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# *Delegated or implementing acts? Formal and substantial criteria in the systematic understanding of EU legal acts*

**Giuliano Vosa**

## ABSTRACT

In the aftermath of the Lisbon Treaty, the newly fashioned system of EU legal acts proves consistent with a process of ongoing de-formalisation in the relationships among the sources of law, involving Union law as well as, to a limited extent, national laws. However, the first ECJ judgement concerning the relations between Art. 290 and 291 TFEU takes an ambiguous position: despite the historical approach, a prognostic evaluation of the nature and quality of the power conferred is held possible in principle – though solved in the negative – prior to the adoption of the secondary act. The Court avoids dismissing the power to review a basic act, with a view to making a sharper use of it in case new patterns of *juridification* arise in the future (i.e. specific "types" of delegation are agreed to fall within the scope of Art. 290 TFEU). In spite of the effort to minimise the theoretical issues at stake, it seems blatantly difficult to reconcile the achievements of a non-formalised and poly-centric system of lawmaking with a prudent, mellifluous tribute to the national traditions and to the State-based understanding of legal acts.

**KEYWORDS:** European Union; legal acts; delegated acts; executive acts; sources of law; essential elements; European constitutionalism; juridification; judicial review.

# *Delegated or implementing acts? Formal and substantial criteria in the systematic understanding of EU legal acts*

*Giuliano Vosa*[*]

***I.*** *Introduction.* ***II.*** *The "essentiality" doctrine in the evolution of derived acts.* ***III.*** *The reasoning followed by the Court in C-427/12. Static* v. *dynamic interpretation: is a* prognostic assessment *ever possible?* ***IV.*** *An ambiguous, non-univocal systematisation of legal acts... or no systematisation at all? The Advocate General's Opinion.* ***V.*** *What the judgement does not say: multiple relations between individuals and power in a multifaceted legal order.****VI.*** *The unbearable lightness of being ... poly-centric: the intertwining of constitutional paradigms.* ***VII.*** *Conclusions. The Court as a strategic facilitator to further rationalisation of the system?*

**I.** ***Introduction.*** The Treaty of Lisbon attempts to elucidate the relations among legal acts in the framework of EU. A few terms of constitutional ancestry[1] have survived the

* Post-doc *Fellow*, Constitutional Law, LUISS Guido Carli University – Law Department – Rome. I would like to express my gratitude to the *Legal Service* of the European Parliament, especially Director dr. *María Jose Martínez Iglesias*, for their hospitality and their genuine advice and support, as well as Prof. *Koen Lenaerts* and the Cabinet of Advocate General *Pedro Cruz Villalón*, with special regard to Prof. *Juan Luis Requejo Pagés*, for their kind availability and their mayor observations, which have been crucial to the development of my research.

1 "Legislation" and "delegation" as constitutional concepts belong to a long-lasting tradition, one that refers to a formally constructed hierarchy of laws within the constitutional framework of the national States. Whether this is intended to bring an element of "formal hierarchy" into the system of EU legal acts, it is largely questionable. Whereas an element of "hierarchy" was clearly introduced through the "pure" constitutional terminology of the Constitutional Treaty (K. LENAERTS – M. DESOMER (2005) *Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures*, *ELJ*, 11-6, 744f., 754) more caution is needed with regard to the Lisbon Treaty. Some elements of formal hierarchy have been recognised by R. BARATTA (2011) *Sulle fonti delegate ed esecutive dell'Unione europea*, *Il Diritto dell'Unione Europea*, XVI, 2, 293f., at 296-297; P. CRAIG (2011) *Delegated acts, implementing acts and the new Comitology regulation*, *ELR*, 5, 671f., at 671-672; see also P. CRAIG (2013) *The Lisbon Treaty (revised edition): Law, Politics and Treaty reform*, *Oxford Press*, 247f.; H. HOFMANN (2009) *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology meets Reality*, *ELR*, 15-4, 482f.; all of them with due care. However, we must note (R. SCHÜTZE (2011)*"Delegated" Legislation in the (new) European Union: a Constitutional Analysis*, *The Modern Law Review*, 74-5, 661f., at 671) that "a hierarchy of norms" is the "…answer to the question of the normative relationship between the enabling act and the delegated act, meaning that the latter cannot amend the former… In national legal systems, this relation is (has traditionally been) articulated in formal terms, that is, when an act is named "delegated" it cannot amend an act which is called "legislative". Conversely, no such relation can be said to take place in the EU legal order: delegated acts are not forbidden, but actually meant to "amend and supplement" the basic act. In the post-State era the logic behind the term "hierarchy" looks slightly different, as States lost their monopoly on the exercise of public power, which questions the value of the model itself. It remains then to be understood to which extent the pair "legislative"–"delegated" keeps its conceptual value in the post-national constitutional framework. National constitutional doctrine may be of help in dealing with such conceptual ambiguity: J. BAST (2012) *New categories of acts after the Lisbon reform: Dynamics of parlamentarization in EU Law*, *CMLR*, 49, 885f., at 921-924 (and see also J. BAST (2003) *On the Grammar of EU Law: Legal Instruments*, NYU *Working Papers*, n°9, at 25, analysing the relation between implementing acts and basic acts by reference to Spanish law, namely by comparison with *decreto legislativo*) applies a domestic (German) law test showing that a "hierarchical distinction" among legislative and delegated acts would be possible according to "the constitutive conditions" fixed in the basic act and to the derogatory force that the delegated act is endowed. Accordingly, a proper hierarchy between delegated and implementing acts would not be possible so long as the respective delegation clauses are located in the same enabling act: in that case, they would be both capable to amend the basic act if the latter so provided; which is true in practice, though inexplicable within (that) theory. As further discussed below, it seems that, when faced with the European Union context, constitutional law concepts need to be re-elaborated in a historical perspective. The idea

impact of the "de-constitutionalisation"[2] that the Constitutional Treaty has undergone; the apparent chaos reflects the tangled intertwine of diverse models for producing law, provided that a profound migration, perhaps irreversible, from domestic to global paradigms for law-making is taking place.[3]

The C-427/12 case recently debated at the CJEU provides the opportunity to follow the path of such migration more accurately. It originates from Regulation No. 528/2012 of the European Parliament and the Council, of the 22nd of May 2012, concerning the making available on the market and use of biocidal products. The Regulation was adopted under the ordinary legislative procedure (Art. 289 TFEU). As a general principle, the "costs of the procedures associated with the operation of this Regulation need to be recovered from those making biocidal products available on the market and those seeking to do so in addition to those supporting the approval of active substances". In this regard "specified tasks with regard to the evaluation of active substances as well as the Union authorisation of certain categories of biocidal products" have been assigned to an Agency. The Agency is entitled to levy fees for "its action in the respective procedures for *(i)* the approval of an active substance or making subsequent amendments to the conditions of approval of an active substance, *(ii)* renewal of such an approval, *(iii)* European Union's authorisation for biocidal products, *(iv)* renewal and amendment of

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behind this article is that profound changes have been affecting constitutional law, European and domestic alike, during that period and a historically-sensitive approach would help solving the "hesitations" as to "transplant legal consequences familiar from national constitutional law" as the same A. says (925).

2 Following the rejection of the Constitutional Treaty, the European integration went through a process of "de-constitutionalisation" affecting both the wording of the Lisbon Treaty and the methods for seeking consensus towards the ratifications. See M. FRAGOLA (2008) *Osservazioni sul Trattato di Lisbona tra Costituzione europea e processo "decostituzionale"*, *Diritto Comunitario e degli scambi internazionali*, 205f.

3 R. SCHÜTZE (2005) *Sharpening the Separation of Powers through a Hierarchy of norms?*, *EIPA Working Papers*, n°1, when referring to the Constitutional Treaty, ties (at 6f.) the hierarchic type of relations among sources of law to the separation of powers doctrine as arisen in parliamentary democracies. The A. (at 5) reminds that such doctrine has been construed in the perspective of the national State, to which the "functions" attached to each "power" have been ultimately attributed. Accordingly, the concept of legislation refers to a "parliamentary conception" and to a "functional conception". The former may be related to a formal scheme: whatever a Parliament names "legislation" is legislation. The latter attaches substantive value to the term, namely referring to a general and abstract discipline of a subject-matter. A formal *versus* a substantial notion of legislation have indeed been intertwining throughout the history of constitutional law (see also A. TÜRK (2006) *The Concept of Legislation under European Community Law*, Kluwer, at 77f., 187f). Which is the privileged model in the Lisbon Treaty? True that the Constitutional Treaty had provided a consistent formal scheme to legislation, which seemingly inclined towards a "parliamentary concept" (R. SCHÜTZE (2005)cit., at 10); yet a material conception of legislation was inherent in the idea that the divide between legislation and implementation ought to be drawn according to "the democratically-most legitimate decision-making procedure, and in the shape of a legal instrument reflecting this situation in its name" (K. LENAERTS – M. DESOMER (2005), cit., at 750). The correspondence of formal and material paradigms in construing the system of EU legal acts is therefore presented as a ultimate goal in the light of what national constitutional law has experienced so far. Nevertheless, a fundamental difference between EU and States' framework for law-making deserves to be highlighted: the former responds to the rise of social pluralism and is poly-centric in nature, whilst the latter has been shaped (a few centuries prior) in a strongly unitary fashion, and all its key concepts alike. To which extent such correspondence can be achieved, will be further discussed below.

such an authorisation, and (*v*) establishing technical equivalence of active substances". In order to avoid distortions within the internal market, "... it is appropriate to establish certain common principles applicable both to fees payable to the Agency and to Member States' competent authorities, including the need to take into account, as appropriate, the specific needs of SMEs [small and medium-sized enterprises]". In particular, Art. 80, "Fees and Charges" authorises the Commission to adopt the above said implementing regulation on the basis of the aforementioned principles, according to the examination procedure (as further specified in Art. 82).

A secondary legal basis is issued under Art. 291 TFEU (implementing acts). According to the executive clause, the object has to refer to the "fees payable to the Agency" including an annual fee for EU authorised products ... and a fee for applications for mutual recognition". The scope of the implementing act is limited to the "fees paid to the Agency"; further discipline is laid down with regard to the amount and structure of the fees, the discipline for reduction, reimbursement and exemption (total or partial), the possibility of a duly justified derogation, the publicity and the deadline for payment.[4]

What the Commission challenges is the type of delegation provided: in its view, the nature and quality of the power conferred would have required to use Art. 290 TFEU (delegated acts) as the legal basis.[5] In that case, the Commission would have been entitled to supplement or amend the basic act to the limit of "new essential elements", whereas Art. 291 TFEU allows to a mere "implementation".

In the view of the Commission, delegated powers are "quasi-legislative" in nature and intrinsically differ from purely implementing powers. The distance between the two types emerges in the definitions laid down in the Treaty: it refers to the very "nature" of the power conferred, so that a mistaken legal basis would amount to "a failure to comply with the system for attributing powers" established in the Treaty.[6]

Pursuant to an exam of the delegating provisions, and having regard to the general context of the basic act, the Commission argues that the delegating clause laid down in the Regulation necessarily leads to an act "supplementing or amending certain non-essential elements" within the meaning of Art. 290 TFEU, rather than to a mere "implementation" of the Regulation in question. In support of this position, two textual arguments come at stake, both grounded on the basic act: 1) the Commission is

4 Judgement of the CJEU, *Commission* v. *Council* and *Parliament* ("*Biocides*") C-427/12, 18th March 2014, at para. 2-8 (*Legal context*).
5 *Ibid*., at 10-11 (*Procedure*).
6 *Ibid*., at 21-22.

empowered to settle rules concerning other sources for funding the Agency (in addition to the mentioned fees) and no criteria are given for those rules; 2) however, the guidelines laid down in the Regulation are indicated as "principles" in the text of the act itself, thus allowing the Commission to an activity which may qualify as development of a legal principle. Therefore, the Commission maintains, such an activity must be broader than a mere implementation.[7]

The European Parliament and the Council stand against this claim. Noteworthy that the EP takes a "co-legislative" attitude: it defends the deal agreed upon with the Council in the negotiations, although it is entitled to more incisive powers under Art. 290 TFEU – that is, should the Commission's version be endorsed by the Court – than under Art. 291.[8]

***II. The "essentiality doctrine" in the evolution of derived acts.*** The case at stake clearly involves delicate issues of constitutional relevance, as it refers to the lengthy inter-institutional diatribe on the nature and effects of the delegation of powers and on the scope of the provisions concerned. In this respect, special attention must be paid to the debate on the concept of "essentiality" as emerged in the case law.

Indeed, in the understanding of the parts and of the Court itself, it seems that the "essentiality doctrine" stands as a benchmark, in theoretical and practical terms.[9] The

7 *Ibid*., at 24-30.

8 It is worth recalling that, if one compares the two procedures – delegation under Art. 290 TFEU and implementation within the scope of Art. 291 – the former gives a little but decisive procedural advantage to the Commission, as both revocation of the delegation and opposition to the delegated act require a positive statement expressed by at least one of the co-legislators through qualified majority. Conversely, under the examination procedure (Art. 5, Reg. 182/2011 of the EP and the Council, 16$^{Th}$, February, 2011) if no opinion is delivered pursuant to Art. 5, para. 1 the draft implementing act can be opposed by the examination committee by simple majority of its components (Art. 5, para. 4, lett. c)) so as to prevent it from entering into force. Thus, the adoption of an implementing act can be opposed by simple majority (of the members of the examination committee); whereas a delegated act can be blocked by qualified majority (of either co-legislator) only. Worth noting that the European Parliament acts in defence of the deal achieved with the Council in the legislative stage: the agreement on the procedure (the "meta-norm") is part of the "essential points" to be regulated in the legislative stage as part of the "essential elements" of the discipline. As numerous interviews with the kind collaboration of the EP's *Legal Service* have clarified, the procedural knot is one of the most delicate and hotly debated issues in the legislative stage. This helps outlining the material origin of the meta-norms, which will be further discussed below. On the Parliament's procedural advantages under Art. 290 with respect to Art. 291 TFEU, see R. BARATTA (2011), cit., at 302; H. HOFMANN (2009) at 492-493; P. CRAIG (2011) at 683.

9 See, for instance, at 23, the formula "the choice made by the EU legislature to confer on the Commission the power to adopt a delegated act or an implementing act must be based on objective and clear factors that are amenable to judicial review" is a perfect quotation, though not expressed, of the previous case-law on essentiality (Judgement of the CJEU, *Parliament v Commission and Council*, C-355/10, September 5$^{th}$ 2012, par. 67) as further discussed below. Assessing the structural continuity between pre- and post- Lisbon regimes: M. KAEDING – A. HARDACRE (2010) *The Execution of Delegated Powers after Lisbon. A Timely Analysis of the Regulatory Procedure with Scrutiny and its lesson for Delegated Acts*, EUI Working Papers, *RSCAS* 2010\85, at 15f.; W. J. M. VOERMANS (2011) *Delegation is a matter of confidence: The new EU Delegation System under the Treaty of Lisbon*, *European Public Law*, 17-2, 313f., at 314f.; S. PEERS – M. COSTA (2012) *Accountability for delegating and implementing acts after the Treaty of Lisbon*, *ELJ*, 18-3, 427f., at 445-446.

presented case is nevertheless relatively new, for it concerns abstract scrutiny of the boundary between two types of secondary measures. Affinity with the essentiality doctrine can be asserted (only) if a systematic approach is taken; that is, if one looks at the delegation as a tile of a bigger mosaic, a part of a structured system.

In the attempt to draw the contour of the mosaic, two alternative paradigms emerge. It is possible to think of the system of legal acts as a formal construction, whose parts are mutually structured in a well-defined hierarchic fashion; in this case, a static concept of "essentiality" is at stake. Conversely, it may be held, the relationships among Treaty-based legislation and the variety of secondary measures may be read as parts of a legal order *in fieri*: thus recalling the evolutionary path of secondary legal based legislation. In this case, a dynamic concept of "essentiality" has to be preferred. Indeed, the latter seems to be more favourably arguable from the Court's case law so far.

Since *Köster*,[10] the practice of delegation enjoys a twofold legitimacy: it is acknowledged as stemming from "legal concepts recognized in all Member States"[11] and at the same time as functional to the achievement of new formulas of "institutional balance". Throughout the following decades, the concept of essentiality has been provided with more articulated structures. The locution "new essential elements" has come to indicate the limit to the delegation: secondary law can be issued as long as it does not bring new essential elements to the substance of the basic act.[12] Delegation was

10 Judgement of the CJEU, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* c. *Köster*, C-25/70, 17th December, 1970.

11 At 6 of the part named "*The question relating to the management procedure*".

12 In *Köster* the Court went to say that, in order for the Treaties to be respected, it was only necessary that the "basic elements of the matter to be dealt with" be adopted under the procedure provided for by the legal basis set in the Treaty. This can be seen as an empiric version of the *reserve de loi*, though phrased in strictly pragmatic terms and still conceptually rough. It must be noted that this ruling paved the way to numerous implementing procedures being used with remarkable discrepancy for each of the legal basis provided for. The border of "essentiality" was explicitly said to allow the Commission to broader powers in areas where the balance *vis-à-vis* the Council – that is, the divide between Community competences and Member States' domain – was perceived as leaving room to the former. See, for instance, Judgement of the CJEU, C-23/75, *Rey Soda* v *Cassa conguaglio Zucchero*, 30th October, 1975, at 11-16, concerning specific measures related to agricultural policy, whereas at 9 it is expressly stated that the objective of Art. 155 (allowing delegation under TEEC) is "the preservation of the balance between the Council and the Commission". It seems like the delegation – and the procedural differentiation that it entails – is instrumental to a fine-tuned institutional balance. This can be seen as a consequence of the arising complexity that legal pluralism generates, in domestic systems and in the European context. Such phenomenon cannot but affect the concepts attached to legislation. The background cemented in domestic constitutional traditions – in particular the alleged unity, generality and justness of the law – is being challenged and new grounds are broken for the differentiation of the applicable law. Such differentiation, within the limit of a "counterpoint" (M. POIARES MADURO (2003) *Contrapunctual law: Europe's Constitutional Pluralism in Action*, in N. WALKER (eds.) *Sovereignty in Transition*, Hart publishing, 501f.) is looked at as the main possibility to foster conciliation of opposite positions in a single, yet pluralistic, legal system. A constellation of diverse institutions (J. HABERMAS (1998) *Die post-national Konstellation. Politische Essays*, Suhrkamp; but see the speech at the *Kulturforum der Sozialdemokratie*, Berlin, 5th June 1998, online at http://library.fes.de/pdf-files/akademie/online/50332.pdf) has replaced the single "legislator" as construed in national constitutional law. This points to the transition from a monistic system for law-making to a poly-centric one, in which competition and struggle among parties are as unavoidable as vital to the

then fully recognised as a new tool to create law in a rapidly evolving scenario, where the Member States' autarchy in law-making was being challenged by supranational and intergovernmental authorities, as well as from infra-national levels.

Consequences of that became evident since the end of the 20th century. "Merely" implementing powers have progressively differentiated from "broader" delegations allowing to a "wider margin of manoeuvre" for amending the basic act. This process of differentiation is coupled with a trend toward the alignment of essentiality and representativeness in the decision making: the more "essential" is a provision contained in a legal act, the more "representative" needs to be the process leading to the adoption of such provision.

This passage deserves to be further dwelt upon. "Representativeness" is to be read in a manifold perspective, for it can be measured along different paths. Cleavages of direct parliamentarisation have been established through the empowerment of the EP and the direct involvement of national parliaments in the law-making, including (to a lesser extent) executive proceedings. On the other hand, widely spread inter-governmental practices and the proliferation of "special legislative procedures" display the robustness of national indirect legitimacy, that the governments are deemed to enjoy on a separate basis *via* national parliaments. Eventually, direct participation of citizens and non-institutional organisations has emerged in multiple ways. Little theoretical framework being provided for in national doctrines, the evolutionary path of participatory democracy branches off into two main channels, namely the law on access to documents[13] – which has remarkably improved from the '90s onwards – and the emergence of a right to be consulted in executive (administrative) proceedings.[14] Whereas the former is tied to the principle of transparency – that is, generally, *participation* as *knowledge* of what is being or has been decided – the latter shows a deeper affinity to the right to protection of one's legal sphere, that is, *participation* as

development of a peaceful society (D. CHALMERS (2003) *The Reconstitution of European Public Spheres*, *ELJ*, 9-2, 127f).

13 *Amplius* on the point K. St. C. BRADLEY (2006) *Comitology and the Court: Tales of the Unexpected*, in H.C.H. HOFMANN, A. H. TÜRK, *EU Administrative Governance*, Elgar, 417f., at 419f.; A. TÜRK (2009) *The Development of Case Law in the Area of Comitology*, in T. CHRISTIANSEN, J. M. OETTEL, B. VACCARI (eds) 21st *Century Comitology: Implementing Committees in the Enlarged European Union*, EIPA, 71f., in part. 92f. and footnotes. For the implications of the case for the future developments of EU legal acts system, R. C. VAN DER SEE – B. VAN MULKEN (2012) *Delegated Legislation and the Implications for European Integration*, Paper presented at the University of Florence – Jean Monnet Excellence Center, 31st May 2012, available at www.researchgate.net, at 6.

14 See J. MENDES (2013) *Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design*, *ELJ*, 19-1, 22f; *ibid*., D. CURTIN, H. HOFMANN, J,. MENDES (2013) *Constitutionalising EU Executive Rule Making: a Research Agenda*, 1f.; see also S. PEERS – M. COSTA (2012) cit., at 430f.

substantive *contribution* to public decisions by bringing before the deciding authority – be it the administration or the judge, in case – one's own reasons.

In broad terms, it can be said that representativeness is measured with regard to the appreciation of the Member States, the ultimate "masters of the Treaties". Thus, in matters that Member States do not wish to confer on supranational authorities, representativeness inclines toward intergovernmental, indirect cleavages, portrayed by the Council. Conversely, in "better Euro-integrated matters", the relation power-individual may be referred to direct representativeness, with fewer constraints at the domestic level.

The emergence of such channels for differentiation seems to be a crucial feature of law-making procedures, so long as it permits the incorporation of diverse interests within the EU system; a need strongly purported by the key actors of EU integration, namely, national political *élites.*

It remains to be ascertained what is "essential" in a piece of legislation. It is well known that the concept has been phrased by the Court with regard to the divide between Treaty-based law and secondary legal based law[15]; nonetheless, in the wording of the Lisbon Treaty, the locution "new essential elements" draws a line *vis-à-vis* delegated acts (Art. 290 TFEU) while being omitted when dealing with implementing acts.

In previous case law the Court has invariably pointed that the border of what is essential for each act must not be left in the hands of legislators, but must be grounded on "objective elements which are amenable to judicial review".[16] In particular, it has indicated as signs of "essentiality" the presence of "conflicting interests" to be "weighed up on the basis of a number of assessments" and the interference of the matter with "fundamental rights … to such an extent that the intervention of the legislature is

15 Secondary legal based acts have developed as implementing provisions; yet they now comprise both delegated and implementing acts. This has lead scholars to raise the necessity for a definition encompassing both, as secondary legal based: J. BAST (2012) cit., at 908, suggests to use the term "habilitated acts" echoing domestic – French and German, in particular – constitutional traditions with respect to delegated legislation. Although a unitary approach – see at 909-910 – is deemed crucial to the understanding of the matter, in this work the term "secondary legal based" is still preferred, for it refers straightforwardly to the evolution of Community Law – including self-delegation to the Council – and is still "neutral" *vis-à-vis* the immense heritage that national constitutional law supplies, which must be handled with due care when delving into EU matters. In C. BARNARD – S. PEERS, eds. (2014) *European Law,* Oxford University Press, at 124f., the term used is "derived acts", used also above in the text.

16 "Ascertaining which elements of a matter must be categorised as essential is not – contrary to what the Council and the Commission claim – for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review". Judgement of the CJEU, *Parliament v Commission and Council,* C-355/10, September 5th 2012, par. 67. The unitary approach to the system of secondary legal based acts, that both the parts and the Court prove to share, despite the difference between the cases, is confirmed by the reference made at para. 23 of Judgement C-427/12. On the point, see Z. XHAFERRI (2013) *Delegated acts, Implementing acts and Institutional Balance. Implications post-Lisbon, Maastricht Journal*, 20-4, 557f., at 564-565. See also above, n. 9.

required".[17] Nonetheless, "objective elements" cannot be understood as pre-established, legally binding parameters which the secondary act must comply with. Even in the terminology used, the Court proves aware of the flexibility of the essentiality criterion: the judges looked for hermeneutic arguments to support, or deny, the existence of a connection between the two acts, such as the secondary act may be said to derive its legitimation from the basic act.

"Essentiality" is therefore understood as a relational measure, as it constantly ties the discipline adopted to the representativeness of the authority in charge of the decision. Briefly, one can say that it measures the "continuity" (from the basic to the secondary act: that is, the compared "regulatory density"[18] that can be inferred by an interpretation of the twos, so that the latter can be said as "derived from" the former) with respect to the "invasiveness" of such act. "Invasiveness" is a highly "political" concept, for it indicates the sensitivity of a certain matter as perceived by the actors involved (that is, by means of the representative principle, the addressees' degree of tolerance toward the to-be-adopted discipline) [19].

Therefore, depending on the evaluation of the law-making actors, certain elements are deemed essential on the basis of their novelty in relation to the perceived sensitivity of the norm that can be inferred by their wording. Should that be the case, they are to be dealt with in a more representative stage; that is, where the quality of representativeness

17 CJEU, C-355/10, cit., par. 76-77. See M. CHAMON (2013) *How the concept of essential elements continues to elude the Court, CMLR*, 50, 849f.; an analysis of the judgement is attempted in G. VOSA (2013) *Elementi essenziali" nella delega di potere legislativo: riflessioni sull'evoluzione del sistema delle fonti nel diritto dell'Unione*, *Rassegna Parlamentare*, 3, 683f., in part. 706f. This concept has been elaborated under German constitutional law (*Regelungsdichte*) and expresses the need to refer to a substantive element – the content of a to-be-adopted measure – when identifying the material extension of the legislative domain. It may well sum up the idea of the relationship between the nature of the regulation and the stage of the law-making to be attributed to – sort of saying, the relation between essentiality and representativeness. The concept is to be read in the light of the long-lasting tradition of the *Gesetzesvorbehalt* (reserve of legislation). See, for instance, M. KLOEPFER (1984) *Der Vorbehalt des Gesetzes im Wandel, Juristen Zeitung*, at 685f.; C. E. EBERLE (1984) *Gesetzesvorbehalt und Parlamentsvorbehalt, Die öffentliche Verwaltung*, at 485f.; see also R. BREUER (2010) *Staatliche Berufsregelung und Wirtschaftslenkung*, J. ISENSEE – P. KIRCHHOF (eds.) *Handbuch des Staatsrecht*, III ed., *Band* VIII, 171f.

18 This concept has been elaborated under German constitutional law (*Regelungsdichte*) and expresses the need to refer to a substantive element – the content of a to-be-adopted measure – when assessing the material extension of the legislative domain. It is important to look at it in the light of the long-lasting tradition of the *Gesetzesvorbehalt* (reserve of legislation) under German law. See, for instance, M. KLOEPFER (1984) *Der Vorbehalt des Gesetzes im Wandel, Juristen Zeitung*, at 685f.; C. E. EBERLE (1984) *Gesetzesvorbehalt und Parlamentsvorbehalt, Die öffentliche Verwaltung*, at 485f.; see also R. BREUER (2010) *Staatliche Berufsregelung und Wirtschaftslenkung*, J. ISENSEE, P. KIRCHHOF (eds.) *Handbuch des Staatsrecht*, III ed., *Band* VIII, 171f. The utmost political nature of the divide between implementing and delegated acts is related to a "higher" sensitivity of the latter category, as recognised in Z. XHAFERRI (2013) cit., at 565 (and footnotes, where references can be found of the positions of other distinguished scholars).

19 The utmost political nature of the divide between implementing and delegated acts is related to a "higher" sensitivity of the latter category, as recognised in Z. XHAFERRI (2013) cit., at 565 (and footnotes, where references can be found of the positions of other distinguished scholars).

is held more appropriate by the law-making actors, be it involving a stronger say for the EP, or a flat consensus-based intergovernmental procedure.

The concept roughly described helps understanding how different legal acts are adopted according to the quantity and quality of interests at stake in various areas of law. Its fundamental assumption is that the law-making system be concerned with several – not only one – actors involved, each of them entitled to pursue autonomous political goals according to the legitimacy provided by diverse representative criteria. In other words, the basic assumption is that the system for law-making be *poly-centric*; should it be concerned with a single law-maker, as it was the case with Parliament under national constitutional law, it would be up to the latter to dictate limits to the powers of another body involved, for the latter's legitimacy would stem from the will of the law-maker itself. A static reading of essential elements, as discernible from the analysis of the basic act alone, would then be more appropriate.

A dynamic understanding of essentiality also implies that a de-formalised perspective be taken on the emergence of the rules regulating the delegation itself. As a matter of fact, the presented construction refers to the idea that essentiality is the threshold of the arising meta-norms concerned: in other words, the conceptual frontier after which meta-norms come to existence in the legal world. [20]

This assumption can be enhanced through empirical observation. Taking into account the historical evolution of the delegation, it appears that – under the umbrella of essentiality – meta-norms have progressively formed and acquired legal value. From the redundant inter-institutional practice, some "essential elements" emerge from the tumultuous river of "essentiality" and undergo a process of rationalisation pursuant to the behaviour of institutional actors. [21]

To put it simply: in the legislative stage, each institutional actor – being centre of conflicting interests and periphery of a wider-ranging negotiation – is entitled to support

20 The concept of meta-norm is a crucial one in the understanding of a general theory of law and clearly exceeds the scope of the present work. To go beyond the general observations put forward here would require a deeper investigation on EU constitutionalism as a whole. As a reference, see N. MAC CORMICK (1999) *The Legal Framework: Institutional Normative Order*, in *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford University Press, 1999, 7f. In the Italian literature, see A. RUGGERI (2014) *Le fonti del diritto eurounitario ed i loro rapporti con le fonti nazionali*, in P. COSTANZO – L. MEZZETTI – A. RUGGERI (eds.) *Lineamenti di diritto costituzionale dell'Unione europea*, Giappichelli, 2014, 268f., 269-270. A thorough survey of the debate on the nature of EU constitutionalism in G. MARTINICO (2013) *The tangled complexity of the EU Constitutional process. The frustrating knot of Europe*, Routledge, at 19f., underlining the need to "…capture the dynamic aspect of integration between legal orders" [at 20].

21 Some might consider this process as one of "juridification"; this concept is nevertheless still quite vague and its implications, both empirical and practical, have not been so far deepened. On the point, A.-M. MAGNUSSEN – A. BANASIAK (2013) *Juridification: Disrupting the Relationships between Law and Politics?*, *ELJ*, 19-3, 325f.

its own position concerning the discipline of a certain matter and its "new essential points". Such position is not free from constraints, as in a poly-centric framework no actor of law-making may act without regard of what has been stated prior: the autonomy of one is countered by the autonomy of the others. It is thus bound by pre-existing law and by the provisions contained in the relevant legal basis.

In this way, an accumulation of equally legitimated interpretations on "what is to be referred as essential" in specific cases occurs in the light of the positions emerged for each case, and a form of consensus is reached on some of those interpretations. Thanks to the flowing practice, the rationales behind the agreed interpretations qualify as criteria to discern rules on the modalities of delegation and may be put in written pursuant to a conceptual abstraction, upon which a broad consensus has been achieved by the institutions themselves.[22] Pursuant to such process, in the long run the battle on the "essential elements" of the adopting act leads to some elements shifting from being part of the "essential" of the discipline, vague and highly "politicised", to rationalisation into a more structured legal form.

Therefore, the evolution of the essentiality doctrine in the Court's case law, as briefly summarised above, could be said to entail a *dynamic* concept of essentiality, which describes the relationship between *continuity* and *invasiveness* of the basic and the derived act at once. Three consequences can then be derived: 1) the primacy of the historical and teleological argument in the systematic understanding of the EU legal acts; 2) a material, de-formalised understanding of the meta-norms concerning delegation in particular, and, more generally, the overall system of legal acts; 3) a poly-centric structure of law-making, where each of the actors is entitled to pursue autonomous political goals according to the legitimacy of the representative criteria it is based upon.

In the case at debate, the Commission acknowledges the need for a systemic approach;

22 As a mere example: it may have been debatable whether the rules concerning, say, chemical fertilizers were part of essentially legislative elements or could be delegated. In a few cases, it is agreed that different lists of various substances used in agriculture, which can be considered as chemical components, must be dealt with by executive examination procedure. After that, a rule emerges, providing that chemical components in agriculture should be dealt with by such procedure. In this case, the arguments in favour of the examination procedure have been subjected to a rationalisation into a better-fledged legal rule. Such empirical observation may be catalogued as informal change to the Constitution and has not go unnoticed to political and legal scholars. For a survey on the relentless constitutional change in the EU, see A. VON BOGDANDY – J. BAST – F. ARNDT (2004) *Legal instruments in the European Union law and their reform*, *Yearbook of European Law*, 23, 91f. (see also, in German, by the same Authors (2002) *Handlungsformen im Unionsrecht. Empirische Analysen und dogmatische Strukturen in einem ein vermeintlichen ver Dschungel*, *ZaoeRV*, at http://www.zaoerv.de/62_2002/62_2002_1_a_77_162.pdf . With reference to the informal constitutional change triggered by the co-decision inter-institutional game, see H. FARRELL – A. HÉRITIER (2003) *Formal and Informal Institutions under Co-decision: Continuous Constitution Building in Europe*, *Governance*, 16-4, 577f. and J.-P. JACQUÉ (2008) *Une vision réaliste de la procédure de co-décision*, *Mélanges en hommage à Georges Vandersanden*, Bruxelles, Bruylant, 2008, 183f.

it nonetheless endorses a static interpretation of the essentiality doctrine. Its remarks can be put as follows. As objective elements, which can be "objectively" individuated in the text of the act(s), define the border between the basic act and the secondary acts, it is then possible to predict whether the delegation provided for in the basic act refers to "non-essential elements" or merely to implementing measures. Therefore, a difference between delegations falling within the scope of Art. 290 TFEU and delegations *ex* Art. 291 TFEU can be drawn *ex-ante*: that is, prior to the adoption of the delegated act itself.

The Commission refers to "the nature and the object of the powers conferred" as the "sole, decisive criterion" to distinguish between delegated and implementing acts. In fact, this position is coherent with the *Communication* dated back to 2009, where it was argued that Art. 290 and Art. 291 TFEU are to be intended as "mutually exclusive".[23]

If this view is to be endorsed, there would be a clean line between Art. 290 and Art. 291 TFEU, the former "supplementing or amending" the basic act in its non-essential elements, the latter allowing to "purely executive" measures. A *prognostic assessment* on the delegated discipline to be adopted would have to take place and the nature of the power conferred could be recognised on the sole ground of the basic act; being thus possible to determine *in abstracto* whether the delegation has to follow Art. 290 or 291 TFEU. The relations among those categories – basic acts, delegated acts and implementing acts – would therefore be of a formal quality, referring to the "nature" of the powers conferred in the delegating act. Every delegation should be seen as drawing the perimeter of the secondary act in a way that is fully predictable *a priori* through the analysis of the basic act.

This conclusion may seem in contradiction with the assumption that it is for the co-legislators to decide on the delegation; but it can be deemed coherent with the essentiality doctrine supported by the Court in so far as a "static" interpretation be attached to the concept of essentiality through a rigid understanding of the notion of "objective elements". Such rigidity in the conceptualisation of delegated acts – and, consequently, of the system as a whole – would provide the Commission with a legal argument to

23 Communication of the Commission to the European Parliament and the Council, (COM (2009) 673) *Implementing of Article 290 of the Treaty on the Functioning of the European Union*, Dec 9th, 2009, at 2.3. The Commission went to say (fifth Paragraph) that "... in order to determine whether a measure "supplements" the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to "supplement" the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures". The lengthy inter-institutional battle among the institutions in the aftermath of Lisbon is well described in W. J. M. VOERMANS (2011) cit., at 316f.; see also S. PEERS – M. COSTA (2012) cit., at 447f.

influence the negotiations in the legislative stage, thereby resulting in a legal limit to co-legislators which could be enforced by the Commission itself.[24]

Conversely, should a dynamic interpretation of the same doctrine be endorsed, it would stem that no such enforcement could apply and there would be no room for legal claims. Any "prognostic assessment" is precluded if the delegated power still has to be exercised: no relational assessment could ever take place, if the other term of the relation does not exist. If the borders between delegated and implementing acts were to be interpreted in the light of a dynamic understanding of the essentiality doctrine, the Court should simply decline its competence and urge the Commission to exercise its powers under Art. 291 TFEU, thereby leaving the way to a future adjudication in case the implementing act were adopted *ultra vires*.

The two approaches are conceptually at odds. The latter leads to a material conception of the delegation, which is said to emerge in correspondence to the concrete regulation of the subject-matter. The former is concerned with a formal, abstract background with regard to legal acts: limits to delegation are based on pre-fabricated norms, thus allowing to an *a priori* analysis of the "nature" of the power conferred in accordance with such norms.

Hereinafter it will be tried to argue that: 1) formal and material criteria would be mutually exclusive to each other in pure logic, as the formal one refers to a monistic law-making, whereas the material criterion better suits a poly-centric order; 2) being both part of the common constitutional culture of Europe, the formal as well as the material criterion are in fact intertwined in the re-construction of the legal acts in a system, and both necessary to its full understanding; 3) such an inconsistency in the Court's reasoning – whilst revealing the high complexity of the European constitution as a process *in fieri* – is somehow benign, as instrumental to further rationalisation of the system. It allows the Court to play an active role in mastering the fragmented, brittle guidelines for delegation into better crafted criteria for differentiation in the law-making.

***III. The reasoning followed by the Court in C-427/12. Static v. dynamic interpretation: is a* prognostic assessment *ever possible?*** Be things as they are, the case under scrutiny could be dealt with in two radically opposite ways.

24 As it would be coherent with the overall architecture of the system, having regard to the context in which it has emerged. See, among others, B. DRIESSEN (2010) *Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU*, *ELR*, 35, 837f.; see also J. BAST (2012) cit., at 917-921; R. SCHÜTZE (2011) cit., at 685-687; H. HOFMANN (2009) at 494-495; P. CRAIG (2011) at 674-675; W. J. M.VOERMANS (2011) cit., at 321-322; S. PEERS – M. COSTA (2012) 439f.; Z. XHAFERRI (2013) cit., at 562f.

If a formal *a priori* categorisation of the respective scope of Art. 290 and 291 TFEU is held possible, then the Court should fully look at the basic act and seek for "objective elements" as tangible frontiers between legal acts. Otherwise, in case no such formal systematisation is held possible, the Court should decline its jurisdiction; the legality of the instrument chosen for delegation could only be questioned once the secondary act has been adopted.

The first solution is based on a formal understanding of the system of legal acts: one which is concerned with a monistic law-making. In this vein, meta-norms are seen as binding parameters fixed *ex ante* by an allegedly superior-in-hierarchy legislator.

The second solution entails a material conception of that system and suits perfectly a poly-centric law-making scenario. Accordingly, meta-norms surface as a part of the negotiation on the content of the discipline to be adopted and progressively acquire legal value as binding criteria along with the flowing juridical traffic. Such norms are de-formalised and material in nature, as opposite to the formal hierarchy that continental constitutional doctrines have come to construe in the age of legal formalism.[25]

Conversely, an *a priori* evaluation is consistent with the idea of a monistic law-making: it rests on the idea of legislation as stemming from a single centre vested with supreme legitimacy and capable to define *the* general interest. In this view, other law-making actors are in principle said to possess inadequate, inferior legitimacy; all normative activities are somehow *contained* in the first act of legislating – or, one might say, of legislative sovereignty – as much as in mathematics the *plus* contains the *minus*. [26]

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25 Since the late 90's, a vast debate has flourished about the nature of the EU, and precisely whether it should be compared to (and pushed toward) a parliamentary or a regulatory model. See, for instance, G. DE BURCA (1996), *The Quest for Legitimacy in the European Union*, *Modern Law Review*, 59, 349f., stressing out the dual nature – parliamentary and "consociational", intergovernmental, of the EU; R. DEHOUSSE (1998) *European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?*, *CMLR*, 35, 595f.; in a wider perspective, encompassing forms of interaction between institutional and social actors, M. EVERSON (2002) *Administering Europe?*, *JCMS*, 36-2, 195f.; see also L. AZOULAI (2007) *The Court of Justice and the Administrative governance*, *ELJ*, 7, 425f. The present work has no ambition to side with any of these theories, just to present some factual observations in a more general framework. It is just coherent with the idea of a poly-centric law-making that no prognostic assessment could take place regarding the discipline that is to be adopted by *another actor*: the autonomy of the latter is in principle recognised on the ground of its institutional *status* and the various interests coming at stake are likewise recognised as legitimately participating in the decision making. This point will be further discussed below.

26 It is not hard to discern a bias in favour of the equivalence "*loi – droit*" stemming from the *Révolution* doctrines as well as, though in a different vein, from the *Staatsrecht* tradition. In both cases, this assumption opened the door to a formalistic understanding of the system of legal acts, with no regard to the substantive content. For the French system, see R. CARRÉ DE MALBERG (1931) *La loi, expression de la volonté générale. Étude sur le concept de la loi dans la Constitution de 1875*, Sirey, also online at http://gallica.bnf.fr/ark:/12148/bpt6k6472605v, in Ch. I. The link between such construction and the affirmation of the Parliament as the sole centre of legislation is clearly expressed in Ch. V. The German debate on the concept of legislation has a more far-reaching tradition due to the evolution of Prussian *Reich*: see P. LABAND (1876) *Das Staatsrecht des deutschen Reiches*, VI ed. 1912, Mohr, at 135f.. as for the difference between "material" and "formal" legislation (in the perspective of reserving a

Accordingly, the legislator is endowed with a law-making monopoly; hence the capacity of predicting, as early as in the legislative stage, on the basis of the delegating act solely, what will be deliberated and adopted in the subsequent normative stages.

The Court rejects the Commission's claim as a result of a tortuous reasoning. After emphasising the use of historical and teleological arguments in the understanding of delegation, it apparently goes to say that an *ex ante* analysis of the basic act is possible to determine whether the delegation must follow Art. 290 or 291 TFEU. A static interpretation of the essentiality doctrine is maintained, that is, the use of the categories of essentiality for an *ex ante* scrutiny, with no reference to the relations among the basic act and the secondary act. After that, quite abruptly, the Court refrains from a deeper examination of the question and rapidly liquidates it in a supreme impetus of self-restraint, on the ground that broad legislative discretion on this point confines the judicial review to a mere review of manifest incongruities only.

Let us follow the reasoning in more details. At a first approach, the answer provided is quite simple, for it avoids ascending to theoretical grounds: judges openly declare that they do not wish to go too far with dogmatic assertions. The motivation is indeed laconic; but, in spite of this scarce redundancy, evidence is found of co-existing formal and substantive criteria – in principle, opposite to each other – in the understanding of the relations among legal acts in the EU system.

When confronted with the notion of "implementing acts" the Court starts by a twofold assertion. First: Art. 291 TFEU gives no such definition but simply a teleological indication, namely that "there is a need for such an act to be adopted... in order to ensure that a EU legally binding act is implemented under uniform conditions" in the EU.[27] Second: the evolution of secondary legislation – including both delegated and implementing acts – is taken into account in so far as it refers to implementing powers in the view of Art. 202 TEC (prior to the adoption of the Treaty of Lisbon). Reference is made to the European Convention and the Constitutional Treaty alike.[28]

Such an *exordium* apparently paves the way for a historical-teleological understanding

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vast ambit to the administrative activity to be referred to the *Staat* by means of an "order of service" (*Dienstbefehl*) having no legislative nature; see also G. JELLINEK (1887) *Gesetz und Verordnung. Staatsrechtliche Untersuchungen auf rechtgeschichtlicher und rechtsvergleichender Grundlage*, Mohr, at. 231f., as for the legislation to be reserved to domains where the action of public powers was likely to endanger property and liberty (*Eigentum und Freiheit*) as a "reserve of intervention" (*Eingriffsvorbehalt*) and G. ANSCHÜTZ, *Gesetz*, K. B. v. STENGEL – M. FLEISCHMANN (eds.), *Wörterbuch des Deutschen Staats- und Verwaltungsrechts*, Mohr, 2vol., II ed., 1913, 212f. A survey in English by M. STOLLEIS (2001) *Public Law in Germany* (1800-1914) Berghahn Books, at 309f., 349f.

27 CJEU, C-427/12, at 33.

28 *Ibid*., at 35-36.

of the delegation: one which takes into account the origins and motives for the emerging distinction between delegated and implementing acts. In this view, as one would expect in the light of the previous case law, the categories of the essentiality doctrine come at stake in a relational and dynamic fashion; thereby, in a way that is contrary to the Commission's view. The Court indeed implicitly credits the above mentioned material conception of meta-norms, according to which the conditions for delegation are negotiated along with the matter's discipline and slowly crystallise into legal rules. Accordingly, the relations among legal acts should be read under flexible, de-formalised criteria; a non-static interpretation of the essentiality doctrine should be held as a paradigm for the systematisation of legal acts.

In this view, "essentiality" is a relational quality, referring to the "continuity" from one act to the other *par rapport* to the "invasiveness" of the secondary act *vis-à-vis* the legal spheres to which the system ensures protection, being them individuals or States.[29]

All this considering, the Court comes to the conclusion that "the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU".[30] It is a sharp turn to formality what the Court makes at this point; it drifts towards the Commission's formal picture of legal acts when admitting that an *ex ante* evaluation of the nature and quality of the conferred power is possible prior to the adoption of the delegated act. Such reference should consistently entail a fully-fledged scrutiny of the pre-fixed parameters among legal acts; but it does not, since par. 40 adds: "*Consequently, judicial review is limited to manifest errors of assessment as to whether the EU legislature could reasonably …*".

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29 It is manifest that, in this case, the relations among legal acts would be construed in an overturned perspective with regard to national constitutional law. It would in fact move from the effect they produce *vis-à-vis* their addressees, rather than from the analysis of the lawmakers and of their powers. Such an inductive perspective seems indeed to better attach to a de-formalized legal order such as the EU, construed in the view of the objectives to be reached by (and in the interest of) its addressees, as enshrined in the legal basis provided for in the Treaties. Whether it would be coherent with the evolution of constitutional law in a post-national public space, it will be matter for further discussed, only partially attempted below.

30 CJEU, C-427/2012, cit., Par. 40, first line. There exist, as a consequence, no *reserve d'execution*; that is to say, the Commission enjoys no right to claim for the application of the preferred kind of delegation and no legal argument can be brought in this respect. Interesting to note that the essentiality doctrine under German Constitutional Law (*Wesentlichkeitstheorie*) developed as a result of the uncertainty about the survival of such a reserve under the *Verfassungsordnung* following the Bonn *Grundgesetz* (and it answered the question in the negative). The point is finely outlined in R. SCHÜTZE (2005) cit., at 12. It would be a matter for discussion whether, according to the evolution of constitutional law in the post-national public space, it could be seen as a mark of the de-formalisation of the relationships among institutional actors in a poly-centric law-making scenario, therefore contributing to the construction of a de-formalised system of legal acts. Such hypothesis is tentatively developed in G. VOSA (2014) *"Nuovi elementi essenziali", ovvero del posto della normativa delegata nella sistematica delle fonti del diritto europeo, Rivista Italiana di Diritto Pubblico Comunitario,* 681f., in part. at 697f.

It must be noted that the category of "discretion" is part of the vocabulary of national public law; to put it roughly, it indicates the margin of appreciation that an authority enjoys with regard to the possibility of its decisions being reviewed. [31] Suddenly abandoning the poly-centric framework, the judges refer to a traditional background, which is far more familiar to national constitutional laws. But, although they agree that the *ex-ante* evaluation can occur, they deny that such scrutiny can be pushed too far. In so doing, they use the category of "legislative discretion" *versus* "judicial restraint" to assert a considerable reduction of their power to investigate on the matter. Not surprisingly then, after a short conduction of the scrutiny in such restricted terms, the Court concludes that no unreasonableness can attach to the co-legislators' choice and therefore the claim must be rejected.

Though apparently solid, the reasoning followed by the Court reveals a thriving and intricate under-brush, where the most delicate relations between individuals and centres of power find their way to light in the European public space.

As aforementioned, the Commission's position has some grasps in the previous Court's case law, the idea of regulating the power to delegate being phrased as a limit to the legislators' discretion by objective elements, amenable to judicial review. Hence the static version of the essentiality doctrine maintained by the Commission: the same method to find the objective elements which indicate where the essentiality lies can likewise be used to determine the scope of a delegation *vis-à-vis* the basic act. Therefore, it would be no absurdity to say that those objective elements may be used to circumscribe the ambit of delegation with regard to implementation, that is, another form of delegation, on the sole ground of the basic act and prior to the adoption of any derived measure.

Motives to counter such assertion are grounded in the evolution of the delegation, as emerged in the inter-institutional practice; nor does the Court ignore the implications of tackling the issue from the angle of a European evolutionary narrative. As the judges are prone to credit the antecedents of Articles 290-291 TFEU, then they show to endorse a dynamic view of the essentiality doctrine; that is, a de-formalised and material conception of the delegation. Had they kept this line, they should have declared

31 In particular it is related to the notion of legislative "liberty" in determining the political objectives and the consequent limited discretion that the executive enjoys, as the perimeter of its actions is fully circumscribed by the legislative. The point will be further discussed below; see M. PEREDO ROJAS (2013) *El margen de apreciación del legislador y el control del error manifiesto. Algunas consideraciones a partir de la jurisprudencia del Consejo constitucional francés y del Tribunal constitucional alemán*, *Estudios Constitucionales*, 11-2, at http://www.scielo.cl/pdf/estconst/v11n2/art03.pdf , 47f. If such view is assumed, the only admissible control is the scrutiny of manifest error, as the A. demonstrates pursuant to a comparative analysis (at 49f).

themselves incompetent to *a priori* ascertain the scope of a delegation, for any such judgement could never take place prior to the adoption of the delegated act.

In the second part of its reasoning, however, the Court steps back to the formal framework and declares that: 1) an *ex-ante* evaluation is indeed possible; 2) although objective elements for distinguishing between Art. 290 and 291 TFEU do exist, they can only be submitted to limited judicial review, because the choice between delegation and implementation rests in the hands of the legislative authority. In other words: there is an objective border between the two *species* of delegation, but only legislators can establish where it is placed, and the Court can interfere with their decision only if they make a blatant mistake.

Is then "objective" whatever the legislators say it is, except manifest error? Anyone who is concerned with the rule of law principle would hardly be comfortable with such assumption.[32]

So: according to what it is said in the first part of the reasoning, the concept of delegation must be construed in harmony with its historical evolution; that is, having regard to de-formalisation and materiality as its main features under a dynamic interpretation of the essentiality doctrine. Conversely, on the basis of the second part of the reasoning, the Court assumes that an *ex-ante* analysis of a basic act pursuant to essentiality categories – though interpreted in a static fashion – is indeed possible; anyhow, it refrains from carrying such scrutiny beyond manifest error and takes as a justification the need to respect the discretion of the "EU legislature". Therefore, it stems that the borders amongst legal acts are policed by pre-structured meta-norms, situated at a level *other* than material legislation, which are addressed to the law-making actors but ultimately rest in the co-legislators' discretion, as judicial review is admitted to a limited extent only.

***IV. An ambiguous, non-univocal systematisation of legal acts … or no systematisation at all? The Advocate General's Opinion.*** At a more profound insight,

32 The mixture of formal and substantial criteria in the understanding of the delegation leads to a confusion between the concept of "legislative discretion" and the "objectivity" which the CJEU derives from "amenability to judicial review" (as reported above). The apparent inconsistency stems from transplanting the category of "legislative sovereignty" to a rather different environment than the parliamentary government that most Member States have come to experiment. In the parliamentary model, "objectivity" is reached by virtue of the general representative principle, according to which people's representatives are able to identify and pursue the general interest. In a Community of law (Judgement of the CJEU, C-294/83, *Partie Ecologiste "Les Verts"* v. *European Parliament*, 23rd April, 1986 ) it is the amenability of a legislature's decision to justice what renders it (more) "objective". The contradiction is due to the clash between opposite paradigms of law-making, as further discussed below.

the overall system of legal acts rests in conceptual fragmentation. Arguments are borrowed from formal and substantial models, though used as they would reinforce each other in the reasoning. Reference is made to the evolution of the delegation: but the Court does not go into details as for the terms and motives of such recalling, nor does it justify the adoption of the essentiality criteria to a formal review of a basic act. A quite obvious difference with regard to the usual case law on secondary legislation, mostly grounded on the relation between the basic and delegated acts and therefore construed under the *ultra vires* scheme. In order to stand a static interpretation, the essentiality doctrine should be proved to adapt to an *in abstracto* scrutiny of the delegating act.

Having regard to what the Court says, the architecture of the legal system would look like as follows. Legislative acts are confined to "essential elements" of the discipline to be adopted and the margin *vis-à-vis* delegated acts is "objectively" derived from an analysis of (both) the act(s) in question. On the other hand, implementing acts are to be placed further away with regard to the pair legislative-delegated acts; an objective definition of their scope does exist, although it is up to the legislator to trace its perimeter and in the sole case of manifest unreasonableness can the Court have a say on the point.

Compared to the laconic reasoning of the Court, the Advocate General Pedro Cruz Villalón is more loquacious in his *Opinion*; however, he strives to keep a "minimal" approach to the issue and systematically eludes wider-ranging theoretical questions.[33] His line of reasoning is no less intricate, though. Starting by a loud praise of the "literal, grammatical" interpretation – quite unusual in constitutional law, and manifestly aiming at devitalising the systematic implications of the case – the Advocate General rules out any legal argument, or "interference" that an overall understanding of the evolution of secondary legislation would generate. Most notably, he complains for the high resonance that the introduction of delegated acts has had. As far as he goes, the EU law is faced with a "novel concept" and one "which, appearances aside, has hitherto had no equivalent in the architecture of Union acts".[34] Provided that Art. 290 TFEU "should be allowed to speak in all its simplicity", the Advocate General quotes it literally, as he were calling for a self-evident interpretation.

The *Opinion* and the Court's judgement apparently start from points which are poles apart. After some general remarks, the Advocate General goes to deny systematic re-

33 *Opinion* of the Advocate General Pedro Cruz Villalón, delivered on 19th December, 2013 at 14 and at 21f.

34 *Ibid*., at par. 21: "Sometimes the need to focus primarily on the grammatical or literal interpretation is particularly acute. By that I mean that there are cases in which we should give absolute priority to what the provision 'says', trying to forget for a moment all that we might know about its history".

constructions; antecedents in domestic constitutional law as well as in previous EC law bear no legal value and, whereas it is somehow natural that "normative categories of the Member States" should be "looked into", "there is no guarantee as for the result". He emphasises the pragmatic significance of the delegation in the inter-institutional game: as he says, "it is an opportunity for the EU legislature and the Commission to collaborate in the work of legislating, in substantive terms".[35] In this vein, he proceeds to bring down theoretical approaches and to minimise the consequences that might be brought about with reference to a more general picture of the legal acts.

It is true that, although with due care, the Advocate General refers in an evocative fashion to the figure of de-legalisation (in Spanish: *deslegalización*) as a model for Art. 290 TFEU.[36] But this passage is somehow set apart from the legal substance of the *Opinion*, in so far as it is immediately highlighted that the question concerning the hierarchy among legal acts is not indispensable for the decision.[37]

The strive to depict an a-systematic figure of EU legal acts relationships results in sporadic observations which are of little avail to a more general comprehension. Nevertheless, a few points can be underlined and the horizons of meaning encompassing such relationships seem to emerge.

The frequent references to national constitutional law concepts, though systematically deprived of legal significance, appear to play a symbolic, evocative role. This impression is confirmed when a tie between the principle of conferral and the delegation is clearly highlighted.[38] Such mention stands as to anticipate any other possible historical-teleological argument and to steer it toward the inter-governmental framework. Noteworthy that, whereas the Court has precisely endorsed such arguments, the Advocate General has precisely refused to do so; in his view, the reference to the principle of

35 "... whereby the legislature can in principle limit itself to regulating the essential elements of an area and entrust the Commission with the remainder of the normative function ..."[at 36].

36 Reference is made to the work by I. De OTTO (1987) *Derecho Constitucional. Sistema de fuentes*, Ariel, at 226-28). The citation refers to the first edition of the work; however, the XI ed. – rep. Sept. 2008 – is available. The referred work is clearly based on formalistic categories in the understanding of legal acts (see *inter alia*, ed. XI, pp. 19f.; 22f). The debate on the relations between form and substance in the understanding of legal acts is vivid in the Spanish literature: although the 1978 *Constitución* has introduced a formal hierarchy, the legacy from the previous legal order is still remarkable and the scheme designed to foster a judicial scrutiny of Executive's legal acts under Francisco Franco's dictatorship is largely based on the *ultra vires* doctrine (cfr. E. GARCÍA de ENTERRÍA (1970) *Legislación delegada, potestad reglamentaria y control judicial*, Civitas Ediciones, III ed. 1998, rep. 2006, at 101f).

37 At 56: "The parties to these proceedings have placed the hierarchy principle center-stage in the dispute, debating, essentially, whether there is a hierarchical relationship between legislative acts and delegated acts or between delegated acts and implementing acts. There is, of course, much to be said on the subject, yet it is by no means clear that it is essential to enter into this debate in order to rule, even in the abstract, on the Commission's application".

38 At 49.

conferral sounds like a replacement, sort of saying, a compensation for such refusal, although in a slightly different perspective. As a matter of fact, when interpreting the system of EU legal acts in the light of the attributed competences, the tribute to the Member States is all the more evident and refers to both their political sovereignty and their constitutional traditions.

Therefore, in the wording of the *Opinion*, the principle of conferral supplies a different perspective to the evolution of EU legal acts as depicted by the Court; one which entails, implicitly but unavoidably, the utmost respect for both national States' political autonomy and legal doctrines which have been giving structure to States' power.

In a way that is perfectly consistent with the approach endorsed, the Advocate General advices the Court to somehow keep a "low profile" when it comes to the definition of the respective scope of Art. 290 and 291 TFEU. He credits a formal understanding of legal acts but never explicitly sides with any of the positions; he is aware of the difficulty of shifting back and forth from formal to substantial paradigms and chooses to leap over the point, as proven by the "admittedly general and largely abstract"[39] nuances through which the *Opinion* seeks to provide a clearer difference between implementing and delegated acts.

Oscillations from the two paradigms are indeed perceptible in dealing with the alleged "grey zone"[40] between the two types of secondary acts. After endorsing a formal approach, the Advocate General moves to a remark echoing a substantially-oriented argument, namely that the difference in the understanding of secondary acts may ultimately depend "on the preconceptions that both sides may have on the two types of instruments".[41] Such idea is inconsistent with the idea of objectively defined borders between implementation and delegation; it is rather inspired by the substantial paradigm. Straight afterwards though, while acknowledging that the Commission "is right to expect that the choice made by the legislature … be subjected to a certain degree of review by the Court of Justice"[42] the *Opinion* goes to say that the role played by the Court "in policing the frontier between essential and non-essential" must be accepted to be "limited".[43] Although seemingly contradictory, this ambivalence can be explained in the light of the self-restraint attitude that the Court is committing to take.

In the same line, a few guidelines are attempted on the way the judgement should be

39 At 79.
40 At 14f., at 68f.
41 *Ibid.*
42 At 70.
43 At 71.

carried; whilst quite general, they never go as far as to form a fully-fledged "test" for abstract scrutiny. Rather the opposite, they are drawn in a manner which openly lacks any systematic ambition.

To sum up, the Court should: yield to the distinction between "political" and "technical"[44] although this distinction is thereafter held not "very helpful";[45] adopt a teleological and systemic interpretation of the basic act[46] as opposite to the literal and grammatical interpretation of Art. 290-291 TFEU endorsed at the beginning of the *Opinion*;[47] accept restrictions when it comes to "policing the borders between essential and non-essential" and thereby give in to further constraints in policing "the other frontier, between what … we might call 'substantive' (in any event, not essential), in other words, that which would specifically belong to Art. 290 TFEU, and what on the other hand, and conscious of the fact that it is scarcely appropriate, I venture to call 'the incidental', in other words, that which would belong to Art. 291(2) TFEU".[48]

Being firm the need for a pragmatic, "a-systematic" approach when it comes to relations among legal acts and the existing limits to Court's jurisdiction, the see-saw from formal to substantial arguments does not quite facilitate a systematic understanding of legal acts. However, the analysis is carried out with a view to defining an "objective" border between legal acts; a static interpretation of the essentiality doctrine is assumed and formality is clearly within the implicit horizons of the author. In this vein, the timid concessions to material approaches look like – if such quotation is permitted – a pale, though sublime, *Königsbergian* dawn. While highlighting the "pragmatic" importance of the Court's intervention, it is acknowledged that the Court itself must bear restrictions in scope when reviewing the choice between Art. 290 and 291 TFEU; these restrictions are related to the existence of a border between essential and non-essential elements, but "[c]ertainly, this other frontier is not situated on a continuum in the same way as the one we first mentioned [between essential and non-essential elements], since different functionalities are involved. However, in this case too, the possibilities for review of any choice made by the legislature when faced with these alternatives are limited".[49] In the mist shrouding the passage, no reference to the regulatory density of the basic act's content is made, and this stands out; being a relational concept, which can only be

44 At 75.
45 At 76.
46 At 73.
47 At 21, as mentioned above.
48 At 71.
49 At 71, last part.

measured in comparison with the secondary act, the regulatory density would be uselessly mentioned in a static reading of the essentiality doctrine. Yet, in the previous case law, the border of essentiality is read in a dynamic fashion; and in the *Opinion*, this border does entertain a relationship with the "second frontier" (defining Art. 290 and 291 TFEU's respective scope) but one of an unidentified nature. The sole mentioned characteristic of this relationship is the lack of a "*continuum*, since different functionalities are involved"[50]: a negative one, that does not say much about which functionalities are in fact involved in each type of act.

As a result, any systematic coherence among legal acts is again ruled out; whatever the word *continuum* might mean and whether it is referred to a line "legislative-delegated acts" or "delegated-executive acts" or else encompassing the three of them altogether. From this relationship though, it is worth recalling, the Advocate General derives the need to accept limitations to the Court's jurisdiction on second legal based acts; that is, ultimately, to stand a limited enforceability of legal claims concerning Commission's prerogatives and thus directly related to the principle of institutional balance. Eventually, the term "functionalities" could be indicated as the symbol of the position held in the *Opinion*; a *felix* imperfection, perhaps a deliberate malapropism of the term "function" largely used in the separation of powers doctrine and generally in national constitutional law.

With little further explanation[51] the Advocate General moves on to quickly examine the basic act in its contested provisions and seems as to suggest to the Court a very prudent approach, as he sees poor grounds for reviewing the legislators' decision.

In sum, the *Opinion* seemingly seeks to provide arguments for a sort of hierarchic relation among legal acts using as the main rationale the States-Union cleavage in defence of national sovereignty. Hence the fact that the doctrinal element is deprived of legal bite and the historical-teleological argument alike. Whereas reference is made to the former in order to pay a due tribute to Member States' heritage, the explicit dismissal of the latter has perhaps more precise reasons. Reading the historical-teleological argument in the light of the principle of conferral allows to shift from legislative-executive to States-Union scenario, therefore endorsing an inter-governmental narrative of the EU. The effects are to cautiously ensure full compliance with national sovereignty and to dismantle the arguments grounded on the evocative force of constitutional language.

50 At 71, second last sentence.

51 At 72-74; "Admittedly general and abstract observations", at 79, as mentioned above.

In this view, an objective distinction seemingly arises between implementing and delegated acts, as Art. 290 TFEU "does not authorise implementation, but rather the completion of legislation through the use of regulatory power. There is therefore as yet no place for Article 291 TFEU implementation, which is possible only once 'legislating' in the widest sense has taken place".[52]

Despite the robust argumentation, such formal construction apparently finds little confirmation in the EU institutional practice. There seems to be no formal hierarchy among EU acts,[53] whose features have not been fixed *a priori* but rather accumulated through increasing juridical traffic, like sediments on the seabed. This is indeed a crucial point in favour to a historical-teleological argument, and it may prompt to attempt a systematic understanding of EU legal acts in the light of its evolution.

**V.** ***What the judgement does not say: multiple relations between individuals and power in a multifaceted legal order.*** Considering that both the Court and the Advocate General share an attitude of reluctance toward broader speculation, legal scholars are left to develop the historical-teleological argument that the Court evokes but abruptly leaves behind.

As mentioned above, the main features of delegation as emerged throughout decades – de-formalisation and materiality – have followed a pattern of progressive correspondence between the "essentiality" of the act to be adopted and the "representativeness" of the seat entrusted with the power to decide. Though crucial to the understanding of the essentiality, this passage has perhaps been scarcely looked into,[54] or has at least hardly found a systematic framework.

It is well known that the "representativeness" has been enhanced with respect to the powers entrusted to the European Parliament in comitology procedures. After a few informal practices,[55] an ambit of parliamentary interference through a "right to be

52 At 61; therefore crediting the idea of a mutual exclusivity occurring between the two provisions, as the Commission maintains.

53 See B. DE WITTE (2008) *Legal Instruments and Law-making procedures in the Lisbon Treaty*, in S. GRILLER – J. ZILLER (eds.) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Springer, 135f.; see also K. LENAERTS – M. DESOMER (2005) cit., at 746-747; R. SCHÜTZE (2005) cit., at 12f.; J. BAST (2011) cit., at 914-919.

54 See, for instance, K. LENAERTS – M. DESOMER (2005) cit., at 749-750; H. HOFMANN (2009) cit., at 489-490; B. DRIESSEN (2010) cit., at 839f.; R. SCHÜTZE (2011), cit., at 675f., all concerned with the enhancement of democratic principles in delegation. See also S. PEERS – M. COSTA (2012) cit., at 433f.

55 Among others, we can recall: the Agreement *Plumb-Delors* as a general practice of exchanging letters between the Presidents of the Parliament and of the Commission (1988); the *Code of conduct* ratified on July, 12th 1993 (so called *Klepsch-Millan*) on the negotiations concerning structural funds; and, most importantly, the *Modus*

informed" and to deliver an opinion has emerged as a sub-type of comitology regulatory procedure; subsequently, as far as PRAC (RPS) was introduced, a more substantive *droit de régard* was conferred on the European Parliament.[56]

As a doctrinal background to such claims, a new interpretation of Art. 155 TEC was taking place, applied to Art. 202 TEC as well, in the aftermath of Maastricht. The law-making capacity previously referred to the Council only was in fact read through a composite notion of "EU legislature" and understood as referring to "the Council and the Parliament" in case the basic act fell within the ambit of the co-decision procedure.[57] "Legislator" then was no longer to be seen as a monolithic entity, from which all the power emanates; rather it is a more complex entity, a process, a step in the decision, a stage in the ongoing normative cycle, composed by diverse institutions and identified by its own *régles d'engagement*. As noted above, the "discretion of the EU legislative", if looked at in the light of competing powers attributed to diverse, autonomous institutions, uncovers its pluralistic dimension and urges to respect the other institutions' prerogatives.

Worth to say at this point that issues relating to representativeness are largely absent in the case under discussion, and little reference is made to the features of a poly-centric law-making either. The background itself is virtually left aside, and so are the implications of a wider understanding of the EU legal order. Eventually, no claim for institutional balance is raised, but for a "failure to comply with the system for attributing powers"[58]: the former owns a thick euro-constitutional aura, whereas the latter flows into a States *v* Union view. [59] The Court commits to transplant the essentiality doctrine into a formally crafted judgement, and to replace the dynamic-relational evaluation by a static-abstract scrutiny of some intrinsic characteristics of the basic act. What is sought is to

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*Vivendi* of December 20th, 1994, concerning the implementing measures of acts adopted under co-decision procedure after Maastricht.

56 On the point, M. KAEDING – A. HARDACRE (2010) cit., at 5f.; W. J. M. VOERMANS (2011) cit., at 320f.; R. C. VAN DER SEE – B. VAN MULKEN (2012) cit., at 8.

57 See K. St. C. BRADLEY (2006) cit., at 419.

58 CJEU, 427/12, cit., at 20.

59 The debate on the point transcends the limits of this work; however, it is worth to mention that according to G. CONWAY (2011) *Recovering a Separation of Powers in the European Union*, *ELR*, 17-3, 304f., the concept of institutional balance in the European Union displays a connection to the rule of law principle, as well as to the principle of conferral; whereas the former highlights the sense of supranational unity of the European polity, the latter is closer to a State-based understanding. This has led many distinguished scholars to couple the vertical and the horizontal divide between Union and Member States, in the light of the federal systems designed in national constitutional law. On the idea of "executive federalism", aiming at a conciliation of the two opposite "souls" of EU architecture, see K. LENAERTS (1991) *Some Reflections on the Separation of Powers in the European Community*, in *CMLR*, 28, 11ss., 15-16.; more recently, R. SCHÜTZE (2009) *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford Press, argues that "European constitutionalism has historically insisted on the indivisibility of sovereignty… The absolute idea of sovereignty operates as a prism that blinds out all relative nuances within a mixed dual legal structure" (at 58-59) with strong reference to US federal system.

ascertain whether the legal framework established by the legislature needs to be merely detailed without being supplemented or amended by non-essential elements. The Commission is thus right in principle but wrong in fact, as judges (and the Advocate General) share its methodological approach; the Court credits its view, but declares itself not to be in the position of exercising the scrutiny to which it was called by the Commission. The intertwining of formal and substantial arguments is clear in the appeal to the dichotomy "legislative discretion and self-restraint" as a motive for refraining from further review.

It is true that those concepts are widely accepted in constitutional doctrines infused with a formal understanding of legislation. They fit well in a monistic scenario for legal production, where all non-legislative centres of law-making are inferior in ranking and their acts cannot really create law, which is the prerogative of legislative acts. Therefore, delegated acts must stand the limits imposed by the legislator itself, and those limits are clearly arguable from the delegating act.

Yet such concepts sound cacophonous in a poly-centric constitutional framework, as tied to the idea of a single legislator being vested with supreme legitimacy. As national systems themselves are confronted with a post-national scenario, they do deserve further analysis.

Indeed, their very same coordinates are fading away. Legislative primacy has been questioned at length even in domestic system and is faced with the eclipse of the principle of general representativeness embedded in the Parliament. The European institutional pluralism is grounded in the recognition of multiple criteria for representation and the very same concept of legislation could perhaps find new grounds in a poly-centric framework, should a thorough analysis of the interaction among the representative criteria be attempted.

The ambiguity of the judgement can thus be put as follows. In the first part, the EU legal order is recognised as concerned with poly-centric law-making: this assumption clearly stems from the passage dedicated to historical-teleological arguments at the beginning of the judgement. In the second part, a formal prognostic evaluation of the powers conferred is deemed possible; that is, the Court credits a monistic law-making and a formal understanding of the relationships among EU legal acts. In the third part, it is affirmed that such an evaluation cannot occur due to judicial restraint; which is consistent with the second part, but at odds with part one. Indeed, should a static interpretation of the essentiality doctrine prevail, pursuant to the rule of law principle, it

would be implicit that a full rationalisation of the system has been achieved and therefore the Commission would have a right to a thorough review of co-legislators' decision by the Court. The "legislative discretion and judicial self-restraint" justification is hardly a convincing one for denial: it is grounded on the acknowledgement of a monistic law-making background, in which the legislator alone can determine the range and the extent of normative action by other organs. On the contrary, it stems from a historical and teleological argumentation that there is no "EU legislator" in monistic terms: "legislator" is a composite stage in the law-making and its positions have to naturally stand a challenge from subsequent stages of the poly-centric framework. [60]

In order to fully understand the point, it is useful to have a closer look at the arguments provided and see what the Court exactly refrains from seeking. The judges declare that, in respect of the co-legislators' discretion, they do not venture to *ex-ante* measure the distance between the basic act and the (not-yet-existing) secondary act, and they stop at the recognition that "the EU legislature could reasonably take the view…".[61] Had they been tempted to go for a more rigorous scrutiny, they should have sought evidence of something like an "excessive distance" between any possible meaning attachable to two acts, only one of those having been adopted. On this ground only, could an *ex-ante* assessment of the nature and quality of the conferred power have taken place. Yet for the scrutiny to be "objective" this "distance" has to be calculated with such precision as to prove beyond reasonable doubt that the yet-to-be-adopted secondary act will drop into the delegated acts' box rather than into the implementing acts' one, or vice-versa; or else, that it will not be "*ultra vires*" at all.

Which kind of evidence should the Court be looking for? Ancient Romans would

60 The idea of legislative discretion is tied to the principle of Parliamentary sovereignty, which is well rooted in the constitutional culture of the Member States, notwithstanding the differences among them. Being the EU legislature a process rather than an organ, the term "discretion" is nevertheless rather simplistic: in a poly-centric scenario, it should refer to the margin between the legislative stage (endowed with a certain degree of representativeness) and the other stages of the decision making. If a dynamic version of the essentiality doctrine is maintained, the thickness of this margin depends on the appreciation of the essential elements as resulting from the positions of the different actors involved in each stage. Thereby, stemming from an open regulated process, it could only be justified through the categories of legislative supremacy at the cost of neutralising its pluralistic value. Nor can it entail a form of judicial restraint without impairing the rule of law principle, which the Court itself has tied to the idea that the border of essential elements is to be policed by judicial review.

61 " … that Article 80(1) of Regulation No 528/2012 confers on the Commission the power, not to supplement certain non-essential elements of that legislative act, but to provide further detail in relation to the normative content of that act, in accordance with Article 291(2) TFEU": CJEU, 427/12, cit., at 52. Being the EU legislature a process rather than an organ, the term "discretion" is rather simplistic: in a poly-centric scenario, it should refer to the margin between the legislative stage (endowed with a certain degree of representativeness) and the other stages of the decision making. Thereby, stemming from an open and regulated process, it could only be justified through the categories of legislative supremacy at the cost of neutralising its pluralistic value. Nor can it entail a form of judicial restraint without impairing the rule of law principle, which the Court itself has tied to the idea that the border of essential elements is to be policed by judicial review.

perhaps call it "*probatio diabolica*", that is, something outside the realm of human capacity.

The question then arises, whether it is self-restraint or material impossibility what keeps the Court away from hazarding a stricter review of the co-legislators' choices.

There is room to be persuaded that the reasons for a limited scrutiny, yet crucial to the overall reasoning behind the case, are profound. Such reasons lie in the delicate overlapping of formal and substantial criteria in the understanding of the law-making process. They are thus related to the passage from a monistic to a poly-centric legal order as emerging in the awareness of the actors involved.

The Court, as well as the parts and the Advocate General, share a subtle but manifest preconception over the nature of the scrutiny concerned: one which sticks out in the sort of "prognostic assessment" that the Commission asks the legislature to make.[62] Faced with the verb "assess" the reader is induced to believe that there is an entity prior to such assessment, which forms the object of the assessing activity. Hence the qualification of such activity as a verification of a given parameter. Actually, the parameter is not complete: what lacks is the secondary act, that is, the activity of the subsequent stage for law-making, whether executive or delegated, which – in a poly-centric system – is entitled to pursue autonomous objectives according to the quality of its representativeness and consequently to interpret the pre-existing legal parameter with a view of achieving such objectives. If one is to recognise the autonomy of the delegated law-maker, there can be no preventive restriction to its activity, but only an *ex-post* scrutiny; the ban to add "new essential elements" to the legislative discipline is the sole limit to its law-making power.

In the light of the above, it might be concluded that a "prognostic assessment", while being possible in single-centric, formally structured systems, would be a nonsense in poly-centric orders, since the object of assessment does not come to life prior to the expression of will by the delegated law-maker, whose autonomy is in principle recognised within the limit of "new essential elements".

62 It is useful to recall (see footnote 24, above) what the Commission affirmed in the *Communication* to the European Parliament and the Council, cit., at 2.3, fifth Paragraph: "The Commission believes that in order to determine whether a measure "supplements" the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to "supplement" the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures".

***VI. The unbearable lightness of being … poly-centric: the intertwining of constitutional paradigms.*** It is indeed the very same idea of "prognostic assessment" the clue to the twofold reading – static or dynamic – of the essentiality doctrine and, as a consequence, of the formal or material nature of meta-norms regulating delegation. This dichotomy revealing its background, *pros* and *contras* of the Court's reasoning become apparent. However, reconciling the two models, as the Court does, is no smooth path in logic terms.

What stems from the short analysis carried out is that the two models, as mentioned above, are rooted in opposite paradigms of law-making. The EU is no monistic law-making system, and there is little doubt about it; [63] it is far less obvious that some of the most common key constitutional concepts need to be re-construed in a different vein, as they originated in the framework of States' constitutional law and relate to a genuinely monistic environment. Therefore, should one accept a poly-centric perspective, a few concepts going almost unchallenged in national constitutional law would come under question.

Let us see some of them. The distinction "general *v.* detailed rule" is one of common use when it comes to shared legislative activity; yet it risks being misunderstood in a poly-centric order, so long as the delegation – whether implementation or delegation in the meaning of Art. 290 TFEU – is said to detail the basic normative. As a matter of fact, the idea that when legislators go into details of a certain discipline, the margin of executive discretion is automatically restricted, could be incorrect. What if the executive applies a "very detailed" discipline to a situation which is slightly different from the one contemplated in the basic act? Pursuant to an autonomous interpretation of the relevant law, the executive could well go beyond the intention, even the imagination of the legislator. In a poly-centric order, should it find arguments to demonstrate that its interpretation of the basic act complies with the continuity-invasiveness test and the essentiality requirements are met, the executive measure would be valid, no matter how "detailed" is the basic act.

63 The vast debate about its pluralistic nature is variously articulated and may be referred to in S. FABBRINI (2008) *The Constitutionalisation of a Compound Democracy: Comparing the European Union with the American Experience*, Constitutionalism *Web-Papers*, ConWEB No. 3/2008, 1-27 plus bibliography; I. PERNICE (2009) *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, *Columbia Journal of European Law*, 3, 349f.; N. WALKER (2010) *Multilevel Constitutionalism: Looking Beyond the German Debate*, in K. TUORI – S. SANKARI (2010) eds., *The Many Constitutions of Europe*, Farnham, 143f.; see in particular M. AVBELJ – J. KOMÁREK (2012) eds., *Constitutional Pluralism and Beyond*, Hart Publishing, where an account of major issues can be found and more bibliography is also provided. A survey in R. IBRIDO (2015) *Oltre le forme di governo. Appunti in tema di "assetti di organizzazione costituzionale" nell'Unione Europea*, *Rivista AIC*, at http://www.rivistaaic.it/oltre-le-forme-di-governo-appunti-in-tema-di-assetti-di-organizzazione-costituzionale-dell-unione-europea.html.

A fine-tuning of the equivalence between the detailing level of the basic act and the limitations to the delegated activity is therefore needed. In the perspective of a poly-centric law-making, legislation is not born as complete and *self-applicant* in principle, as it was the case in the era of legislative primacy; rather it structurally requires to be supplemented and amended, or else implemented, in order to meet the expectations of the rule-followers and to continuously provide room for being contested by minorities. The notion of "general rule" emerges *per relationem* to the "detail" adopted; it is the detail, conceived in the course of a supplementing, amending or else implementing law-making activity *other* than the legislative one, what develops the applicative potential of the "general rule" in the legal world. One can never predict how far the subsequent normative stage will go, as it legitimately aims at its own political objectives, autonomously elaborated and negotiated among the participants. The coherence between such approach and the dynamic version of the essentiality doctrine is manifest.

If this is true, we also need to reconsider the appropriateness of terms such as "margin of manoeuvre", "broad-narrow" and so on. These terms describe the delegation in the like of a corral, mentally associating it with a physical space; thereby, one that is physically measurable, as all physical entities are. On the contrary, the relation between a basic act and a delegated act is of a purely conceptual nature, as a dynamic reading of the essentiality doctrine shows. The use of the above mentioned terms is quite undisputed; yet it reveals an implicit bias in favour of a single-centric law-making, which could subtly affect the outcome of any analysis, though accurate and profound, of the EU legal acts system.

If we fully accept the poly-centric nature of the European law-making, we have to admit that the degree of discretion which may be attributed to one of the actors can never be determined prior to the exercise of the power conferred. It depends instead on the basic act's reading prevailing in the executive bargaining: each of the actors involved in the executive stage is legitimated to give its own reading of the basic discipline in the light of the objectives it plans to achieve. In the same vein, any pretension to curb the scope of yet-to-be-adopted secondary acts by defining *ex ante* the nature and quality of the provided delegation would result in absurdity, that is, in the denial of the poly-centric assumption. Any *ex-ante* evaluation would not contemplate the possibility that, in every step of law-making, autonomously tailored interpretations of the basic act could be maintained by each actor with a view to pursuing its own specific political goals.

Eventually, the horizons of meaning influencing the structure of a formal judgement

result in the admissibility of an *ex-ante* delimitation of delegated normative activity: when a delegation is issued, a fully-fledged delimitation of its scope is claimed to be possible in advance. Paradoxically, despite the formal acknowledgement of a delegation, the autonomous law-creating capacity and the very same legitimacy of non-legislative acts would be implicitly denied, *à la manière* of what has been a common belief in the era of legal formalism.[64] Such a denial would ultimately be grounded on the idea that the actors other than the legislator are deemed to possess neither the legitimacy to pursue autonomous political goals nor the capacity to perform legally relevant activities. Therefore, it would be perfectly consistent with a monistic conception of law-making, but alien to a poly-centric scenario.

These assumptions in favour of a poly-centric law-making seem coherent with the evolutionary pattern of alignment between essentiality and representativeness in the system of EU legal acts. Indeed, the material criterion for the classification of legal acts according to the degree and quality of the representativeness by which it is supported is grounded on the dynamic version of the essentiality doctrine. As a result, the higher the representativeness, the denser the essentiality of a decision and the lower the extent to which it can be modified in less representative stages.

In this perspective, legislative power is based on a higher quality representativeness; other stages of decision making are recognised as fully autonomous and functional to the institutional balance, according to the quality of the representativeness involved;[65] at these stages the act can be modified and/or integrated to an extent which is determined – once the derived act has been adopted – by the dynamic interaction described in the essentiality doctrine.

It could not be held that legislative power stems from a formal attribution, in the way domestic constitutional law doctrines have done at length. *Pro futuro*, the practical consequences of this reasoning would not be of little importance: a static version of the essentiality doctrine would dissolve the evaluation of the representative mechanisms into

64 A clear example can be found in the evolution of the non-delegation doctrine in the case-law of the US Supreme Court, when it was prompted to affirm that the delegation was legitimate because it was not comparable to "the making of the law". See W. GELLHORN, C. BYSE (1974) *Administrative Law: Cases and Comments*, VI ed., Foundation Press, at 62f. A comparison between the US system and the EU delegation is in R. SCHÜTZE (2011) cit., at 663-669.

65 "Higher quality" representativeness is to be understood, as previously pointed out, in the light of the appreciation of the Member States and their political *élite*, the ultimate masters of the Treaties and the key figures of European integration. In matters that Member States do not wish to confer on supranational authorities, the Council is deemed to hold a higher quality representativeness; whereas, in "better Euro-integrated matters", the parliamentary representativeness is credited with a higher quality. Those differences in treatment, key to the differentiation allowing the inclusion of diverse interests within the EU legal order, portray a variegated system of legitimate exercise of power, whose coordinates are mapped in the legal basis provided for each area of EU competence.

the dogma of legislative primacy. This would ultimately result in a formalistic understanding of the law-making process and, which would be all the more harmful for a healthy democracy, in a progressive reluctance to question the quality of the representativeness involved.[66]

In the light of the above, the judgement should be interpreted as saying that an *ex ante* scrutiny could only take place when a meta-norm has achieved such a high degree of acceptance that any departure from the pre-established meaning could be seen as a misunderstanding, or manifest error. Being concerned with a sort of *Grenzbegriff*, this reasoning should be used with the highest parsimony; a ultimate chance should be given to each institutional actor, pursuant to congruous motivation, to promote the review of even established law and submit its views to the scrutiny of other actors, including the judiciary.[67]

***VII. Conclusions. The Court as a strategic facilitator to further rationalisation of the system?*** The ambivalent approach taken by the Court testifies to the profound transformations that public law is undergoing in the open public space. State's monolithic dimension is crumbling away, eroded from outside and inside the domestic border; at the same time, it cannot be seriously affirmed that a global constitutionalism is replacing national particularism, in theory and in practice. Not in theory, as the conspicuous heritage from national law proves difficult to adapt to the new circumstances; worth to note that it is regularly used as a political tool to defend "national identities" *vis-à-vis* enhanced integration in areas that domestic *élites* consider as peculiarly sensitive for the safeguard of their survival as *élites*. Not in practice: the ambivalent relations among EU legal acts reflect the tense relationships within the European Union as a polity. Very serious questions about the meaning of democratic constitutionalism, yet assumed as a

66 As much as a formal conception of legislation progressively replaced the substantial correspondent notion. With reference to the French system, see R. CARRÉ DE MALBERG (1931) cit., at 85-86; see also, A. ÉSMEIN (1894) *De la délégation du pouvoir législatif*, *Revue Politique et Parlementaire*, 202f.

67 This is what actually happens in the concrete evolving EU law, as formally established rules are being challenged and "non-applied" by acts formally inferior in ranking. As an example, the wording of Art. 290, par.1, TFEU and the *Common Understanding* on delegated acts with reference to the duration and the term of a delegation are in clear, strident contradiction. Despite the "foundational value" attaching to the Treaties, it is the *Common Understanding* (Title IV, par. 8 ff. – ratified by the Institutions as late as 2011 – March 3rd by the Conference of Presidents of the EP) what in practice has found and finds application. As lawmakers have apparently accepted the innovation, the Treaty can be said to have been "integrated" and "implemented" in a way which, though in contrast with the wording of Art. 290, is not seen as breaking the "essential elements" of the delegation. It is for other law-making actors – judges, in particular; but not only – to raise concerns on the point and influence the views of the law-making actors. See, as an example, the Informative *Report* by the Economic and Social Committee, CESE 248/2013 – INT/656, approved on September 19th 2013, *Better Regulation: implementing acts and delegated acts*, Part D, 7ff.

foundational value in the Treaties, need to be raised. And, if horizons are to be enlarged so as to encompass a truly global dimension, the quite uncomfortable position in which the once called "Western block" finds itself nowadays allows to little optimism; not least, for the gravity of the ongoing crisis deteriorates the social structures and sombrely exposes their intrinsic, rarely tackled, contradictions.

This work would dare to contribute to a better understanding of the state of art with respect to the intertwining of constitutional paradigms in the law-making. Such phenomenon can only happen within the framework of the free migration, in time and space, of cultures and thought and is therefore inextricably tied to constitutional democracy as such. The case recently dealt with by the Court is a good example for that, and one which clearly shows the consequences that may derive in terms of institutional policy. The ambivalent answer delivered by the Court may anticipate future patterns of rationalisation likely to better define in fact the border between delegated and implementing acts. In brief: through the development of good practices in the field, some informal rules are likely to emerge and, for instance, establish in principle that certain kinds of Annex or Chart or other pre-formulated instruments are to be adopted via Art. 290 or 291 TFEU, in the same vein as the pre-fabricated delegation clauses laid down in the 2011 *Common Understandin*g on delegated acts. Once such a rule has reached a sufficient degree of consolidation, should the case be brought to Luxembourg, the Court may well accept to conduct a fully-fledged *ex ante* scrutiny and vest it with binding force.

It is eventually clear that the Court has refused to rule out the possibility of an abstract review (though inconsistent with the poly-centric understanding of the system of legal acts that it endorses) with a view to enhancing its role in the inter-institutional game. In fact, more structured parameters for delegation are likely to turn into legal norms and emerge from the magmatic flow of "essential elements". The Court would then act as a strategic facilitator in the view of an evolving rationalisation of the meta-norms related to Art. 290 and 291 TFEU. After all, by denying their material nature, the Court places itself in the best position to contribute to their material formation. Paradoxical indeed, but perhaps indispensable for the growth of a better crafted legal system?