Ustrój instytucjonalny Unii Europejskiej w czasach kryzysu – horyzontalny podział władzy i funkcji

Streszczenie

W artykule postawione zostały pytania: czy i na ile ukształtowany w systemie instytucjonalnym Unii Europejskiej podział kompetencji między instytucje oraz relacje między nimi odpowiadają modelowi trójpodziału władzy, jakby można było wnioskować z treści traktatów? czy mamy do czynienia z zasadą podziału władzy i jakie rozwiązania normatywne ją wypełniają? czy może ona stanowić zabezpieczenie przed arbitralnością autonomicznych w swych działaniach i nie w pełni kontrolowanych instytucji unijnych? Dokonana analiza pozwala stwierdzić, że w unijnym systemie instytucjonalnym trzy oddzielone funkcje (władze) zostały przyporządkowane odrębnym instytucjom. Rada i Parlament to władza prawodawcza. Komisja i Rada Europejska tworzą *divided executive* – Komisja w bieżącym procesie politycznym, Rada Europejska jako instytucja spełniająca strategiczne zadania. Trybunał Sprawiedliwości UE dzierży władzą sądowniczą. Instytucje te uzyskały bardzo silną pozycję w ramach swoich funkcji, jednak nie zostały wypracowane odpowiednie mechanizmy hamowania i równoważenia się władz – przede wszystkim prawodawczej i wykonawczej. W systemie unijnym władze te praktycznie się nie ograniczają. Dostępne w tym zakresie mechanizmy hamowania i równoważenia są albo nieliczne, albo politycznie nieskuteczne.

W systemie instytucjonalnym Unii Europejskiej mamy więc do czynienia z silną władzą wykonawczą (tylko częściowo, w ograniczony lub mało użyteczny sposób kontrolowaną) i silną władzą prawodawczą niekontrolowaną i nierównoważoną przez władzę wykonawczą, oraz bardzo wpływową, aktywną legislacyjnie władzą sądowniczą. W systemie instytucjonalnym UE funkcjonują zatem trzy oddzielone, ale arbitralne, bo niekontrolowane i nierównoważące się władze.

Słowa kluczowe: *ustrój Unii Europejskiej, władza prawodawcza, władza wykonawcza, władza sądownicza, zasada podziału władzy w Unii Europejskiej*

Abstract

The article poses a question about the existence of the rule of separation of powers in the EU institutional system, as it is suggested by the wording of the treaties. The analysis led to the conclusion, that in the EU institutional system there are three separated functions (powers) assigned to different institutions. The Council and the European Parliament are legislative powers, the Commission and the European Council create a "divided executive". The Court of Justice is a judicial power. The above mentioned institutions gained strong position within their main functions (legislative, executive, judicial), but the proper mechanisms of checks and balances have not been developed, especially in the relations between legislative and executive power. These powers do not limit one another in the EU system. In the EU there are therefore three separated but arbitrary powers – because they do not limit and balance one another, and are not fully controlled by the member states.

Key words: *government of the European Union, legislative power, executive power, judicial power, separation of powers in the European Union*

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Institutional organisation of the European Union in the time of crisis – horizontal division of power and functions[1]

Despite over fifty years of European integration, the European Union remains an *unsettled polity* (Olsen 2010: p. 57). We are witnessing the ongoing process of structuring of its basic institutional shape. The EU is still looking for its institutional form, political vision, *finalite politique*, it constantly undergoes institutional reforms. Simultaneously, a wide range of competence was conferred on the institutions of the Union at the beginning of the integration, which strengthened during the integration process, while the institutions became more and more independent from their principals – the member states. The latest amendment of the Treaty states that, within the European Union, the Council and the European Parliament exercise legislative power (TEU: art. 14.1), while the European Commission executes the budget, manages programmes, exercises coordinating, executive and management functions (TEU: art. 17.1).

Regarding the abovementioned wording we should ask ourselves a question about the existence of the rule of separation of powers in the EU institutional system – does the division of competence among institutions and their mutual relation create a *trias politica* model, as it is suggested by the wording of the treaties; do we have a real separation of powers in the EU, and what normative solutions are standing behind the rule, can it be a real safeguard against the arbitrary power of autonomous institutions, whose activity is not fully controlled by the member states.

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The legislative power

As already pointed out, the Treaty on European Union (TEU) states *expressis verbis* that the European Parliament jointly with the Council exercise legislative and budgetary functions. (TEU: art. 14.1, 16.1). Further, more detailed guidance on the distribution of legislative and implementing powers in the EU is based on the catalogue of sources of law of the Union and the principle of hierarchy that the law is governed by. According to the Treaty on the Functioning of the European Union (TFEU) the Council and the European Parliament adopt legislative acts by ordinary or special legislative procedure. Each time a legislative act is a result of their joint action (TFEU: art. 289). The Treaties entrust thus the role of the Union's legislators to the Council and the European Parliament, that is the competence to define general rules, adopt the acts of general application connected with political decision making, providing strategic orientation for the EU's activities in a given field (Hoffman 2009: p. 487).

While laying down the possibility of a delegation of powers to adopt non-legislative acts to the Commission through a legislative act, the TFEU stipulates that "the essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power" (TFEU: art. 290.1). Therefore the legislation that specifies the essential elements of an area cannot be delegated and it is reserved for legislative authorities: the Council and the European Parliament.

Through this the legislative authority of the EU has been distinguished, both functionally and organisationally. The vast majority of the essential decisions on the functioning of the internal policies in the European Union and describing their key elements has been entrusted to legislative acts that are implemented jointly by these two legislative authorities, under the legislative procedure.

At the same time certain decisions of legislative nature have been reserved to the Council, when it acts individually, in agreement with the Parliament or after consulting it. These decisions are especially sensitive and essential from the perspective of the interests of the member states and their different traditions. Leaving these decisions to the Council, which often has to achieve unanimity, is a procedural safeguard of vital national interests.

The legislature of the European Union is therefore a bicameral legislature, and its specificity lies in the increased legislative and decision-making powers (also in the non-legislative area) that has been granted to the Council. In consequence it is the Council that should be called the First Chamber.

Executive power

The executive power is mainly an effective implementation of legislation and agreed political initiatives and planning of general priorities for legislative activities, initiating legislation, agenda- setting (Craig 2004: p. 4).

The division of legislative and implementation tasks in the European Union results from the classification of the sources of secondary law and the hierarchy by which the law is governed. On its basis the Council and the European Parliament adopt legislative acts, whereas the Commission is to issue regulatory and implementing acts (non--legislative acts: delegated and implementing acts). By the way of exception, that last competence can be retained by the Council (TFEU: art. 289; Hoffman 2009: p. 487). Delegated acts, whose adoption can be entrusted to the Commission in a legislative act, are intended to complete or change legislative acts (TFEU: art. 290). The legislative bodies can entrust the Commission with the power to adopt general, political decisions, although non-essential ones. It should be noted that through this legislative competence has been delegated to the Commission, not the implementing competence, although they are performed through a non-legislative procedure (Hoffman 2009: p. 491). At the same time, TFEU appoints only one entity the quasi-legislative competences can be delegated to and it is the Commission. The Council cannot keep them to itself (Schütze 2011: p. 683).

The aim of introducing this third category of acts, between legislative and implementing acts, was to free up legislative capacity by passing on the possibility to define non-essential elements of legislation and by avoiding overly detailed legislative acts. The latter should focus on important, general matters (Hoffman 2009: p. 495).

The legislative act as well as the delegated act (as a type of substantial legislative act) may contain the need to issue implementing acts that set out the principles of applying the legislation on a case-by-case basis or implementing it by the member states into their own law. The adoption of implementing acts is entrusted to the Commission, and, exceptionally, the Council. Because the Commission lays down the rules of direct implementation of legislation in the member states, its executive power comes down to policy-making and regulating, in exceptional circumstances it takes the form of direct administrating and carrying out the law on a case-by-case basis (competition policy is such an exception). It arises from the nature of the European Union as an international organisation. The Union does not possess its own law enforcement authorities, the implementation has to be therefore carried out by the member states and their admini-

strations (Curtin 2004: p. 6). At Union level the implementation of legislation, through implementing non-legislative acts on the basis of legislative acts, which complement them or set the rules of implementation, has been entrusted to the Commission. It is the Commission that has the key competence of the executive power.

When it comes to the next traditional power of the executive which is agenda-setting, the Treaties give the right to submit a legislative proposal (legislative initiative) only to the Commission (TEU: art. 17.2). While describing the functions of the Commission, TEU states also that, to support the general interest of the Union, the Commission shall introduce relevant initiatives, especially on "Union's annual and multiannual programming with a view to achieving interinstitutional agreements" (TUE: art. 17.2). Drafting and executing the Union's budget, another competence typical for the executive power, has been entrusted to the Commission by the Treaties (TFEU: art. 314, 317). Practically, all the key competences of the executive (implementation of the legislation, agenda-setting, drafting and executing the budget) have been entrusted to the Commission.

Further power that defines the executive, i.e. conducting foreign policy, has been entrusted to the Commission only partially. It is the Council that is the main coordinating and decision-making body. After the Treaty of Lisbon entered into force, several competences in this area were taken over by the High Representative of the Union for Foreign Affairs and Security Policy, who initiates and negotiates agreements on common foreign policy and security (TFEU: art. 218). The High Representative also shares with the Commission the task of sustaining partnerships with international organisations (TFEU: art. 220). The area of initiating and concluding international agreements on the first pillar, the so called external policies of the European Union, remains with the Commission. At the same time, the fact that the High Representative is a Member of the Commission and its Vice-President despite being independent from the EC (he can take the initiative within the framework of common foreign policy and security, he is appointed under a different procedure, he cannot be dismissed at the request of the EC President), he strengthens the EC participation in the foreign policy, rather than weakens it (Craig 2004: p. 39).

Another institution that is part of the executive of the European Union is the European Council. Functionally and as an entity it belongs to this branch of political authority in the Union's institutional system. The main task of the European Council, since the beginning, has been programming and agenda-setting at the highest political level. "[…] The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" (TEU: art.

15). Because of its composition, the European Council is the most important political actor in the EU's system of government. As Curtis puts it: "The European Council […] is the alpha and the omega of the executive power in the EU political system" (Curtin 2009: p. 71). TEU (art. 15) clearly recognises that the European Council does not act as a legislative authority, although it decides in a legally binding way, or even in a legislative way upon certain legislative matters (Curtin 2009: p. 72). Examples include the prerogative to decide whether the Council should decide unanimously or through qualified majority, the possibility of defining the European Parliament's composition, determining the composition of the Council and the conditions for performing the rotating Council Presidency. These are all, however, specific kinds of situations. They are constitutional decisions that amend the Treaties: the constitutional charter of the European Union, but not the legislation (according to the hierarchy of law in the EU, the legislative acts are issued under the treaties for the purpose of further specification, to meet objectives and to implement policies); that is why the decision remains in the hands of the highest political authority, which is simultaneously the member states' representative – the representative of the parties to the treaties, "the masters of the treaties".

Because of its composition and the level of representation of the member states, the European Council acts as the appeal court. In some situations, when a consensus on passing the legislative acts has not been reached in the Council, i.e. when one of the member states challenges a project due to national interests, the matter may be submitted for decision to the European Council[2]. In those cases, the European Council is the last resort by which a political stalemate could be overcome, the Union's highest arbitrator in reaching a compromise between the interests of the member states. The European Council, mainly through its permanent President, on its own level: the level of Heads of States and governments, also functions as the external representation of the European Union, with respect to the competence of the High Representative of the Union for Foreign Affairs and Security Policy (TEU: art. 15).

All these tasks: being a strategic agenda-setter, not involved in the current administration of the Union's affairs, excluded from the legislative process, being the highest political arbitrator and the external representation of the European Union, they make the European Council the collegial head of state within the Union's government sys-

[2] Matters such as social security, recognition of judgements and judicial decisions in criminal matters, establishing minimum standards on violations and sanctions, establishing police cooperation, (TFEU: art. 48, 82, 83, 87).

tem. Together with the Commission it forms a divided/shared executive. The President of the European Commission is a member of the European Council without the right to vote, which further strengthens and enhance cooperation between both these institutions of the executive power of the EU.

The relations between the legislative power and the executive power

The procedural and institutional mechanisms that govern the relations between the executive power and the legislative power make up an essential element of the principle of the division of powers: a system of checks and balances. It should be asked then how and to what extend the EU legislative power, the Council and the Parliament, control and hinder the sovereignty of the EU executive power (the Commission and the European Council). And *vice-versa*: how the executive power affects the legislation or how can it curb or limit the authority of that power. In this context, three questions need to be considered: the role of the legislative power in appointing the Commission, the control of the Commission's implementing powers and the political control of the Commission.

The procedure for appointing the Commission underwent a parlamentarisation during the integration development: the role and the importance of the Parliament's opinion on the composition of the Commission has gradually increased during the integration. Currently, results of the elections to the Parliament determine the candidate for the position of the President and the committee hearings are of crucial importance for the staffing in the European Commission. The Council, which is the second element of the EU legislative power, is involved in the procedure for appointing the European commissioners. The European Council opens and closes the procedure, it nominates and proposes a candidate for President to the Parliament and appoints all the members of the college (TEU: art. 17.7).

The EU legislative power's oversight of the issuing of implementing acts by the Commission takes two forms, because there are two different types of non-legislative acts that the Commission issues: delegated acts, which supplement non-essential elements of the legislative acts, a type of quasi-legislative acts and implementing acts, which lay down the uniform conditions of EU law implementation. In both cases two different ways and sources of control exist. In the first case the oversight is exercised by the Union's institutions (mainly the Council and the Parliament), in the second case by the member states

(TFEU: art. 290, 291). In the case of delegated acts the legislative oversight is based on the possibility of revoking of delegation by the legislator (the Council or the Parliament); a delegated act also enters into force only if the legislative power (the Council or the Parliament) allows it. One might therefore say that the legislative powers of the EU executive power (the issuing of delegated acts) are subject to oversight from the legislative power, equally from both elements (Schütze 2011: p. 686).

A different control mechanism is provided in relation to the Commission implementing acts. This is where the procedure of comitology is applied. In accordance with the wording of the TFEU comitology is understood as oversight by the member states, not the Parliament or the Council. The political oversight by the Union's legislative body has clearly been excluded. It can be justified by the fact that it is the member states that are responsible for EU law implementation therefore they should be able to control the requirements for implementing the law. However, it is contrary to the principle which states that one who delegates powers oversees them. It is worth noting, in the light of the principle of separation of powers, that this important competence of the executive power, delegated by the legislative power, has been excluded from the control of EU legislators. The Parliament and the Council are only informed, on a regular basis, about the work of the committees, the documents they receive, the opinions they adopt and the draft implementing acts that are submitted to them. When a legislative act adopted under the ordinary legislative procedure is the basic act to the implementing act, they have the option of *ultra vires* control. They are able, at any time, to indicate to the Commission that, according to them, the draft implementing act exceeds the implementing powers provided for in the basic act. The final decision rests with the Commission: as a result of such a reminder it can withdraw the act, modify or uphold it. The Council and the Parliament cannot block the adoption of such an act. The legislative power is thus not provided with mechanisms of institutional control of the implementing competence of the executive power, within the frame of issuing the implementing acts, which strengthens the Commissions position as the EU executive power.

The primary range of tools of political control over the Commission includes questions from the members, the debate on the activity report, individual petitions, a vote of no confidence and granting discharge for the execution of the budget. All of them were entrusted to the European Parliament through the treaties. There is thus only one element of the EU legislative power that exercises political control over the work of the Commission: the European Parliament.

The other branch of the executive power, the European Council, because of its position, composition and nature, is beyond the control of other institutions. The impact of the EU legislative power (the Council) upon it can been observed only by the fact that the General Affairs Council prepares the meetings of the European Council and the Council Secretariat assists the European Council and prepares its conclusions (Curtin 2009: p. 77–78). The European Council is also obliged to report on its meetings to the European Parliament (TEU: art. 15.6). Since the Lisbon Treaty there is a possibility of bringing the acts of the European Council before the Court of Justice.

The legislative authorities, as indicated above, have many ways of influencing, obstructing and controlling the Commission (the executive power) and although they do not impair the Commission's independence, the set of instruments is wide. Does the Commission also possess instruments for curbing the legislative power? Neither the Commission nor the European Council have veto rights on the legislative acts adopted by the Council or the Council and the Parliament. If they decide them to be unlawful, they can submit a complaint to the Court of Justice, which can declare the act to be void, if it is vitiated.

The only influence that the Commission can have on the legislative acts is connected with its agenda-setting role and the role of initiative. However, because the most common procedure of adopting a law is currently the ordinary legislative procedure, the role of the Commission as the agenda-setter is limited to proposing a draft legislative act, it does not have as big of an influence on the shape of the legislation; it also does not have such a control over a draft legislative act, until the act has been adopted, as it had in the initial phase of the integration.

The judicial power

There is no doubt that the Court of Justice of the European Union exercises judicial power in the European Union: its role remains unchanged since the founding treaties and it is to ensure that the Union's law is the interpretation and application (TFEU: art. 19.1). It aims to do so through judicial procedures, which can be initiated by the member states, institutions and individuals. The wide jurisdiction conferred to the Court of Justice from the beginning of integration distinguishes it from other international courts (Dehousse 1998: p. 5).

That strong default institutional and juridical position of the Court of Justice has been even further strengthened by its own activities and judicial decisions. It can be

said that the Court established and formed the nature of the law of the EU and, within this law, the Court also established its own role; a role that was not planned by the member states while establishing the European Community. None of the tasks that the Court was entrusted with at the beginning, were connected with the settlement of fundamental matters such as the relationship between the national law and the Community law or assessing the compliance of the national law with the Community law upon request of courts. The Court of Justice made these matters the central component of its activities and, as a consequence, it played a key role in the Community integration process, a role more significant than the national supreme and constitutional courts usually have. Even if the constitutional courts very often close loopholes in the national law, they do not establish a new constitutional system, which has been the role of the Court of Justice throughout the years. As Takis Tridimas points out "the influence of the Court of Justice in the development of Community law has been extraordinary. Some forty years of case-law have had a determining influence both on the constitutional structure and on the substantive law of the Community so much so that, in its present stage of development, Community law can be said to be as much the result of the case-law of the Court as of the text of the founding and the amending treaties " (Tridimas 1996: p. 199).

Not only did the Court of Justice shape the EU law system, but it also established a decentralised control system, based on the preliminary ruling procedure, which verified that the national law is in compliance with the EU law; by this the Court of Justice has extended its competences and build the authority of the court as a strong institution (Stone Sweet 2011: p. 132). In consequence, it deserves to be called not only the EU judicial power in the fullest sense of the term, but also a highly influential institution with wide decisive power and a well-established judicial authority. It is the highest and final arbitrator, who decides on the legality of institutional acts (legislative and non-legislative), the relationship between institutions, and between institutions and the member states; it also assesses continuously the application of the Union law by the member states. Neither international courts nor the constitutional courts within the national judicial systems have such a wide range powers.

Conclusion

When talking about the horizontal division of power and functions in the European Union it needs to be recognised that three separate functions were allocated to different

institutions. The Council and the Parliament are the legislative power. Both these institutions are responsible for the legislative process usually under the ordinary legislative procedure. The Commission and the European Council form the divided executive: the Commission in the day-to-day political process, the European Council as an institution that meets strategic objectives. The Court of Justice of the European Union have the undisputed judicial power.

The allocation of functions ensures that the three basic types of interests in the EU: those of the member states, the citizens and the Community are carried out. The Council and the European Council provide institutional conditions for representing the state's interest, the Parliament – citizen interest, and the Commission – the Community interest. Under the legislative process the representation of interests of the member states and citizens is guaranteed through equal participation of the Council and the Parliament in the ordinary legislative procedure. At the same time, legislation designing (the on-going agenda-setting) takes place in the interest EU-wide interests through the participation of the Commission and the exclusive legislative initiative that it has. This EU-wide interest also plays a key role in the process of law-implementation, which was entrusted to the Commission. The strategic programming also needs to be in accordance with the interests of the member states who are the masters of the treaties, as the task has been assigned to the European Council. The distribution of functions between the institutions of the EU, within the division of powers in the European Union, seems to ensure their balance and adequate procedural and institutional safeguards. Thus, during the integration process the requirement for the distribution of functions between separate EU institutions has been fulfilled and those institutions acquired a strong position within their functions.

However, within the theory of separation of powers, the mechanisms of checks and balances are equally important, especially between the legislative and the executive, while in the EU system those powers do not limit one another. There is a either a very small number of available instruments of checks and balances that could be used or they are politically ineffective. Although the influence that the European Parliament has on the Commission's composition was increased significantly, during the Commission's establishment process, the Parliament's oversight during the parliamentary term is very limited. It has several political tools of controlling the European Commission (questions from the members, the debate on the Commission's activity report, individual petitions, committees of inquiry, a vote of no confidence), but their value and effectiveness are doubtful. Neither the Parliament nor the Council have the control over the

Commission's implementing powers, which are key to the executive. After the Lisbon changes it was the member states who got entrusted with controlling that matter, which is contrary to the rules on the relationship between the legislative and the executive power that derive from the theory of separation of powers. Both legislative bodies have effective means of control only over the quasi-legislative delegated acts adopted by the Commission. In consequence, the Commission enjoys a high degree of autonomy. Simultaneously, which is a paradox of the Union's system of checks and balances, it is mainly the Commission that is subject to control. The formally extensive control of the executive power (the Commission), is not balanced by the control of the legislative power, neither from the European Commission, nor the European Council. The only protection mechanisms against the inadequate legislation are of judicial nature.

As a consequence, the institutional system of the EU has a very strong executive (only partly and not effectively controlled), strong legislative that is not controlled and not balanced at all by the executive and a very influential and active judiciary. In the EU there are, therefore, three separated but arbitrary powers – because they do not limit and balance one another, and are not fully controlled by the member states.

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