

# GUIDES TO GOOD GOVERN- ANCE

No. 09

## Delegating Decision-making – Developing Professional Management in Public Institutions



CENTRE FOR INTEGRITY  
IN THE DEFENCE SECTOR



Norwegian Ministry  
of Defence

## CENTRE FOR INTEGRITY IN THE DEFENCE SECTOR

The Centre for Integrity in the Defence Sector (CIDS) promotes integrity, anti-corruption measures and good governance in the defence sector. Working with Norwegian and international partners, the centre seeks to build competence, raise awareness and provide practical means to reduce risks of corruption through improving institutions and through education and training. CIDS was established in 2012 by the Norwegian Ministry of Defence (MOD) and was officially appointed as NATO's Department Head in the new discipline area, established through the Building Integrity Programme in 2013. The Centre is now an integral part of the MOD. The views expressed in this document are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian Ministry of Defence.

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# FOREWORD

CIDS is proud to publish the ninth booklet of the series “Guide to Good Governance” (GGG). The objective of the Centre for Integrity in the Defence Sector’s Guides to Good Governance is to present key issues within the area of good governance to a wide audience in a concise and reader-friendly format. The guides are usually brief, at the same time they do not overly simplify matters. In this ninth GGG – “Delegating Decision-making. Developing Professional Management in Public Institutions” – the development of the notion of delegation in decision-making processes in countries is discussed.

The paper describes the legal arrangements that enable orderly and accountable delegation of responsibility within public administration. Delegation is regarded as a condition for good administration and for sound management practices. However, this notion depends on national legislation being properly designed to open up for such delegation.

The paper is based on broadly accepted practices of delegation in different EU member states and provides comparative information for legal and organisational design. At the same time, the paper shows how difficult it would be to foster a professional senior civil service – including public management values like efficiency if, at the interface between politics and administration, the instrument of delegation is not applied.

The guide was written by Mr. Francisco Cardona. Mr. Bård Bredrup Knudsen assisted in the editing of the document. CIDS is happy to receive feedback to the guide.

Oslo, 5 March 2020



**Per Christensen**

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# CONTENTS

INTRODUCTION .....	3
1. THE PROBLEM .....	4
2. MANAGERIAL ACCOUNTABILITY AND DELEGATION .....	7
3. ADMINISTRATIVE ACT .....	9
4. RESPONSIBILITY OR JURISDICTION .....	10
5. ADMINISTRATIVE (OR HIERARCHICAL) DELEGATION .....	12
a. Basic notions .....	12
b. Some Practical Questions on Administrative Delegation .....	14
6. CONTRIBUTION OF DELEGATION TO BETTER POLICY-MAKING AND BETTER PUBLIC MANAGEMENT .....	15
a. Administrative Reforms of the Politics- Administration Interface .....	15
b. Policy-making and Administration .....	17
c. Politics and Management in EU Member States .....	19
7. MAY 'DELEGATION' CONTRIBUTE TO BETTER PERFORMANCE IN CENTRAL AND EASTERN EUROPE? .....	22
CONCLUSIONS .....	24

# Introduction

This paper addresses a number of basic concepts that could be useful for developing, through legislation and changes in management practice, the notion of delegation in Central and Eastern European public administrations. Such a development could contribute to fostering efficiency and responsibility, as well as accountability.

The focus of the paper is twofold. On the one hand, it centres on the legal arrangements that, while preserving the principle of legality, enable an orderly and accountable delegation of responsibility within public administration. Properly handled, the power to delegate is a condition for good administration and for sound management practices to flourish. However, the value of efficiency depends on legislation being properly designed. The paper is based on broadly accepted practices of delegation in different EU Member States and

provides comparative information for legal and organisational design. At the same time, the paper shows how difficult it would be to foster a professional senior civil service – including public management values like efficiency if, at the interface between politics and administration, the instrument of delegation is not applied.

In order to better grasp the rather complex legal meaning of delegation in the functioning of public law organisations, one needs to dwell first on the notions of responsibility and on delegation, within an administrative public body or between two administrative bodies. Delegation is a decision whereby the top level of a body transfers certain responsibilities to a lower level in the same body, or whereby a public body delegates the authority to make decisions in defined areas to another body or administrative unit and enables the latter to make decisions on its behalf.

# 1. The Problem

Decision-making at the organisational top level is common in most countries. However, it is a particularly prevalent phenomenon in Central and Eastern European countries, as a distinct and lingering legacy from their communist past, *not* to delegate. A strong concentration of decision-making responsibilities at the top of the hierarchy, in ministries and in other public institutions, remains a dominant feature in most of these countries. This has been labelled as “dominance of verticalism”<sup>1</sup> and points to the fact that the disappearance of the Communist Party from the administrative system, left public administrations virtually without horizontal management systems. Little has been done to replace the Soviet-inspired vertical systems with new and more decentralised structures. This situation is part of a crisis in politico-administrative relations that has been conducive to a long-lasting lack of trust between politicians and civil servants in many countries. As a result, politicians are in general reluctant to delegate decision-making powers to the various public and governmental institutions or administrations in the country.

This situation has several negative effects, such as:

1. A tendency to politicise administrative decisions, i.e., decisions tend to be based more on political choice and convenience than on the principle of legality. In a democracy, the latter principle should guide any administrative decision.
2. Seen as part of a bigger picture, the above leads to a blurring of political and administrative roles and responsibilities in public management.
3. Crowding the organisational top level with most administrative decisions, big or small, creates bottlenecks and overloads at the top that are detrimental both to efficiency in administrative decision-making and to the development of strategic approaches to policy-making.
4. Civil servants at lower ranks in the hierarchy tend to retreat from participating in administrative decision-making, unless specifically required to do so, because they do not see it as an inherent part of their job. This degrades the job of civil servants

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

to being passive and doing nothing, unless otherwise ordered to by their superiors.

5. To be expected to be passive and to only act on specific instructions, tends to be de-motivating and is, in the end, an obstacle to developing a more professional civil service system and, in particular, to fostering a pool of legitimate and professional public managers.
6. As a result, the initial scepticism of many observers regarding the inability of many new EU Member States' public administrations to participate constructively in EU decision-making processes, as well as in other international organisations such as NATO, has been generally confirmed.

The essential principles for any administrative organisation to fulfil their missions, are effectiveness, economy, adequate distribution of work and responsibilities, as well as professional competence. Ensuring internal and external co-ordination and co-operation, in pursuit of a common purpose (or mission), mainly through a more or less tight hierarchical oversight or control, is another key principle. Most modern governments design their public administrations in line with these principles.

A number of national constitutions in Central and Eastern Europe include efficiency and effectiveness, as well as the notion of rule of law, as fundamental values. Service to the public and to the State is regarded as principles that should shape administrative behaviour and thereby administrative organisational design and procedures. However, a major problem in that respect is the still prevailing administrative culture, based on command and control ("verticalism"). It makes it difficult

to implement the above stated principles in terms of administrative practices.

As a consequence of these shortcomings, other problems follow. A major consequence is inefficiency. Accountability mechanisms related to inefficient performance are in general weak or non-existent in many post-communist countries.

A related problem is that certain administrative legal techniques that could contribute to efficiency and effectiveness in public administrations, are either conceptually underdeveloped or simply not properly regulated through legislation. What is more worrisome, even if the legal framework exists, is that it is not applied in practice and has little impact on the organisational behaviour of public administrations. Functional reviews or similar instruments have been used in some cases in attempts to overcome these shortcomings. Functional reviews (in essence they are research instruments) are useful in identifying certain causes of organisational malfunctioning and in classifying institutional or organisational practices. However, unless they are followed up by reforms that change established administrative practices, they will not provide a solution to the problem.

In order to tackle the problem effectively, it is necessary to work in at least two mutually reinforcing and complementary directions:

The first one is administrative law legislation with the aim to create an enabling legal environment for a more rational distribution of responsibilities at multiple levels, while preserving accountability.

The second one is to promote informed debates and training, aimed at producing changes in the prevailing politico-administrative culture that was described above. This is perhaps the most significant challenge - administrative culture may prove hard to change.



## 2. Managerial Accountability and Delegation

The concept of managerial accountability is fundamental and needs to be properly understood. It is defined in law in some countries (e.g. Serbia, Bosnia and Herzegovina and Albania) – especially with regard to public financial management, but also in other areas. However, none of these definitions refer to the *autonomy* of managers, to the link between responsibility and authority, or to the obligation or opportunity to *delegate* responsibilities to lower levels.<sup>2</sup> In practice, however, experience shows evidence of risks associated with the introduction of delegation, or other attempts to introduce managerial accountability.

Greater managerial autonomy should not be confused with managerial arbitrariness. However, greater managerial autonomy assumes an element of greater flexibility within the legal framework, through the combination of managerial accountability and delegation of authority. If internal controls and monitoring mechanisms are weak, or if managers have not yet internalised the values of the rule of law, or if transparency is limited, opportunities may

arise for unethical or even illegal behaviour.<sup>3</sup> In response, there will be a strong temptation to tighten internal controls and to reduce discretion in public managers' decision-making by regulating their activities closely and in an extremely detailed way. In fact, public managers may be deprived of any power to delegate through a re-centralising of decision-making. This vicious circle can only be broken if the risks and limitations associated with managerial accountability are understood and properly addressed.

In order to prevent the potential negative consequences of delegation without, in parallel, imposing tight regulatory controls that restrict managerial autonomy, managers may demonstrate that they are acting appropriately and in accordance with the relevant legal norms. That may be achieved by providing data on performance indicators, quality improvement schemes, or audits. However, that approach may result in undesirable side effects such as increased bureaucracy through reinforced internal scrutiny, excessive reporting and other efficiency-reducing paperwork. On the other hand, without some systematic provision of

<sup>2</sup> See OECD (2018) SIGMA Paper No. 58 on *Managerial Accountability in the Western Balkans. A comparative analysis of the barriers and opportunities faced by senior managers in delivering policy objectives*, pages 16-17, AT <http://www.sigmaweb.org/publications/Managerial-accountability-in-the-Western-Balkans-SIGMA-Paper-58-November-2018.pdf>

<sup>3</sup> OECD (2017), *Recommendation of the Council on Public Integrity*, OECD, Paris, p.10, <http://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf>

data on decisions made at the administrative level, politicians will not be able to monitor the behaviour of managers – individually or collectively. As a result of such a lack of data, there will be a tendency to limit delegation of authority.

The notion of managerial accountability cannot be introduced by legislation alone. Legal provisions may, nevertheless, promote or hamper its successful implementation. Examples of how managerial accountability may be hampered are when legal rules specifically make delegation of authority impossible (e.g., requiring that certain documents must be signed personally by the minister), or when important mitigating tools are made useless (e.g., making progress reports confidential).

In Norway, the Ministry of Defence puts forward the instrumental value of delegation, which is a core value also in the Norwegian Armed Forces:

*"Leaders take responsibility for planning, executing and completing tasks. They take responsibility for their subordinates, just as subordinates support their leaders. This builds mutual trust. Responsibility is delegated wherever possible. Every colleague pulls their weight in order to achieve common results. Leaders are role models and custodians of culture. Their responsibility is to inspire and provide space for reflection and discussion on ethics and values. Subordinates are equally responsible for doing their part. Many who work in the defence sector have stated in surveys that they value the autonomy which their job provides. Autonomy requires a willingness to take on responsibility. Leaders and their subordinates must share in an openness and willingness to learn and, sometimes, to challenge their own pre-conceived notions and routines".<sup>4</sup>*

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<sup>4</sup> Norwegian Ministry of Defence (2013): Core Values of Norway's Defence Sector. At: <https://www.regjeringen.no/globalassets/upload/fd/dokumenter/forsvarssektorens-verdigrunnlag-desember-2013-engelsk-nettutgave.pdf>

### 3. Administrative Act

Generally speaking, the notion of responsibility entails the authority to decide an administrative act, or that a body has jurisdiction to dictate the substance of administrative acts. “Administrative act”, particularly the one known as a *unilateral* administrative act, is one of the most fundamental concepts developed by administrative law. However, no single and uncontroversial definition exists of the term “administrative act”. Its meaning is mainly an elaboration of jurisprudence of national courts and of legal doctrine.

In general, one could say that a unilateral administrative act is a decision or action of an administrative unit that creates or modifies the legal situation of an individual or a private entity. There are other definitions of administrative acts, such as those acts through which the administration creates or modulates general, not individual, legal situations (also called regulatory decisions or *pouvoir réglementaire*), but they will not be further discussed here.

The notion of an administrative act is almost purely formal: an act is administrative because it is a measure taken or an action decided in the execution of public authority, by a public body that is different from a judge or from the

parliament. However, also judges and parliaments may make administrative acts concerning their internal structures, i.e., when they act not as constitutional bodies but as organisational, administrative entities.

Administrative acts, in order to be legally valid, need to be produced, following a legally established administrative procedure. Such acts are rule-bound as opposed to fully discretionary, even if in rule-bound acts discretion (the use of personal judgement) is not only possible but also necessary on many occasions, as laws cannot foresee all real-life situations. This is the reason why discretion has to be based on and take inspiration from constitutional principles that are value-based. Otherwise, discretion becomes arbitrariness. In fact, legislation on administrative procedures and administrative law in general, aim at confining and structuring discretion in administrative decision-making in order to prevent arbitrariness. Many judicial review cases of administrative decisions centre on assessing whether the public authority acted within its responsibility and followed the right procedure.

## 4. Responsibility or Jurisdiction

From a legal point of view, responsibility refers to the legitimate decision-making authority the law has ascribed to a public entity. From a managerial point of view, responsibility refers to an obligation: to ensure effective performance. To carry out that responsibility, there is a need for strategic management capacity and expertise. However, the concept of expertise, though related, is not identical to the notion of responsibility. The word 'competence' has a different meaning when used within the domain of administrative law as compared to when used in the management field. The former defines the *right* to manage, i.e., the right to make decisions. In the management field, 'competence', defines the capacity to manage, i.e., the management's abilities and skills for ensuring that decisions are made and results are achieved.<sup>5</sup>

The responsibility (jurisdiction) of an administrative authority is established in legislation and defines the range of its powers in dealing with and deciding over a given matter or policy domain, in order to produce administrative acts.

The main obligation of an authority is to exercise its jurisdiction. The administrative authority cannot refuse that responsibility or abstain from exercising it. However, in some cases doubts might exist about whether an authority has or does not have jurisdiction over a particular matter. In such a case the authority must act, nevertheless. If a third party disputes the jurisdiction (be it an individual person or another administrative authority), legislation foresees mechanisms for conflict resolution. "Conflict of attribution" among administrative authorities is not uncommon. If the challenger is a third party, the case may require a court decision or a judicial review.

As already noted, there are various sorts of responsibility. The responsibilities attributed to an administrative body may include: <sup>6</sup>

- **Exclusive responsibility:** solely the organ that has the appropriate authority can decide, not others, not even via appeals. This competence cannot be delegated.
- **Alternative responsibility:** decisions can be made by two or more organs within the same entity.

<sup>5</sup> See Les Metcalfe: "Law, Conservatism and Innovation: A Management Perspective" in European University Institute (EUI), Department of Law, Working Paper Law NO. 2001/12 on "Law and Public Management: Starting to Talk". Workshop held at the EUI on 11-12 May 2001.

<sup>6</sup> This classification has mainly an Italian origin

- *Shared responsibility*: the authority is attributed to different organs depending on the different phases of the decision-making process.
- *Concurrent responsibility*: different organs or different entities have competence on the same matter because they have authority over different legal aspects. An example is where different authorisations from different administrative authorities are required for undertaking an economic activity. This is one of the issues that most frequently has a negative impact on efficiency in the administrative decision-making process and where most criticisms arise against “red-tape” and over-regulation. Most countries are attempting to overcome this by creating so-called “one stop shops”, service conferences (Italy) and other regulatory or structural reforms or Regulatory Impact Assessment (RIA) mechanisms.

- *Substitution of responsibility*: the competence of a given body cannot be carried out unless the organ that has the primary competence has failed to act.

In this context it is worth noting the difference between delegation of *responsibility* and delegation of *signature*. The delegation of signature is not a real delegation of responsibility because the delegating authority retains the decision-making powers whereas the delegated person solely signs, on behalf of the delegating body and under its control of a decision already taken by the delegating body. In contrast to the delegation of signature, delegation of responsibility implies transferring a legal and real authority to decide. Unlike the delegation of responsibility, the delegation of signature can be delegated to someone else.

## 5. Administrative (or Hierarchical) Delegation

### A. BASIC NOTIONS

The delegation of authority from a public entity to another and not subordinated authority (this is also known as ‘devolution’) entails specific issues that are not the subject of this paper (e.g., a central government institution delegating some of its responsibilities to a local government authority). The same is true for the so-called “delegation of public services” in France, or similar arrangements in Australia, Canada and New Zealand. The latter kind of delegation includes provisions that may overlap with ‘devolution’ but includes two different elements: administrative delegation and *out-sourcing* of public services.

This paper focuses on the notion of delegation to subordinated units within an entity of the public sector, because this is the kind of delegation that represents a key to improving the performance of public institutions, and in terms of overcoming the drawbacks described at the beginning of this paper. One could call it ‘managerial’ delegation to the extent that it is intended to solve management problems without negatively affecting the legal certainty in the administrative decision-making. The latter point means that it does not modify the necessary clarity in terms of accountability.

The term ‘delegation’ has a wide range of usages in common language, but in legal terms it has a more precise meaning. The legal meaning of delegation referred to here is a public administrative law notion. Administrative delegation is also different from the constitutional delegation whereby a constitutional body (e.g., the parliament) delegates certain rule-making powers to a ministry or to the government as a whole, to produce legislation that is legitimate under the constitution.

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

However, the notion of delegation also relates to aspects like the competence, jurisdiction or responsibility of a given administrative authority. In some national legal orders, such authorities are known as ‘administrative bodies’ whose decisions are binding for the State and for third parties. The purpose is to differentiate them from ‘administrative units’ whose decisions are not binding, except internally for those working in the organisation. Delegation

means delegation of *responsibilities*, i.e., delegation of decision-making authority in a given area, as discussed above.

The delegation of authority to hierarchically subordinated bodies or units has many common legal features:

1. Delegation is an entitlement established and delimited by legislation, whereby an authority is enabled to partially transfer the exercise of its competencies to a subordinated unit, alternatively, to a non-subordinated unit. Obviously, the delegating authority cannot transfer the totality of its competencies to another unit – subordinate or not.
2. Delegation is contingent on specific domains (subject matters) for which the responsibility is delegated, i.e., the delegating authority may choose to delegate certain domains of its jurisdiction, but not others, or with respect to certain procedural phases while reserving the final decision on the matter for itself.
3. The delegating authority cannot delegate the responsibility to decide on a specific case, say, in procurement, but can fully delegate a general power to carry out public procurement, for example, below or above a certain monetary threshold.
4. The owner of the authority to make decisions in a specific domain continues to be the authority legally given that competency. The body that has been delegated the competency can only exercise the delegated competency and not delegate it further. Consequences of this are, for example, that the delegation is revocable at any time and that decisions are considered to have been made on behalf of the delegating authority. Most EU countries embrace the general public law principle against sub-delegation whereby *delegata postestas delegatur non potest*.<sup>7</sup> Given the fact that the delegated entity has only a right to exercise what has been delegated, and since it is not the “owner” of the competence, it cannot dispose of the competence and sub-delegate it to someone else. This general rule may have exceptions if a law explicitly permits sub-delegating certain decisions. Another aspect is that the delegating authority can no longer exercise the delegated competence on its own, unless the delegation is revoked or recalled. From the very moment that the delegation is published and been given effect, the delegating authority has no longer the competence to make the decisions that has been delegated.
5. Administrative acts that require a decision based only on administrative discretion cannot be delegated (a general rule), unless the law establishing the responsibility so permits (the exception). The latter applies mainly to the capacity to administrative acts that are rule-bound. The former applies mainly to acts of government (also known as “political decisions”).
6. Delegation of authority should be published and the scope of the delegation should be clearly defined and delimited. Making the delegation public is essential as it will have effects on the rights or interests of third parties. Delegated competence is not delegated if not published.

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<sup>7</sup> Powers delegated cannot be delegated to someone else.

7. The competence to make decisions linked to administrative recourse (appeals, complaints which require a second and independent decision), cannot be delegated.

## **B. SOME PRACTICAL QUESTIONS ON ADMINISTRATIVE DELEGATION**

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

- Can a proposed delegate refuse the delegation? Civil servants have their duties defined in legislation whereby, among others, it usually appears that civil servants have to accept any duty imposed lawfully on them by superiors. The acceptance of a delegation of powers or duties would appear to fall within that clause. If civil service legislation does not foresee such a clause, it may be established in secondary legislation or even in the relevant civil servants' job description. It may also appear in the relevant subject area legislation (e.g. Public Procurement Act, Financial Management Act, Civil Service Management Regulations, Environment Act, and so forth).
- Is the delegate obliged to sign the accep-

tance of the delegation? Normally he/she is not if the delegation is foreseen in legislation. If not, different practices appear in different countries.

- Is a superior body/civil servant obliged to delegate its powers to a subordinated entity/civil servant? Normally not, as the competence to delegate or not is a prerogative of a superior or, to put it differently, of the institution who is the owner of the responsibility.
- In which fields can delegation be more functional than centralised decision-making? In principle, in any administrative field delegation may play a decisive role in speeding up administrative decision-making. It is used in the majority of administrative settings. However, administrative delegation will work better in fields where there are pre-established norms and decisions are rather mechanical and rule-bound (e.g., based on whether certain defined criteria are fulfilled). On the other hand, decisions on policies are not to be delegated, although early activities to prepare policy decisions usually are. Likewise, decisions entailing a strong discretionary component are usually not delegated.



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

### A. ADMINISTRATIVE REFORMS OF THE POLITICS- ADMINISTRATION INTERFACE

Democratic public administration and reliable civil service functions are evolving in two separate directions. On the one hand, changes may be of a structural nature, aimed at building up capable democratic institutions ruled by law and, at the same time, to provide the citizenry with an adequate standard of public services. On the other hand, changes may be of a more functional nature, aimed at enhancing acceptable professional and ethical behaviour in public life, and at putting in place efficient public management methods. These structural and functional aspects are intertwined as both aim at strengthening the public legitimacy of the State.

In the structural domain, the necessity of distinguishing between politics and administration is fundamental, together with a number of equally important issues linked to principles like the rule of law, the representation of the public interest, the respect of civil rights, equality before the law, etc. All of these aspects will normally demand direct intervention at the political level related to the structural elements of the State, in order for them to be

effective. Structural changes require political decisions.

In the domain of administrative behaviour and the efficiency of public management, it is not always necessary to address the structural elements of the State, even though it may sometimes be unavoidable. Functional changes mainly require managerial interventions aimed at processes and working procedures. However, they are directly dependent on well-functioning state structures and sound administrative procedures.

The design and development of the public administration system belongs in principle to the structural domain of the State. The institutional development of the civil service is an essential part of the public administration system, because it entails the management of public power within the competencies of the State. At the same time, the bureaucratic, professional or technocratic power has to enjoy a certain degree of autonomy from the political power, in order for public administration to work properly. Still, the structural arrangements for democratic representation and expression of the pluralism that characterises any society, are essential parts of the demo-

cratic State. As a consequence, the distinction between politics and administration belongs to the structural field of public administrative systems – even though the distinction between politics and administration in practice often has blurred boundaries.

A major problem that Eastern European countries normally face when attempting to develop a professional civil service, is to design an accepted and balanced borderline between the political levels of public administration and the professional/civil service levels. There is a need for constructive co-operation and a mutual understanding of which decisions belong where. Arbitrary and politicised management of administrative systems in areas of importance for the rights of citizens should be prevented while, at the same time, leaving proper room for a more general political guidance of the public administration. This challenge has been addressed differently in different EU Member States.<sup>8</sup> EU candidate member states and some new member states are still striving to find an adequate balance and a proper way ahead.

It would be a positive development if administrative legislation and practices in the latter group of countries were promoting instruments, such as more common use of delegation, to encourage more de-centralisation of administrative decision-making in the administrative hierarchy. No administration can work effectively if all the decision-making power is wielded only at the top level of the organisation. For an organisation to work smoothly, it needs to appropriately delegate power down

the hierarchical ladder. Such delegation is also a condition for enhancing the necessary policy-making capabilities at the top level, as well as other upper administrative management skills. Aspects like responsibility and accountability will not mature otherwise.

Public administrations that want to develop more effective and efficient problem-solving approaches need to increase institution-alised delegation as a part of their institution-building efforts. That should take place in parallel with the development of civil service professionalism and other administrative reforms, such as orderly and well-structured policy-making procedures. Delegation should aim at facilitating sound management and optimise a rational use of resources. The effectiveness of such measures, however, depends on how well they have been designed. Quality considerations include: consequences for the economy; consequences for the rule of law; whether implementation can be assured and controlled/enforced; interaction with other policies; legal quality criteria in case any measure leads to a legal instrument, etc. All these issues require the expertise that a professional civil service is meant to represent in the policy-making process.

It is worth remembering that a basic reason for creating a professional civil service system, is to establish the status and required standard of those to whom public authority is delegated, and to define the duties and accountability of civil servants. In addition, the civil service system should define the rights of civil servants, and provide protection against unwarranted pressure.

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<sup>8</sup> For example, through cabinets either purely political or including seconded professional civil servants; through political appointments to clearly defined posts within the hierarchy; through appointing politically associated civil servants; by using a "pure" administrative model; through 'delegation' mechanisms, etc.

These are key elements of democratic reforms. Civil servants who participate in policy formulation and development should possess the appropriate professional level and competencies, and be trained in impact analysis techniques. Staff who participate in the implementation of policy or legislation should have a clearly defined status and have defined rights protected by legislation. In addition to these requirements, good legal arrangements for delegation will help to promote improved administrative practices that in turn may have positive operational consequences for the organisational design of public institutions. The objective should be to develop an efficiency-oriented managerial culture that ultimately may contribute to:

- An organisation of ministries whereby ministers and staffs at the policy-making level are separated from the day-to-day implementation of policies and can instead concentrate on devising policies, drafting statutes, and overseeing their implementation.
- A public sector which is given specific tasks to fulfil while possessing a degree of autonomy, within the framework of a clearly structured legal framework.
- An administration where an accountable and committed professional management culture takes root.

## **B. POLICY-MAKING AND ADMINISTRATION**

Politics and administration influence each other. Should this be regarded as something negative? It is worth remembering that policy-making and administration are two *different but still related processes*. In several EU member states with rather strong traditions in

administrative law, policies concerning public administration are expressed formally through a law passed by parliament. In the traditional understanding of the separation between politics and administration, when policy becomes law, it will be quite easy to delegate administrative decision-making powers down the hierarchical ladder, in order for the administration to apply, enforce, and implement the law (i.e., the policy). Administrative legislation defining *how* decisions at the administrative level have to be made, will clearly establish the proper legal framework within which delegation of authority may take place.

Does it mean that before a policy becomes a law the administration has no role? Does it mean that only politicians prepare and decide on policies? 'Policy' describes political objectives in operational terms – *what should be achieved and how*. Many languages, however, do not have separate words for "policy" and "politics". The accepted usage in Europe is that 'policy' in this context means "a course of action adopted and pursued by the government". Many countries use the word 'programme' as a synonym for 'policy'. Policy expresses a political decision to designate the nature of the actions of a public administration, including goals, the general framework for administrative action, and 'policy instruments'. Policy instruments are the tools that the government will employ to achieve the stated policy objectives, such as a law or other authoritative regulations, or defined public services. All government activity has to be based on law, and in countries with a strong tradition in administrative law, policies are often expressed and discussed in legal terms. Thus, policy-making tends to be closely linked to the process of production of legal norms.

Policy is decided by politicians, not by the administration or civil servants. Usually, national constitutions designate ministers – individually and collectively in the government – as the key decision-makers. Ministers decide on the content of the policy. However, most problems faced by ministers are so complicated and technical that the ministers have to rely on professional experts to assist them in designing policy. When a problem is identified, ministers set general guidelines for their professional experts who analyse the situation and provide ministers with policy options. Ministers decide which policy option will be adopted, but the initial steps in policy-making are mostly technical and administrative and subject to an administratively provided ‘professional design’.

In general terms, government policy-making follows a predetermined administrative procedure. This is often a regulation of the government with concrete administrative components such as standard forms, standard circulation lists, fixed timing relative to meetings of the government, standards for the quality of analysis (e.g. estimation of budgetary cost, environmental impact statements etc).

One specific principle, common to all member states of the EU, embedded in their procedures of policy-making, is that cross-ministerial discussion and coordination of policy should be carried out before the policy is decided by the government (ministers). Usually, there is a principle that cross-ministerial discussion takes place at a level below the ministers themselves; only when it proves impossible to reach an agreement is a question elevated to a higher level or to the top. Leadership for this process is either assigned to the ‘originating’ Ministry (for example, in Germany), who has

responsibility for piloting the issue through to final agreement, or it is vested in the General Secretariat of the Government (for example, in France). Cross-ministerial discussions can involve ministerial ‘Cabinets’ with a specific role to be sensitive to particular political aspects or objectives. Eventually, all decisions/proposals on policy reach the minister or government, but in nearly all cases the previous cross-ministerial discussion means that only a formal decision of approval will be required by the government. The point here is that political decision-making is underpinned by administrative processes and procedures. These procedures are consciously designed and maintained. If the performance of government in policy-making is considered weak, reform of the policy-making system will normally be initiated.

Numerous actors, both at the political and administrative levels, are required and play a role in developing and then deciding on policy. Because today’s policy issues tend to be complex and in many cases technical, most EU member states are strengthening the capabilities of the actors that are involved. Ministers and state secretaries are provided with professional assistance through expert seminars or public hearings, as well as through party channels. The resources available to ministers can be enhanced when needed (e.g., budgets for awarding contracts to study a particular policy issue, budgets for policy advisers). In EU member states, however, civil servants usually make the most important contribution to policy development. This is because civil servants:

1. Have substantial technical expertise and can best interact with other civil servants and experts; most European policy is formulated at this bureaucratic level;

2. Provide continuity, which is especially important in the European context, because EU policy-making does not coincide with national political cycles; and
3. Supply expertise on implementation considerations, so that policies are designed to be effective and efficient, and above all properly executed.

The capabilities of civil servants to contribute to policy-making can be enhanced through improving their skills (e.g., training, staff selection and recruitment), ensuring organisational specialisation (e.g., creation of tailored policy units), increasing budgets for policy development, strengthening intra-ministerial co-operation, and systematic use of administrative instruments such as delegation of responsibilities.

## C. POLITICS AND MANAGEMENT IN EU MEMBER STATES

The separation between politics and administration, though acknowledged as a goal in the classical organisational design of public management, is not always easy to identify in administrative (or political) practice. Such a separation – alternatively, the blurred line between them – is a response to difficult dilemmas concerning responsibility, subject areas, the nature of the process, etc. In short, practice is diverse. It is also an area in which justification of different views and arguments, becomes part of public discussion and criticism, opposition, and competition between alternative solutions. In a democratic society, such conflicts are tolerated, sometimes encouraged, and even institutionalised.<sup>9</sup>

At the same time, the general role of a public administration will be focused on establishing and maintaining a public order that guarantees stability and continuity of the State, an order able to channel conflicts and solve them through legally established instruments. Within administrative practice, conflict will easily be considered as negative – a dysfunction. That is why a mix-up of administrative versus political responsibilities is deemed as detrimental, whereas an orderly and clear-cut distribution of responsibilities is considered a goal in itself.

The above clearly illustrates that despite the close interaction, politics and administration are two different social realities that ideally should be kept separated from each other. At the same time, the administrative system is expected to exhibit mechanisms for loyal co-operation from the civil servants that retains the subordinate character of the civil service administration to democratic politics. Without a capable and professional administration apparatus, the legitimacy of democratic politics will be jeopardised insofar as democratic politics need to produce significant policy results, like legal certainty, rule of law, and satisfactory public services. That is not possible without a developed and professional administration capable of supporting democratically elected political representatives. Democratic politics requires legitimacy at the outset (free elections) but must underpin its legitimacy by producing results. *Both* the basic legitimacy at the outset and results-based legitimacy, need to be present.

In addition, the administrative machinery may lose its legitimacy, too, if it is not lead by democratically elected politicians. In short, co-operative working mechanisms between these two elements of social and political life – pol-

<sup>9</sup> Johan P. Olsen and B. Guy Peters: "Lessons from Experience: Experimental learning in Administrative Reforms in Eight Democracies". Scandinavian University Press. Oslo, 1996.

iticians and the civil service administration – are vitally important.

Administrative systems in EU member states shape the politico-administrative relationships in different ways. Although the differences are difficult to classify, two basic models have been suggested<sup>10</sup> for classifying that interaction:

1. An *osmosis model* in which the political and administrative spheres are interwoven and the political and administrative elites are regularly interchangeable. By weighting together the differences and similarities, France, Germany, Sweden, Spain, Belgium and some other countries would be included in this model.<sup>11</sup>
2. *Insulated compartment model* whereby politicians and administrative elites keep themselves rather strictly separated from each other with minimal mutual intrusions. For different reasons, the United Kingdom, Ireland and Italy would fall within this model, the UK out of a strict legislation that prevents civil servants from being involved in politics and Italy out of a traditional unwritten pact<sup>12</sup> whereby civil servants will not intrude in politics, and politicians will leave civil servants alone.

In both these models, however, the borderline between politics and administration could be a

unsettled one, where the interaction between two different public realms may constantly be under strain, and where intrusions into either camp are common, either openly or in a disguised manner.

In some OECD countries, public management reforms during the past two decades have produced results with somewhat opposite conclusions, depending on who does the analysis<sup>13</sup>. Some reforms have been seen as management invading politics and taking over slices of political territory. Other reforms suggest, to the contrary, that management reforms have been a vehicle by which executive politicians have gained a tighter grip on their administrative public servants. Pollit and Bouckaert<sup>14</sup> suggest, after examining the borderline more closely, that the frontier between politics and administration is related to, but not necessarily identical with, the boundary between civil servants and politicians. If politics is defined, not by referring to the people involved (elected or appointed politicians or civil servants), but by the *processes* involved, then both politicians and civil service managers may agree on the activities and interactions as a joint field of activity. Political activity as a distinct field of activity (or better, seen as policy-making), is not necessarily the same as party politics. Nevertheless, political activity involves the mobilization of various kinds of resources in order to achieve a chosen set of policy objectives, in a situation where the interests of the various parties concerned may be in conflict – potentially or de facto.

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

11 For a sharp criticism of the osmosis model see Carl Dahlström and Víctor Lapuente (2017): "Organising Leviathan: Politicians, Bureaucrats, and the Making of Good Government", where the authors propound a separate career path for politicians and civil servants as the best way to prevent administrative malpractice, politicisation and corruption. This separation could better enable the civil service to play an effective role as part of the system of checks and balances. Cambridge University Press, 2017.

12 Sabino Cassese: "L'Amministrazione pubblica italiana. Un profile". Il Mulino, Bologna, 1994.

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

14 Op.cit.

Civil servants as public managers frequently have to be involved in these kinds of policy processes, even if they are and should be 'politically neutral' in terms of party politics. In some cases, policy activities that actively involve civil servants, take a great deal of time. Even then, it is not self-evident in the experience of most OECD countries that politicians are willing to 'confine' themselves to a more limited role as 'strategic steering heads' of their portfolios, nor that operational public management can be completely de-politicised. It is not self-evident either, whether the development and growth of public bureaucracies have seen an inevitable progression towards increasing political power for senior bureaucrats. It is genuinely difficult to measure the 'power' of a disparate group like the senior civil service<sup>15</sup> because, for example, while organisational and policy entrepreneurship skills of bureaucrats in France and Germany appear

to be more highly appreciated than in Belgium, Greece, or Italy, this might well be because of the different characters of the political systems and the impact of the different frameworks of law, statutes, and organisations within which civil servants operate.

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

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<sup>15</sup> See Edward C. Page and Vincent Wright: "Bureaucratic Elites in Western European States: A comparative Analysis of Top Officials". Oxford University Press, New York, 1999.

## 7. May 'Delegation' contribute to better performance in Central and Eastern Europe?

A common historical feature in Central and Eastern European countries, some still in transition, including candidates for membership of the EU and some that are already members, was the lack of clear boundaries between party, public administration and government. This fact meant that the state apparatus – including the public administration – and the political party apparatus, melted into one entity. That amalgamation of political power was challenged by social, political and economic forces, leading finally to the collapse of the communist political system.

Although the transition in many social, economic and political realms is more or less completed in many of these countries, it still tends to be incomplete in the field of state administrative structures and administrative instruments and processes. In these fields, the necessary disentanglement and differentiation between public administration, the government and the political parties is not satisfactorily progressed. The consequences of this are continued and considerable politicisation of the public administration and, as pointed out earlier, a concentration of all kinds of powers at the (political) top of the administrative structure. As noted above, that leads to

a number of negative consequences.

All European Commission reports, starting with the 1997 Opinion and followed by all progress reports subsequently released, have pointed to the common insufficiencies in these countries, directly linked to the necessity of more reliable and professionally based state institutions and civil services. This criticism points to the need for a clear separation between political and professional civil service personnel, each with their defined and transparent roles and responsibilities. In most former communist countries, the establishment of professional, efficient and reliable public administrations is not completed. What is called for are professional and stable civil services under the rule of law, which are able to perform efficiently to the benefit of the citizens, both domestically and in the larger European context.

Even if the boundaries between politics and administration in older EU member states are characterised by many of the problems and dilemmas discussed above, in all of them the public administration has reached a high degree of professionalism. Legislation and administrative practice guarantee a basic clarity



in the distribution of responsibilities between politicians and civil servants. In most new EU member states, however, as well as in the remaining candidates for EU membership, the role of political personnel – both elected officials and non-elected political appointees – is often covered by weak and unclear legal regulations. This leads to a blurred distribution of roles and competencies and to muddled interactive patterns between the political level and the administrative level. In short, there are remaining weaknesses in the governmental systems of the said countries.

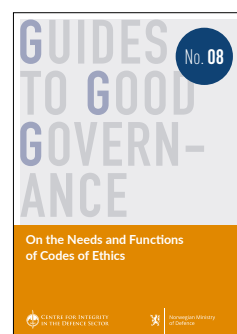
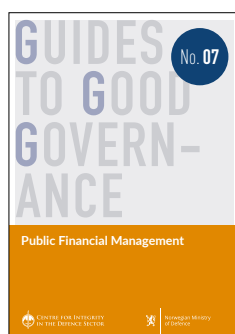
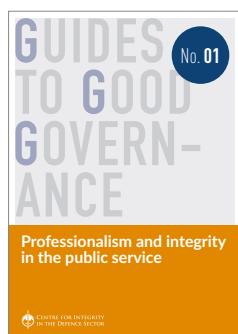
Some examples of dysfunctions resulting from that situation include: political advisors taking decisions in the name of the administration or preventing professional advice reaching ministers; ministers delegating powers to political appointees who have weak knowledge of the functioning of the administration; political advisers and politicians tending to act as line

managers at the administrative level, etc. All of this disturbs regular and efficient administrative operations. In fact, in many cases the status, role and attributions of political advisers are insufficiently regulated or not regulated at all. In other cases, political appointees are *de facto* or *de jure* assimilated to the professional civil service, a fact that undermines the efforts that most of the countries concerned are undertaking to establish merit-based civil service systems in which the principle of universal access to the civil service is embraced on the basis of professional competence and experience. The unavoidable dysfunctions in the emerging merit-based public management systems from political appointees threaten to undermine progress in developing adequate and accountable public administrations, providing a negative impact on the functioning of the state.

# CONCLUSIONS

1. Delegation of administrative decision-making powers is a legal technique, which may enhance co-operation between politics and administration, both in the field of policy-making and in the various domains of implementation of policy and law.
2. Delegation as a legal instrument, may also have important and valuable organisational and managerial consequences, in terms of organisational patterns and administrative structures and behaviours. In many countries, there is a need to promote more effective and efficient decision-making processes, while keeping the lines of responsibility and accountability within the administration well-defined and transparent.
3. Administrative delegation, consequently, is a legal and managerial instrument that promotes and helps establishing better quality – both in policy-making and in administrative decision-making.
4. Ultimately, delegation is also a means to improve the quality of public management and to increase administrative efficiency in public institutions.

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DSS publikasjonsnummer: S-1031 E

ISBN trykket utgave: 978-82-7924-103-4

ISBN elektronisk utgave: 978-82-7924-104-1

Published by: Centre for Integrity in the Defence Sector

Design: [www.melkeveien.no](http://www.melkeveien.no)

Print: Norwegian Government Security and Service Organisation

March/2020. Impressions: 100



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