or treaty bodies.[[51]](#footnote-51)

1. Shifting the balance towards the executive, and back again

Transferring decision-making powers to treaty bodies conforms to the delegation of public powers from the legislative to executive institutions. This is confirmed when analysing their legal effects: Treaty bodies´ decisions may, not least in the view of the European Court of Justice, influence the content of EU legislation[[52]](#footnote-52) and form an integral part of the EU legal system.[[53]](#footnote-53) Hence, one must conclude that the treaty bodies when issuing binding decisions exercise domestically relevant public powers which have been delegated to them by the EU by way of establishing their competences in agreements. Their powers have been transferred on them by way of treaty making which is done by the EU legislative, as shown above. The EP therefore delegates part of its powers of legislating and treaty-making to treaty bodies by consenting to rule-making and treaty amendment mandates for them by its consent to EU trade agreements.

The new generation of EU FTAs have expanded their scope and reach. They do not only deal with tariffs and border issues of goods and services´ market access to the EU, but expand their legal obligations to regulating behind the border issues like professional qualifications, service provision, manufacturing practices etc. Therefore, their contents have an impact also on domestic regulation. As the new FTAs place some of the implementation, but also amendment and rule-making powers insofar in the hands of treaty bodies, the executive gains influence insofar, whereas the EP´s influence is lost. The EP does not take part in the treaty bodies´ rule-making and treaty amending, nor does it have effective control powers insofar, as shown above. In contrast, Commission and Council are directly involved in the treaty bodies´ decision-making and have decisive influence. This shift of power to the benefit of executive institutions has gained momentum with the proliferation of treaty bodies in new generation FTAs, both with regards to their sheer numbers, but also with regards to their ever comprehensive powers, based on quite broad mandates. The EP´s control powers over FTA treaty bodies have not been expanded along with the proliferation of EU FTA treaty bodies. Thus, the establishment of a sophisticated treaty body system in EU FTAs is capable of evaporating the EP´s legislative and treaty making powers. This calls for a rebalancing of the EP control powers. Its powers have to be strengthened again to catch up with increased use of delegation of rule-making and treaty amendment powers to the executive. Another way of rebalancing the power shift implied in comprehensive power delegation to treaty bodies would be limiting the scope of delegation. The latter will be analysed in the following section, before the last section will present proposals for increased EP involvement in the treaty body decision-making.

1. Constraining delegation to treaty bodies

The results of this chapter so far have shown that the EP´s powers may be endangered by delegation of comprehensive powers to treaty bodies. As EP´s powers and its accompanying prerogatives serve its democratic functions[[54]](#footnote-54), comprehensive decision-making powers of treaty bodies that go beyond mere executive implementation may violate democracy and institutional balance requirements of the EU Treaties. Therefore, these constitutional requirements necessarily limit the scope of delegation available to treaty bodies. Their use must be constrained. This section will explore the constraints to delegation to the executive and apply them to transfer of powers to treaty bodies.

1. Constraints to Delegation to the executive in EU law

Delegation of rule-making to executive actors on the basis of enabling acts is explicitly provided for since Lisbon in Article 290 and 291 TFEU, and in both cases it is (mainly) the Commission which is the delegate. Under Article 290, legislative acts may bestow the Commission with the authority to adopt delegated acts of general application that amend legislative acts (hence are quasi-legislative[[55]](#footnote-55)), whereas under Article 291 (2) the Commission may be entrusted with the power to adopt (individual or general) implementing acts, in continuation of the long established Comitology system.[[56]](#footnote-56) Besides, there exist other forms of delegation to adopt individual decisions or general rules, in particular to EU agencies.[[57]](#footnote-57) Common to these variations of internal delegation is the requirement of a basic enabling legal act that establishes the mandate of the delegate. The object of delegation is rather broad: the delegate may supplement or even amend the enabling act in its substance, or implement it by applying it to individual cases or by adopting general rules that add more detail in order to make general stipulations of the basic act applicable.

The delegation of decision-making powers to the treaty bodies fits to the basic structures of the internal types of delegation: Treaty bodies adopt binding acts also of general application to implement an agreement by specifying details or by amending its text; the competences for doing so must be provided for in the agreement entered into by the EU. In a democratic order such as the EU (Article 10 TEU), the exercise of public powers by executive institutions is legitimate only if their establishment is subject to a parliamentary decision, at least a parliamentary participation (see Article 289 (2) TFEU). This requirement is confirmed by Article 290, as the delegation requires a legislative basic act. Also the delegation to agencies presupposes the adoption of a legislative act.[[58]](#footnote-58) Under Article 291 TFEU, transferring implementing powers to the Commission involves the legislative by way of enacting the control mechanisms in a legislative act (Art 291 (3) TFEU). Indeed, the EP – besides the Council - is involved in the delegation of powers to treaty bodies as it gives consent to the empowering international agreements.

Delegation, however, never is unlimited. This insight can be learned from comparative constitutionalism, as well as from principal agent theory. Comparative constitutional analyses demonstrate that the delegation of powers from the legislator to the executive is subject to constraints. Domestic legal orders such as US constitutional law know a non-delegation doctrine which draws red lines.[[59]](#footnote-59) Functionally similar, the delegation of legislative powers to the executive is limited by the stipulations of Article 80 Basic Law in Germany, and by the doctrine that the legislator itself must regulate the essential aspects of a legal act.

Similar specific limits to (internal) delegation of rule-making to the EU executive do exist under EU law: Article 290 (1) TFEU provides that the essential elements of an area shall be reserved for the legislative; they shall not be the subject of a delegation. Thus, transferring rule-making on fundamental issues, i.e. the basic elements of a matter, to the executive is unconstitutional. They must be reserved to the legislature because of their political nature as they comprise political or strategic decisions on the fundamental orientation of a EU policy. Such decisions require immediate democratic legitimation as they imply wide discretion, in particular the need for political choices that weigh conflicting policy aims and interests. [[60]](#footnote-60) Likewise, the objectives, content, scope and duration of the delegation shall be explicitly defined in the legislative act; hence delegation must not be unspecified but determine and circumscribe precisely the powers transferred.[[61]](#footnote-61) Besides, delegation must be accompanied by control mechanisms. EP – like the Council - is entitled to revoke the delegation or reserve a veto so that it can review the exercise of delegated powers and of any discretion transferred insofar, Article 290 (2) TFEU. Such mechanisms counterbalance the derogation from the principle of separation of powers inherent in the delegation of rule-making powers to the executive, and thus ensure observance to the requirements of democratic legitimacy.[[62]](#footnote-62) Also the delegation of implementing powers under Article 291 (2), (3) and Regulation 182/2011 is subject to constraints: The adoption of implementing acts underlies control mechanisms which ensure scrutiny by the Member States according to the legislative rules adopted by the EP and the Council in said Regulation. And also the conferral of implementing tasks requires some precision as regards the scope of the powers and the provision of specific criteria to be followed. The scope of the powers and the criteria for their exercise must be set out in the enabling act with a certain degree of specificity; they must be “clearly defined”.[[63]](#footnote-63) These limitations ensure democratic legitimacy of delegated rulemaking and parliamentary control and are also founded in the constitutional principles of institutional balance of EU organs.

Constraints to delegation that result from democracy requirements and the institutional balance in the EU (initially termed "balance of power") are also enshrined in the Meroni case-law that restrains the delegation of discretionary powers.[[64]](#footnote-64) The guiding principles of Meroni still are pertinent.[[65]](#footnote-65) Meroni requires the transfer of power to be limited to "clearly defined executive powers"[[66]](#footnote-66). The powers transferred must be set out in precise terms, and their exercise must be carried out under strict observance of objective criteria determined by the delegator, without granting a wide margin of discretion.[[67]](#footnote-67) The use of the powers has to be supervised by the delegating authority (cf. the parallelism with Article 290). Meroni furthermore prohibits “an actual transfer of responsibility” by way of delegation, which would be the case if the delegate enjoyed a degree of latitude so that it actually exercised the political function that the EU Treaties allocate to an EU organ. Hence, delegation must not conflict with the division of powers provided for in EU Primary Law. The allocation of responsibilities in EU Primary law must be respected.

Article 218 (9) confirms that constraints to delegation are not limited to internal rule-making but do exist with regard to external action, too. It explicitly excludes changes to the institutional framework of an agreement from its application. Consequently, such changes to agreements must be entered into by using the normal treaty making procedure, requiring consent of the EP.[[68]](#footnote-68) “Particularly important decisions” - such as institutional changes - were not intended to be subject to the simplified procedure, but only “minor and quite technical amendments”[[69]](#footnote-69). Consequently, “particularly important decisions” cannot be transferred to treaty bodies.[[70]](#footnote-70) This limitation ensures the competences of the EP and thus the institutional balance.[[71]](#footnote-71)

From the above one must infer clear constraints to delegation: First, there is an EU non-delegation doctrine. The provision of the essential must not be delegated to executive institutions. Second, delegation presupposes control mechanisms. One can distinguish mechanisms of ex ante and of ex post control: Ex ante, the transferred powers must be determined with some precision. Transfer of powers requires the provision of specific criteria to be followed by the delegate. These criteria must be set out in the enabling act with certain specificity. Ex post oversight is implemented by monitoring and sanctioning powers of the delegator, like vetoes, or withdrawal of delegation. Delegation that allows for amending legislative acts must be subject to stricter control by the EU legislative than transferral of mere implementing powers that do not alter the substance of legislation or treaties, for reasons of balance of power. Requiring specificity and control mechanisms does not indicate clear, absolute limitations to delegation, but these constraints are interrelated: The less specific a mandate is drafted, or the more important decisions by a delegate are for the lives of people, the more control powers the delegator must have.

As these constraints to delegation are anchored in constitutional principles of EU law, i.e. democratic legitimacy and institutional balance, they must also be respected with regard to external delegation of decision-making on the international level.This can be stipulated at least with regard to external trade relations, as a consequence of the parallelism of the EP´s legislative and treaty-making powers and the symmetry of the EP´s and the Councils competences insofar (above II.).

Even though in traditional constitutional thinking external relations are a particular area of policy and accordingly subject to specific rules, which give a primacy to the executive (with the consequence of lower control standards for parliaments), such stance nowadays does not reflect the modern reality of international relations. The domaine of contemporary international legal rules considerably expanded and pertains to regulatory issues as can be easily determined when looking at the negotiation issues of trade agreements. Hence, parliaments should not be excluded from having a powerful position also with regard to external action.[[72]](#footnote-72)

In conclusion, constraints to delegation contain a prohibition against transferring the regulation of essential aspects of a policy on the executive (non-delegation) and requirements of specificity of delegation and of parliamentary control.

Similar conclusions derive from principal-agent theory: A principal will not delegate very sensitive decisions to the agent, and will exercise oversight over the agent. The principal will establish control mechanisms in order to avoid agency losses, which imply checks on the ways how the agent uses its powers[[73]](#footnote-73) which may translate into *ex ante* guidelines on how to exercise the mandate, and into *ex post* monitoring and even sanctioning. Accordingly, the principal will specify the mandate given to the agent as clearly as possible and determine the decisive objectives to be followed.

1. Consequences for conferring powers to treaty bodies

The constitutional limitation to delegation flowing from non-delegation doctrine prohibits a delegation of decision-making on fundamental issues to treaty bodies. Such decision-making has to be reserved to treaty making institutions (Council and EP) which means that general-abstract, hence quasi-legislative rule-making on essential elements of a policy, including considerable interference with fundamental rights, cannot be transferred to decision-making by treaty bodies. Amendments can be delegated to treaty bodies only with regard to non-essential issues.

Beyond such (relatively) absolute limitation, constitutional constraints to delegation require a certain degree of specificity of the competences and the establishment of effective control mechanisms to the benefit of the EP, too. The mandates for treaty bodies must be determined as precisely as possible in the agreements, with regard to both their scope and the criteria for their exercise. The delegation of generally applicable rule-making or of decision-making implying considerable discretion on part of treaty bodies presupposes control mechanisms for the EP, in order to ensure its impact on the substance of the treaty bodies´ decisions. As there are no such assurances for the EP´s functions under today´s rules, the current lack of involvement of the EP militates in favour of constraining the type of delegatable powers, in conformity with the type of executive powers conferred to the Council. Thus, the powers of treaty bodies must be limited to decisions of an administrative or executive kind that merely implement the terms of the agreement, in conformity with a formula used by the CJEU: “applying or implementing that agreement”.[[74]](#footnote-74)

Even though the theoretical conceptions both under a comparative constitutional viewpoint as well as under the principal-agent theory align in comparable insights, the constitutional reality of delegation practice very often gives testimony to a loss of control standards with regard to delegation.[[75]](#footnote-75) The current EU practice of increasingly making use of treaty bodies in order to delegate (“out-source”) decision making to international institutions in ever more substantive issues without assuring sufficient parliamentary control may be perceived as following this unfortunate trend. An explanation for this is the presence of multiple principals in EU law as their involvement in the delegation might necessarily lead to exceedingly broad and not specific delegations of regulatory power.[[76]](#footnote-76) Such a plurality of principals also exists in the case of EU Free Trade agreements.

1. Mechanisms to Strengthen the Role of the EP in the Operation of Treaty Bodies

An alternative, partly overlapping way of securing the EP´s prerogatives, and hence to safeguard the democratic legitimacy of treaty bodies´ decision-making, is to strengthen the EP´s effective control over their decision-making (beyond being informed and having a debate). This is particularly required in case of rulemaking or the exercise of powers implying wide discretion, especially if treaty bodies´ decisions could interfere with EU legislation. The improved mechanisms should allow a considerable, preferably ex ante, impact of the EP on the substance of the treaty bodies´ decisions. Such ways are conceivable on the international and on the domestic level:

Internationally, it could mean a direct involvement of the EP in the decision-making of the treaty bodies at international level. Members of the INTA or the responsible monitoring group could become part of the EU representative in the treaty bodies, at least as observers. As mentioned, the Framework Agreement foresees Members of the EP as observers at international conferences, as part of the EU delegation. This possibility could be amended to include observer status also in FTA treaty bodies. The EP would get direct information about the processes in the treaty bodies, which would increase the effectiveness of the EP´s control over the executive because it is better informed and can directly monitor the implementation of the EU position and EP resolutions. The EP, however, would mainly be limited to ex post control, whose effectiveness is undermined by the fact that a decision adopted in the treaty body cannot be overturned unless being replaced by a new one on whose adoption the EP does not have any influence. Hence, ex post control by the EP is effective only if there were routes in which the effect of a treaty body decision could terminated. Insofar, a possible remedy would be the suspension of a treaty body decision, in the same way as an agreement or parts thereof may be suspended, but for other reasons (because of acting ultra vires, or of adopting illegitimate rules). Such remedy, however, would be a novel feature of an FTA and hence must be explicitly enshrined and set out in more detail therein.

More preferable are mechanisms of ex ante control. Insofar, a suitable control mechanism could mean the introduction of (Joint) Parliamentary Assemblies with parliamentarians of the other party to the FTA.[[77]](#footnote-77) Such assembly could represent a forum for common discussion of democracy issues and of other non-economic concerns. Together with the establishment of such assemblies, which must be enshrined explicitly in the FTAs, the FTAs must also provide competences, in particular with regard to decision-making of treaty bodies. The FTAs could foresee – beyond information and comments on draft decisions - suspension or veto powers in case of rule-making decisions.

On domestic level, ex ante control could mean to formally involve the EP in the adoption of the EU position under Article 218 (9) TFEU. Steadfast, immediate and full information must be given to the EP also with regard to envisaged treaty body decisions. The full information of the EP by the Commission before approving modifications to an agreement that are authorised by the Council under Article 218 (7) TFEU[[78]](#footnote-78) must be expanded to include Article 218 (9). Furthermore, the EP should get the right to issue recommendations which the Commission is required to take into account in drafting a Council decision, and if not, the Commission must explain the reasons.

A further step towards increased scrutiny would be a formal EP involvement in the Council decision-making under Article 218 (7) and (9). If the decisions relate to rulemaking requiring – in their implementation - change of EU legislation, the Council decision must be subject to consent of the EP. Adding an EP consent requirement to the Council decision-making would resolve the imbalance between the EP´s strong role in legislating and treaty-making compared to its negligible role in the simplified procedures. The latter have not been amended by Lisbon to reflect the EP´s strengthened role in legislating and treaty-making.[[79]](#footnote-79) Such change would not require reform of EU Primary law, but such right could be enshrined into the Council decision concluding the FTA. There, one could establish a legal framework for the EP´s involvement in the simplified procedures. Alternatively, a Framework Agreement between the Council and the EP or, preferably, by virtue of a legislative act under Article 207 (2) TFEU, a general regulatory framework for the delegation of powers to treaty bodies could foresee an EP consent requirement to certain types of Council decisions under Article 218 (7), (9).

In addition to, and independently from new mechanisms, the EP´s monitoring of the operation of FTAs should intensely make use of the usual monitoring instruments, also with regard to treaty bodies´ decision-making, like oral questions, meetings with Commission and Council staff, or expert and stakeholder hearings, but also meeting with representatives of the other party to an FTA. The EP also should make its consent to FTAs subject to a commitment by the Commission and the Council to annually report on the implementation of the FTAs also with regard to their treaty bodies´ decision-making activities, which would add to the overall transparency/quality of information insofar.

1. Conclusion

As EU Trade Policy expands beyond border issues, EU external trade policy becomes another internal policy in need of strengthened democratic legitimacy. The role of the EP has to keep pace with the topical expansion of trade policy and its interference with formerly mainly domestic regulatory policies. From this perspective, the expansion and extension of autonomous decision-making powers of the treaty bodies must be viewed critically. The resulting upgrading of executive powers in rule-making and treaty amendments urgently needs to be balanced by extended supervisory mechanisms in favour of the EP in the operation phase of trade agreements.

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   See M. Krajewski, 2005 CMLRev 91; M. Pollack, The Engines of European Integration, 2003, 383 ff. [↑](#footnote-ref-1)
2. See e.g. CJEU, Case 138/79, paras. 33 f (consultation is essential formality, rooted in principle of democracy); Case 70/88, EU:C:1990:217 Case C-316/91, paras. 9 ff (extension of legal standing); C-658/11, EU:C:2014:2025, paras. 79, 81, and C-263/14, ECLI:EU:C:2016:435, paras. 73, 76 f (scope of information rights to include negotiation directives and provisional application, also in CFSP); C-65/90, ECLI:EU:C:1992:325, paras. 17 ff (participation also to amended drafts); most recently C-73/17, ECLI:EU:C:2018:787, paras. 28 ff, 32, 44. See also F. Terpan, in Vara/Sánchez-Tabernero (eds), The Democratisation of EU International Relations Through EU Law, 2019, 39; F. Terpan/S. Saurugger, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 77 at 85 ff. [↑](#footnote-ref-2)
3. Communication of the Commission, Global Europe: Competing in the World, COM (2006) 567. [↑](#footnote-ref-3)
4. See e.g. Art 26.1 (3), (4) Comprehensive Economic and Trade Agreement with Canada (CETA), or Art. 16.1 (3) EU Singapore Free Trade Agreement (EUSFTA). [↑](#footnote-ref-4)
5. See P. J. Kuijper, in Neframi/Gatti (eds), Constitutional Issues of EU External Relations Law, 2018, 201 at 225; W. Weiß, 2018 EuConst 532 at 534-543. [↑](#footnote-ref-5)
6. CJEU, Case C-658/11, ECLI:EU:C:2014:2025, para. 56. [↑](#footnote-ref-6)
7. 2010 OJ.EU L 304/47. For a detailed analysis of the Framework Agreement see the chapter by Marco Urban. [↑](#footnote-ref-7)
8. L. Puccio/R. Harte, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 387 at 395. [↑](#footnote-ref-8)
9. CJEU, Case C-263/14, ECLI:EU:C:2016:435, para. 80. [↑](#footnote-ref-9)
10. See para. 1 of Annex III to the Framework Agreement. [↑](#footnote-ref-10)
11. See Framework Agreement, para. 23 [↑](#footnote-ref-11)
12. C-263/14, para. 75 ff, also with regard to the CFSP. See also A. P van der Mei, 2016 MJ 1051 at 1066 f. [↑](#footnote-ref-12)
13. See para 46 of the EP resolution A7-0120/2014 on the Report on the implementation of the Treaty of Lisbon with respect to the European Parliament (2013/2130(INI)). [↑](#footnote-ref-13)
14. See E. Brok, 2010 integration 209. [↑](#footnote-ref-14)
15. See Framework Agreement, para. 24. [↑](#footnote-ref-15)
16. F. Hoffmeister, in Czuczai/Naert (eds), The EU as a Global Actor. Liber Amicorum Gosalbano Bono, 2017, 309 at 323. [↑](#footnote-ref-16)
17. See para. 4 and 5 of Annex III to the Framework Agreement. [↑](#footnote-ref-17)
18. See K. Meissner, EFAR 2016, 269; A. Ott, MJ 2016, 1009; G. Rosen, in Khorana/Garciá (eds), Handbook on the EU and International Trade, 2018, 117 at 118, 122 ff; R. Schütze, Foreign Affairs and the EU Constitution, 2014, 385 f; Wessel/Takács, 2017 EBLR 103 at 113 f. [↑](#footnote-ref-18)
19. See *C. Eckes* 2014 ICON at 904, 910 f., 917; *K. Meissner* 2016 EFAR at 269, 273 f [↑](#footnote-ref-19)
20. *C. Eckes* 2014 ICON at 917, 923 f. [↑](#footnote-ref-20)
21. See EP resolution of 13 March 2014 on the implementation of the Lisbon Treaty (2013/2130 (INI)), and para. 7 of Annex III to the Framework Agreement according to which the COM “shall inform Parliament as early as possible when it intends to propose its provisional application to the Council and of the reasons therefor”. The right to information with regard to provisional application was confirmed by CJEU, Case C-263/14, para. 76. For the EP´s role in the provisional application, see G. van der Loo, in Vara/Sánchez-Tabernero (eds), The Democratisation of EU International Relations Through EU Law, 2019, 210 at 222; R. Passos in Czuczai/Naert (eds), The EU as a Global Actor. Liber Amicorum Gosalbo Bono, 2017, 380 at 384, 387 et seq. [↑](#footnote-ref-21)
22. L. Puccio/R. Harte, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 387 at 390 et seq, 409. [↑](#footnote-ref-22)
23. L. Puccio/R. Harte, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 387 at 394 et seq. [↑](#footnote-ref-23)
24. They consist of INTA Members, staff working for the EP, and Commission staff. See L. Puccio/R. Harte, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 387 at 396, 400, 408. [↑](#footnote-ref-24)
25. See B. Martenczuk, in: Kronenberger (ed.), The EU and the International Legal Order, 2001, 141 at 150 et seq. [↑](#footnote-ref-25)
26. Hoffmeister, The EU in the WTO – A Model for the EU´s Status in International Organizations?, in Kaddous (ed), The EU in International Organisations and Global Governance, 2015, 121 at 124. [↑](#footnote-ref-26)
27. e.g., the CETA Joint Committee is composed of representatives of Canada and the EU, usually the Trade Commissioner (Art 26.1.1 CETA). [↑](#footnote-ref-27)
28. See para. 25 ff of the Framework Agreement on relations between the European Parliament and the European Commission, 2010 OJ L 304/47. Para. 26 provides - with regard to multilateral as opposed to bilateral agreements - that the Commission “facilitate access as observers for [MEP] forming part of Union delegations to meetings of bodies set up by multilateral international agreements involving the Union, whenever such bodies are called upon to take decisions which require the consent of Parliament or the implementation of which may require the adoption of legal acts in accordance with the ordinary legislative procedure.” [↑](#footnote-ref-28)
29. See para. 4 of Annex III to the Framework Agreement. [↑](#footnote-ref-29)
30. See para. 26 of the Framework Agreement. [↑](#footnote-ref-30)
31. *Accord* L. Puccio/R. Harte, in Costa (ed) The European Parliament in Times of EU Crises, 2019, 387 at 396. [↑](#footnote-ref-31)
32. Art. 218 (7) is a further simplification of Art. 218 (9) TFEU, see AG Sharpston, Opinion in Case C-73/14, ECLI:EU:C:2015:490, para. 67; AG Maciej Szpunar, Opinion in Case C-600/14, ECLI:EU:C:2017:296, para. 57. [↑](#footnote-ref-32)
33. See e.g. Article 2 of the Council Decision 2017/38 on the provisional application of CETA, OJ 2017 L 11/1080 according to which Article 218 (7) applies to the adoption of the CETA Joint Committee decision under Article 20.22 CETA to amend Annex 20-A. [↑](#footnote-ref-33)
34. See Annex III, para. 9 of the Framework Agreement between Commission and EP. [↑](#footnote-ref-34)
35. See with regard to delegation to the EU P. Lindseth, 8 EUConst (2012) 153 at 156 ff. See also German Federal Constitutional Court, Judgment of 30 June 2009 (Lisbon Treaty), Case 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 262. [↑](#footnote-ref-35)
36. Art. 36 ff Additional Protocol, annexed to the Agreement establishing the Association between the European Economic Community and Turkey, OJ EC 1977 L 361/59. [↑](#footnote-ref-36)
37. C. Bradley/J. Kelly, 2008 Law and Contemporary Problems 1. [↑](#footnote-ref-37)
38. Art. 15.4 EU Korea FTA, OJ EU 2011 L 127, 6 [↑](#footnote-ref-38)
39. Art. 2.5.4 EU Korea FTA. [↑](#footnote-ref-39)
40. Art. 15.5.2 EU Korea FTA regarding Annexes, Protocols and Notes; Art. 15.1.4 d) on binding interpretations. [↑](#footnote-ref-40)
41. Art 26.1 ff CETA; Art 16.1 ff EUSFTA; Art 22.1 ff JEFTA. [↑](#footnote-ref-41)
42. Art 21.7 (5) CETA: the Committee on Trade in Goods can endorse implementation measures for the mutual exchange of product warnings between EU and Canada which enable the Committee to set common standards including on protecting personal data and business secrets. [↑](#footnote-ref-42)
43. Art. 8.28 (7) CETA. [↑](#footnote-ref-43)
44. Art. 8.44 (2) and 8.44 (3 b) CETA. [↑](#footnote-ref-44)
45. See, e.g. Art. 8.1, Art. 8.10 (3), Art. 2.13 (1 b), Art. 4.7 (1 f) i.c.w. Art. 26.1 (5 c), Art. 23.11 (5), Art. 20.22 (1) i.c.w. Art. 26.1 (5 c) CETA. [↑](#footnote-ref-45)
46. Art. 8.31 (3), 8.44 (3), 26.1 (5 e) CETA. [↑](#footnote-ref-46)
47. See e.g. Art 26.1 (5 a), g) and h) CETA. [↑](#footnote-ref-47)
48. Under Art. 6.14 (4) i.c.w. Art. 2.8 (4) CETA, the Customs Cooperation Committee can resolve customs issues. [↑](#footnote-ref-48)
49. E.g. Art 26.1 CETA. [↑](#footnote-ref-49)
50. For a detailed analysis of the CETA insofar see W. Weiß, 2018 EuConst 532 at 536-539. In the FTA with Korea Art. 15.4 provides the binding force of the decisions of the Trade Committee. A requirement of prior acceptance by the parties is only provided with regard to amendments, Art. 15.5.2. For other agreements see J. Czuczai, (2012) Yearbook of European Law 452; N. Appel, Das internationale Kooperationsrecht der EU, 2016, 211 et seq. [↑](#footnote-ref-50)
51. See N. Appel, Das internationale Kooperationsrecht der EU, 2016, 324 et seq.; AG Maciej Szpunar, Opinion in Case C-600/14, ECLI:EU:C:2017:296, para. 58, 162; *A.* *von Bogdandy/F. Arndt/J. Bast*, (2004) 23 YEL 91 at 130; *A. Alemanno*, 2015 JIEL 625 at 636. [↑](#footnote-ref-51)
52. CJEU, C-399/12, ECLI:EU:C:2014:2258, para. 63. For some practical examples see J. Czuczai, ‘The Autonomy of the EU Legal Order and the Lawmaking Activities of International Organizations: Some Examples Regarding the Council’s most

    Recent Practice’, 31(1) Yearbook of European Law (2012) 452. [↑](#footnote-ref-52)
53. CJEU, Case 30/88, ECLI:EU:C:1989:422, para. 13. N. Lavranos, Legal Interaction between Decisions of International Organisations and European Law, 2004, 35 ff, 53, 93. [↑](#footnote-ref-53)
54. Also in external relations, see CJEU, Case C-658/11, para. 81. [↑](#footnote-ref-54)
55. Cf. J. Bast, 2012 CMLRev 885 at 917; P. Craig, The Lisbon Treaty, 2013, 264. [↑](#footnote-ref-55)
56. For the development of Comitology see C. Bergström, Comitology: Delegation of Powers in the EU and the Committee System, 2005; for its reform under the Lisbon treaty see C. Bergström/D. Ritleng (eds), Rulemaking by the European Commission, 2016. [↑](#footnote-ref-56)
57. CJEU, Short Selling. [↑](#footnote-ref-57)
58. For the EP´s involvement in setting up agencies see F. Jacobs, in Everson/Monda/Vos (eds) European Agencies in between Institutions and Member States, 2014, 201 ff. [↑](#footnote-ref-58)
59. For an overview see R. Schütze, 2011 Modern Law Review 661 at 663 ff. [↑](#footnote-ref-59)
60. CJEU, Case C-355/10, ECLI:EU:C:2012:516, paras. 64-67, 76, 78; Case C-240/90, ECLI:EU:C:1992:408, para. 37. Not entirely negligible interferences with fundamental rights amount to essential elements of a policy as well, CJEU, Case C-363/14, ECLI:EU:C:2015:579, para. 53; D. Curtin/T. Manucharyan, in Arnull/Chalmers (eds), The Oxford Handbook of EU Law, 2015, 103 at 112. [↑](#footnote-ref-60)
61. See J. Bast, 2012 CMLRev 885 at 914; CJEU, Case C-66/04, ECLI:EU:C:2005:743, para. 49, 62 - Smoke Flavourings. [↑](#footnote-ref-61)
62. AG Mengozzi, Opinion in Case C-88/14, ECLI:EU:C:2015:304, para. 45. [↑](#footnote-ref-62)
63. See CJEU Case C-66/04, ECLI:EU:C:2005:743, para. 48 ff, 62 regarding pre-Lisbon delegation to the Commission. [↑](#footnote-ref-63)
64. CJEU, Case 9/56, ECLI:EU:C:1958:7 = 1958 ECR 133 - Meroni. [↑](#footnote-ref-64)
65. P. Craig, EU Administrative Law, 2012, 155; CJEU, Case C-270/12, ECLI:EU:C:2014:18, para. 41 ff – Short Selling. [↑](#footnote-ref-65)
66. CJEU, Case 9/56, ECLI:EU:C:1958:7 = 1958 ECR 133 at 152; Joined Cases C-154/04 and C-155/04, ECLI:EU:C:2005:449, para. 90. [↑](#footnote-ref-66)
67. Discretionary powers are critical as soon as they imply a wide margin of discretion, see CJEU, Case 9/56, at 154; Case C-270/12, para. 50. For this understanding see also R. Schütze, (2011) MLR 661 at 674, note 89. [↑](#footnote-ref-67)
68. G. de Baere, in Schütze/Tridimas (eds), Oxford Principles of EU Law, Vol I, 2018, 1234 at 1246. [↑](#footnote-ref-68)
69. AG Maciej Szpunar, Opinion in Case C-600/14, ECLI:EU:C:2017:296, para. 58, fn. 30 [↑](#footnote-ref-69)
70. Opinion of AG *Cruz Villalon* in Case C-399/12, ECLI:EU:C:2014:289, para. 75. [↑](#footnote-ref-70)
71. Cf. Opinion of AG *Cruz Villalon* in Case C-399/12, ECLI:EU:C:2014:289, para. 80. [↑](#footnote-ref-71)
72. See C. Möllers, The Three Branches, 2015, p. 166 f. [↑](#footnote-ref-72)
73. R. Dehousse, The Politics of Delegation in the EU, in Ritleng (ed), Independence and Legitimacy in the Institutional System of the EU, 2017, 57 at 60 f; G. Brandsma/J. Blom-Hansen, Controlling the EU Executive?, 2017, 23 ff. The application of the principal-agent model to Comitology is not uncontested as the national representatives in the committees also engage in supranational deliberations and may prefer to search an EU solution over enforcing their national governments´ position, see P. Craig, The Lisbon Treaty, 2013, 55. This institutionalists´ view, however, confirms the principals´ need for effective control mechanisms over their agent. [↑](#footnote-ref-73)
74. CJEU, Case C-73/14, ECLI:EU:C:2015:663, para. 65. [↑](#footnote-ref-74)
75. B. Iancu, Legislative Delegation. The Erosion of Normative Limits in Modern Constitutionalism, 2012. [↑](#footnote-ref-75)
76. See P. Lindseth, Power and Legitimacy, 2010, 254. [↑](#footnote-ref-76)
77. As is provided for in the Cotonou Agreement. [↑](#footnote-ref-77)
78. See Annex III, para. 9 of the Framework Agreement. [↑](#footnote-ref-78)
79. Accord Alemanno, 2015 JIEL 625 at 636 ff. [↑](#footnote-ref-79)