



European Economic and Social Committee

INT/656
Better regulation:
implementing acts and
delegated acts

Appendices
to the information report on Better regulation:
implementing acts and delegated acts

Rapporteur working without a study group: Mr Jorge Pegado Liz (PT-III)

Expert: Ms Véronique Chappelart



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Appendix I
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Legal and conceptual aspects

1. Introduction

- 1.1 The legal practice of delegation of powers, or delegation of competences, has a long tradition in many national legal systems¹, whether at national or local level.
- 1.2 Ever since Montesquieu's *Spirit of the Laws* gave us the principle of separation of powers, modern democratic states have regulated the delegation of powers. The reasons given by those states are well known, as are the different terms used in the various constitutional systems (e.g. government orders, decrees, decree-laws or regulations, statutory instruments).
- 1.3 All these Member States have sought to define the scope of such delegation, the legal nature of the empowering act and the guarantees needed to avoid the abuse of power.
- 1.4 The cornerstone of this legal architecture is the definition of a pyramidal hierarchy of legal norms, with the constitution of each nation state constituting the basic norm or *Grundnorm*².
- 1.5 The Community legal order created by the Treaty of Rome was not comparable to any national legal order, but was more akin to the international law of treaties, albeit with its own specific features.
- 1.6 For example, "legislative" power did not originally belong to the European Parliament and had no direct democratic legitimacy, being in the hands of the Council, composed of representatives of Member State governments, and the Commission, an executive body made up of officials (including its president) who were appointed by the Member States and thus, by definition, not democratically elected.
- 1.7 The legislative "acts and measures" that the EEC could adopt were lawful but not true "laws" in the institutional sense of the word. Furthermore, one of the characteristic features of Community norms, namely their supremacy over national law (by the principle of primacy of Community law³) was not always accepted in Member State constitutional law⁴.

¹ A comparative study of the constitutions of 27 EU Member States made by Ms Annamaria Colucci, trainee at the EESC, in the preparation of this report, found that only 11 Member States do not provide for delegation arrangements; in some countries governments have, as well as parliaments, an ordinary legislative power over certain matters or in specific situations.

² Hans Kelsen, "Théorie Pure du Droit", Dalloz, Paris, 1962, page 266; "Théorie Générale de l'État", Arménio Amado, Coimbra, 1951, page 99.

³ For all, see ECJ, 15 July 1964, Costa c /ENEL, Case. 6/64, 1141.

- 1.8 Although the 1957 Treaty of Rome did not provide for delegation of powers, the need for some simplification, and above all for greater efficiency, soon led to the adoption of the "comitology" system.
- 1.9 From its first appearance in the 1960s, through the first Comitology Decision of 1987⁵ and up until the eve of the draft Constitution for Europe, a number of improvements and adjustments⁶ were made to the operation of comitology.
- 1.10 The most important of those was the introduction in 2006 of the regulatory procedure with scrutiny (RPS)⁷, involving a significant amendment to the Comitology Decision (1999/468/EC).
- 1.11 The aim of the political actors involved, that is to say the Council, the European Parliament and the Commission, was to reconcile legal certainty with a democratic decision-making process, while at the same time making procedures simpler and quicker and ensuring compliance with the Community version of the principle of separation of powers (i.e. the principle of institutional balance, as first established by the *Meroni*⁸ judgment).
- 1.12 A real political battle took place behind the scenes on the extent of the various institutions' powers, with treaty revisions providing the formal opportunity for some arguments to claim victory over others⁹.

⁴ Two judgments of the German Constitutional Court are a good example of how some Member States have interpreted the rule of Community law. "Solange I" 1974 although not questioning the principle of primacy of Community law, brings a touch of size: "as long as" the European Community does not provide protection of fundamental rights comparable to that provided by the German Basic Law, the Court of Karlsruhe will control Community law, which it refuses the superiority of its own fundamental rights. By cons, in the judgment "Solange II" in 1986, the German Constitutional Court welcomes the progress made by the European Community in terms of protection of fundamental rights, and is reviewing its position accordingly: "as long as" the European Community will grant the protection of fundamental rights, it does not control the Community law in relation to its own Constitution.

⁵ 87/373/EEC.

⁶ See Council Decisions 1999/468/EC, 2006/512/EC.

⁷ Decision 2006/512/EC of 17 July 2006, subject to successive rows of old acts of "omnibus" regulations "(COM (2007) 740 final, 741 final, 822 final, 824 final, (2008) 71 final and (2009) 142 final). See Opinion CESE 980/2008, of 29 May 2008 INT/397 (rapp. Pezzini) and 1193/2009, of 16 July 2009 INT/484 (rapp. Retureau).

⁸ ECJ, June 13, 1958, *Meroni*, Case. 9/56 11.

⁹ See Gijs Jan Brandsma and Jens Blom-Hansen, "Negotiating the Post-Lisbon Comitology System: Institutional Battles over Delegated Decision Making", *JCMS*, Vol 50, No. 6, 2012, p. 939 and Manon Malhère, "EP and Council battle it over Delegated acts" *Europolitics*, 4360, 09/02/12.

- 1.13 In the context of the Convention on the Future of Europe, which was entrusted with drawing up a "constitutional" treaty, a detailed review took place of the nature and classification of European Union acts, seeking to establish a hierarchy of norms closer to that in the Member States; "comitology" itself was therefore also reviewed¹⁰.
- 1.14 It was in the preparatory work of the Convention, and then in the draft constitution, that the first explicit reference appeared to the concept of "delegated acts" as a type of Union legal act, by way of contrast with "legislative acts" on the one hand and "implementing acts" on the other¹¹.
- 1.15 The draft constitution was rejected by certain Member States and did not come into force. Its classification of EU legal acts was therefore lost, together with some of the structural and political change that the constitutional project implied.
- 1.16 Nevertheless, the Lisbon Treaty attempted to retain some of the new features introduced by the draft constitution. One of the changes that survived was the concept of delegated acts, the nature, scope, content and duration of which are dealt with in Article 290 TFEU¹².

10 The original classification of acts was based on the legal effects of such acts rather than a hierarchy of norms inherited from the principle of separation of powers. The drafters of the Constitutional Treaty attempted to rationalize the system by creating a new classification of actions while reducing the number to 6 instead of 15. Article I-33 of the Constitutional Treaty listed as follows:

- European law;
- European framework law;
- European regulation;
- European decision;
- recommendation;
- opinion.

The following items proceeded in turn to the classification of such acts in legislative acts (laws and European framework laws), non-legislative acts (European regulations and decisions) and delegated European regulations and implementing acts.

11 Delegated acts already existed in substance in the EC Treaty, but the origin of the specific reference to delegated acts dates back to the working group on the simplification of instruments and procedures, chaired by Giuliano Amato in the frame of the works of the Convention on the Future of Europe. With the delegated European regulation, thus appeared a new legal status, in addition to conventional regulations under the Treaty and implementing regulations.

12 The Treaty of Lisbon returned back to the original qualification of legal acts, Article 288 TFEU listing:

- the regulation;
- Directive;
- the decision;
- the recommendation;
- the opinion.

In parallel, the Lisbon Treaty establishes a new hierarchy of standards based on a distinction between legislative acts adopted under the Community method, and delegated acts and implementing acts adopted by the Commission. Delegated acts being "non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act."

The category of "legislative acts" comes from the preparatory works of the Convention and refers to the concept of "European law" that the authors of the original Treaties had carefully excluded in the past.

- 1.17 Since 2010, the Commission has made use of delegations under Article 290 TFEU in a number of its proposals for regulations and directives. Several delegated acts have thus already been adopted.
- 1.18 A complex and rather bureaucratic system has also been set up to allow for the communication of these delegated acts between the EU institutions and for each institution to exercise its review powers. Implementing rules have been published, the rules of procedure of the relevant institutions have been modified¹³ and "understandings" have also been agreed¹⁴. There is thus a framework in place to manage the adoption of delegated acts.
- 1.19 In a certain number of recent EESC opinions¹⁵, various rapporteurs have raised concerns as to the number and intended content of some of the delegated acts that the Commission has proposed and have questioned the need for such acts and the content of the proposed delegations. They have expressed doubts about the effectiveness of the scrutiny of those acts by the other institutions (the European Parliament, Council and Court of Justice) and by the national parliaments, as provided in the Lisbon Treaty. They have also been concerned about the nature and limits of the delegated acts, the criteria governing the choice between delegated and implementing acts and the influence of lobby groups in the adoption and scope of delegated acts.
- 1.20 At its meeting of 10 July 2012, the EESC Bureau decided that the time had come for civil society to consider the way in which not only the Commission but also the European

Following the rejection of the Constitutional Treaty, the approach taken by the drafters of the Lisbon Treaty was to avoid any reference to the "European law" or "framework law" while maintaining a distinction between "legislative act" and "non-legislative act".

13 EP "Internal" Rules (EP Rules of Procedure - 7th parliamentary term - July 2012) and the Council.

14 The "Common understanding on delegated acts" of 4 April 2011 (Doc. Council 8640/11).

15 In fact, the Committee has, in several opinions, formally challenged the Commission on the use of these delegated powers, their democratic dimension, the effectiveness of control operated on delegated acts and their compatibility with certain fundamental principles of the Union. This is the case, among others; NAT/489 opinion of 16.02.2011 on the EAFRD and the CAP (rapp. Bros.) TEN/447 of 09.03.2011 on the integrity and transparency of the energy market (rapp. Iozia). NAT/509 on voluntary modulation of direct payments/CAP of 15 March 2011 (rapp. Mira) NAT/510 on 15 March 2011 on single CMO/agricultural sector (rapp. Narro) NAT/505 on marketing standards of 04.04.2011 (rapp. Polica) NAT/507 of 04.04.2011 on the financing of the CAP (rapp. Kallio) NAT/508 on financing by the European Agricultural Guarantee Fund of 04.04.2011 (rapp. Liolios), INT/574 Interconnection of central registers of 15 June 2011 (rapp. Pásztor) SOC/401 on the strategy for the Charter of Fundamental Rights of 21.09.2011 (rapp. Bischoff Pirvulescu) NAT/525 on promoting the tastes of Europe 07.12.2011 (rapp. Slavova) NAT/523 on exploitation of fishery resources in the Mediterranean, 07.12.2011 (rapp. Le Nouail Marlière) ECO/298 on the role of civil society in financial regulation 22.02.2012 (rapp. Morgan), INT/603 22.02.2012 on financial markets (rapp. Iozia), TEN/469 on guidelines for trans-European telecommunications networks, 22.02.2012 (rapp. Longo), INT/610 on the settlement of consumer disputes online of 28.03.2012 (rapp. Pegado Liz), INT/619 the Programme for the Competitiveness of SMEs of 29.03.2012 (rapp. Lannoo and Burns), INT/622 of 25.04.2012 on the MIF Directive (rapp. Iozia), SOC/455 of 23.05.2012, the General Data Protection Regulation (rapp. Pegado Liz), INT/635 of 23.05.2012 on the UCITS (rapp. von Fürstenwerth), NAT/561 on Multi-annual plan for the Baltic cod stocks of 11.07.2012 (rapp. Kallio), TEN/490 of 18.09.2012 on electronic transactions in the internal market (rapp. McDonogh).

Parliament, the Council, the Member States and national parliaments have used the powers given to them by the Lisbon Treaty.

- 1.21 The EESC Bureau therefore agreed that the SMO should draw up an information report to "analyse the use made of this procedure and to draw conclusions on the way in which the monitoring system put in place has worked, preventing or remedying any excesses or misuse which might obstruct the democratic rules of the 'community based on the rule of law' which is the EU".

2. **Main conceptual issues**

2.1 **Legal nature of delegated acts**

- 2.1.1 The fact that Article 290 TFEU is to be found in Section 1 ("The legal acts of the Union") of Chapter 2 ("Legal acts of the Union, adoption procedures and other provisions") of the Treaty shows that delegated acts are indeed considered to be legal acts in the sense of being binding in law.

- 2.1.2 However, a number of questions about the precise legal nature of delegated acts have not yet been answered.

- 2.1.3 In national law, delegation implies the existence of a hierarchical relationship between the delegating higher authority and the authority that receives the delegation, as well as a legislative relationship between the delegating act, which is by definition a higher norm, and a subordinate rule, namely the rule created by the authority that receives the delegation. In Community law, the high degree of interpenetration between legislative and executive responsibilities makes the situation more complex.

- 2.1.4 Any "legislative act" – in other words, according to Article 289(2) TFEU, any legal act adopted by the ordinary legislative procedure – can be the source of a delegation of power. In accordance with the ordinary legislative procedure, the co-legislators must, however, agree to include the delegation in the "basic legislative act".

- 2.1.5 Institutionally speaking, however, only the Commission can receive a delegation of powers.

- 2.1.6 Article 290 TFEU makes clear that the delegation can only relate to "non-essential elements of the legislative act". That concept is very familiar from case law and the comitology system, as well as being a principle that is at the heart of the delegation mechanism.

2.1.7 Article 290(2) also provides that the Council and the European Parliament have the power to revoke a delegation and the right to veto the entry into force of a delegated act "within a period set by the legislative act"¹⁶.

2.2 Scope of the delegation

2.2.1 It is up to the legislator to choose whether or not to delegate powers. The delegation procedure in the context of the "ordinary legislative procedure"¹⁷ appears to give the Commission substantial discretion compared with the situation under the regulatory procedure.

2.2.2 Under the old regulatory procedure, the Commission's exercise of its delegated powers was scrutinised by a regulatory committee, which could paralyse the Commission's ability to take executive action and could even subsequently transfer the Commission's delegated power to act, to the Council.

2.2.3 In the context of the "old ordinary legislative procedure", the scope of the delegation was limited to supplementing or amending the *non*-essential elements of a basic legislative act. The regulatory procedure, on the other hand, only covers the *implementation* of elements, whether essential or not, of a basic act.

2.2.4 In the context of the "old regulatory procedure", the comitology rules gave the Council and the Parliament a "right of scrutiny" that allowed them to indicate to the Commission "at any time" that in their view, a draft implementing act "exceeds the implementing powers provided for in the basic act"¹⁸.

2.2.5 Under the delegation procedure, on the other hand, the Parliament and the Council have greater power to scrutinise the Commission as a result of their ability to revoke or object to a delegated act adopted by the Commission¹⁹.

¹⁶ It is interesting in this regard to note that the Council and the Parliament have both the unilateral authority to revoke or to veto, but it is not expected to exert these skills together.

¹⁷ Article 294 of the TFEU.

¹⁸ Art. 11 of Regulation (EU) N° 182/2011 du February 16, 2011 (in OJ L 55 of 28/02/2011). This article continues: "In such cases, the Commission shall review the draft implementing act, taking into account the views expressed and inform the European Parliament and the Council of its intention to maintain, amend or withdraw the draft deed of execution. "So that means that the Commission is not obliged to withdraw the act, but simply to "review it". On the exact scope of this procedure, see Paul Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation "(2011) EL Rev. October, p. 671.

¹⁹ This right of "veto" must be exercised either by the Council by qualified majority or by the Parliament, by an absolute majority of its members.

2.3 What is the significance of the fact that delegated acts are "non-legislative acts"?

2.3.1 In general legal theory, a legislative act is defined as an abstract, general rule that expresses the general will.

2.3.2 The Lisbon Treaty, meanwhile, distinguishes between legislative acts and non-legislative acts, as well as between delegated acts and implementing acts.

2.3.3 The distinction comes down to three main points:

- first, under Article 290 TFEU, only a legislative act can "delegate to the Commission the power to adopt non-legislative acts of general application";
- secondly, under the EU (ordinary, special and regulatory?) legislative procedure, the Council, like the Parliament, deliberates and votes in public session²⁰;
- thirdly, *both* "legislative" and "non-legislative" acts, in the EU context, are intended to have legal i.e. binding force.

2.3.4 The system of public sessions and exchanges of views with the national parliaments therefore only applies in relation to the adoption of legislative acts.

2.3.5 As a result, the fact that delegated acts are classified as "non-legislative" or not formally legislative acts²¹ means that they are *de facto* adopted without national democratic scrutiny and by way of a process that fundamentally lacks transparency.

2.4 What is the difference between legislative acts and implementing acts?

2.4.1 *Delegated acts and legislative acts*

2.4.1.1 Article 289 TFEU provides that legislative acts are, in principle, adopted by way of the ordinary legislative procedure. By contrast, therefore, other acts are not legislative acts.

2.4.1.2 However, "special legislative procedures" do exist²². Legislative acts are therefore not necessarily limited to the outcome of an agreement between the Council and the European Parliament under the ordinary legislative procedure.

²⁰ Protocol No. 1 on the role of national parliaments provides that any legislative proposal must be communicated to national parliaments. In addition, the Protocol No 2 on the application of the principles of subsidiarity and proportionality requires the Commission to consider these concepts before any legislative proposal. The Protocol also provides in Articles 6 and 7, to involve national parliaments in the institutional dialogue to control the inclusion of the principle of subsidiarity, through the mechanism known as "early warning".

²¹ Some authors call them rightly, "legislative" or "quasi-legislative" in nature (Paul Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation "(2011) EL Rev. October, p. 671).

2.4.1.3 According to the Lisbon Treaty, a legislative act is a binding legal act based on a Treaty provision that explicitly provides for the existence of legislative competence. Only a legislative act can be the basis for a delegated act.

2.4.2 *Delegated acts and implementing acts*

2.4.2.1 Article 291(3) TFEU, introduced by the Lisbon Treaty, provides that the rules and general principles concerning mechanisms of control are defined in advance by means of regulations adopted in accordance with the ordinary legislative procedure²³.

2.4.2.2 Article 291(2) TFEU clearly defines the EU's executive role, providing that it is to intervene only where uniform conditions for implementation are needed.

2.4.2.3 As in the past, therefore, either the Commission or the Council can be granted implementing powers. The Commission has these powers as a matter of course, while the Council can be empowered only "in duly justified specific cases"²⁴.

2.4.2.4 One of the main differences between implementing acts and delegated acts is therefore that only the Commission can adopt delegated acts, whereas implementing acts can be adopted by either the Commission or the Council.

2.4.2.5 The limits of a delegation of powers are set out in advance in the legislative act, while the limits of implementing powers are established subsequently in the form of a comitology procedure²⁵.

2.4.2.6 Lastly, delegated acts can only relate to non-essential elements of a legislative act, whereas there is no such restriction for implementing acts. This makes sense, since the purpose of

22 Article 289 of the TFEU.

23 Remember that there are basic regulations, still called autonomous regulations, and implementing regulations. The basic regulation is adopted by the Council or the Commission under the Treaty for the implementation of certain policies. The delegated act differs from the basic Regulation because it does not find its direct source in a treaty provision but in a derivative legislative act. It also differs from the Regulations because the purpose of the delegated act is to legislate and not to implement. In addition, the Commission, as delegated authority, acts alone, without the use of comitology procedures, and even subject to a regulatory committee. One might object to the above that the comitology is never mandatory for implementation, but it is clear that in practice the comitology almost always applies when it comes to adopt implementing regulations.

24 Some authors consider this sentence as really "Delphic", which precise meaning is to be found (see Paul Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation" (2011) EL Rev. October, p. 678).

25 Article 291 of the TFEU.

implementing acts is not to supplement or amend a basic legislative act, but to facilitate its implementation²⁶.

2.4.2.7 In addition, Regulation No 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers restructures the exercise of implementing powers in such a way as to exclude the Council and the Parliament from the executive role (although the Council does retain certain powers).

2.5 Form of the delegating act and the delegated act

2.5.1 In relation to the delegating act, Article 290(1) TFEU provides that it must explicitly define the objectives, content, scope and duration of the delegation of power. Article 290(2) further requires that the delegating act explicitly lay down the conditions to which the delegation is subject, which "may²⁷" be as follows:

- a) the European Parliament or the Council may decide to revoke the delegation;
- b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

2.5.2 As far as delegated acts are concerned, Article 290(3) provides that the adjective "delegated" (in French, "*délégué*" or "*déléguée*") must be inserted in the title of the delegated act, thus confirming that the delegated act may be a regulation (*règlement délégué*) or a directive (*directive déléguée*).

2.6 Content and limits of the delegated act

2.6.1 Article 290(1) TFEU provides that delegated acts may only supplement or amend "certain non-essential elements of the legislative act".

²⁶ Some authors, however, consider the distinction, which already proved controversial during the preparatory work of the Constitution, remains unclear and the aim to distinguish the two concepts has not been reached. (See Paul Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation" (2011) EL Rev. October, p. 672). The well-known case of differences of position on the revision of Regulation 1934/2006 (allocation of funds to 10 ACP countries in the banana sector) with its impact on the financial perspectives and instruments of external funding for the period 2014/2020 is a good example (see Manon Malhère, "EP and Council battle it over Delegated acts" *Europolitics*, 4360, 09/02/12).

²⁷ Some authors, reminding preferences from the member of the Convention when drafting the Draft Constitution, consider that other conditions may be imposed (see, e.g. Eduardo Virgala Foruria "*Los actos no legislativos en la Constitución Europea*" which, however, exclude the possibility of "tacit revocation"). The escheat of delegated acts after the lapse of a specified period ("sunset clause"), has been definitively excluded (see Gregorio Garzon Clariana, "Delegated acts in the system of sources of law in the European Union", *ERA Forum* (2011) 12, p. 105).

- 2.6.2 As the Comitology Decision of 28 June 1999 (amended by that of 17 July 2006) shows, the concept of "essential elements" is well established in the field of comitology.
- 2.6.3 In the context of the delegation procedure, the purpose of this concept is to limit the powers conferred on the Commission.
- 2.6.4 Some academic writers²⁸ are worried about the subjectiveness of the concept of the term "non-essential", even considering that the limits set out in the basic legislative act might be different in different fields, with the ultimate result that no issue would be permanently beyond the reach of the executive.
- 2.6.5 On 5 September 2012²⁹, the Grand Chamber of the Court of Justice of the European Union gave its view on the subject, refining the criteria that define the scope of the legislative domain. The basic significance of that judgment lies in its acknowledgement that the question of individuals' fundamental rights is the sole prerogative of the legislator and cannot therefore ever be delegated to the Commission.

2.7 **Duration, scope and binding nature of delegated acts**

- 2.7.1 The second subparagraph of Article 290(1) provides that the scope and duration of the delegation are to be explicitly defined in the basic legislative act.
- 2.7.2 The limit on duration is justifiable and readily comprehensible as a way to avoid any risk of arbitrary action by the Commission.
- 2.7.3 As for the concept of scope, this has a very specific meaning in Community law, being linked to the notion of "direct effect"³⁰. However, the principle of direct effect does not have general application and is only fully effective where the Community norm is sufficiently clear, precise and unconditional.

²⁸ F.-X. Priollaud and D. Siritzky in "The Treaty of Lisbon," La Documentation française, Paris, 2008.

²⁹ ECJ, Grand Chamber, 5 September 2012, aff. C 355/10 Parliament v. Council. Parliament criticized the Council of having exceeded its executive powers in the field of surveillance of the sea external borders of the European Union, recognizing on the benefit of border guards, a power of arrest, inquest, search and seizure of ships, and the power of landing people in the third country where the ship departed from.

Having recalled in paragraph 64 of the judgment, the principle that "the adoption of basic rules governing the matter is reserved to the jurisdiction of the ruler of the Union" and that these basic rules cannot be object of delegation, the Court finds that the coercive powers of border guards "allow interference in fundamental human rights" and that this entails "the need of legislative action."

³⁰ Main feature of Community law, as enshrined in the European Court of Justice in connection with the case of Van Gend en Loos in 1963, meaning that Community law can directly create rights and duties for or on borne of individuals, that they may in certain circumstances invoke in support of an action before the national judge.

- 2.7.4 Defining the scope of the delegated act could therefore mean that the legislator has the power, in principle, to put limits on the nature of the delegated act and thus restrict the Commission's discretion to choose which legal instrument it can utilise i.e. either a regulation, directive or decision.
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Procedural aspects

1. **Interinstitutional operation of the delegation procedure**

1.1 *Procedural aspects*

- 1.1.1 The stated and committed objective of the process which led to the adoption of "delegated acts" was, while guaranteeing certain scrutiny and monitoring mechanisms, to facilitate a speedier, more expeditious way of regulating those aspects of legislative acts deemed to be "non-essential". This objective ties in fully with the premises of "better regulation" and "smart regulation", as defined in numerous Commission documents adopted in EU programmes and communications.
- 1.1.2 Underlying the purely legal and conceptual aspects set out in the first part of this opinion, in the options for delivering delegated acts there is a political and institutional question which has led to a new configuration of the respective powers of the Community institutions that play a part in drafting legislative and quasi-legislative acts. The rising number of delegated acts with the above-mentioned features and the nature of the issues dealt with by means of these delegations warrant analysis from the point of view of compliance with the fundamental principles of legality and democracy when they are being drafted.
- 1.1.3 As referred to above, in the absence of any formal rules specific to the preparation of delegated acts (unlike the situation with implementing acts), various informal instruments have been adopted by the Community institutions and a series of practices agreed upon between them for this purpose, as well as for the scrutiny and monitoring thereof.

The main ones are:

- Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM (2009)673 final, 9.12.2009)
- “Common understanding on delegated acts” agreed between the Parliament, Council and Commission and approved by the Conference of Presidents of the European Parliament on 3 March 2011, communicated to the Council in a letter of 30 March and submitted to the Council in a cover note on 4 April 2011 (Ref. 8460/11)³¹
- The resulting amendment to Rules 87a and 88 of the European Parliament's Rules of Procedure, in the wake of its Decision of 10 May 2012³².

- 1.1.4 These resulted in the following **blueprint** for drafting and publishing delegated acts.

³¹ This document responds to the report of Mr József Szájer of 29 March 2010 on the power of legislative delegation (PE 439.171v03-00, A7-0110/2010) and the resulting EP resolution of 5 May 2010 (A7-0110/2010).

³² Doc. A7-0072/2012.

A) **The delegating act** (any legislative act adopted either as part of the ordinary legislative process or as part of special legislative processes) must lay down the terms for the delegation explicitly, precisely, clearly and in detail.

a) Substantive limits in terms of:

- Subject – amending, fully or partially, or supplementing a legislative act
- Content – necessarily non-essential elements of a basic legislative act
- Scope – defining aspects that can be delegated
- Nature – measures of general scope and not measures of individual scope or implementing measures.

b) Time limits defining the duration of the delegations

- Duration determined in terms of:
 - A fixed period (sunset clause), a solution which the Commission does not deem to be well enough established
 - Achievement of a specific objective
 - Indeterminate or indefinite duration, the solution preferred by the Commission; this has been the rule for the delegations adopted most recently.

In the event of a delegation being set for a specific duration – the most common period being four to five years, renewable – the delegating act must in principle establish that the delegation will be renewed tacitly for periods of the same duration, except where the European Parliament or the Council opposes renewal at least three months before the end of each period. The Commission must in such cases produce a report on the delegated powers at least nine months before the end of each period.

c) Conditions

- Unilateral option for the Council or the European Parliament to express objections to the delegation, having suspensory effect, within a fixed period set on a case-by-case basis in the delegating act; it is up to the legislator to determine this period, but there is a consensus between the bodies involved that this should normally be two months, renewable for a further two months, at the request of the Council or the European Parliament, except in the event of emergencies, and/or
- Unilateral option for repeal by the Council or by the European Parliament, with an *ex nunc* effect (affecting acts implemented in the meantime) or an *ex tunc* effect (only in force in the future, preventing any new acts being adopted).

Exercising any of these powers is discretionary, but it has been the understanding of the Commission that the body exercising them should set out the grounds for their decision.

d) Urgent situations

In the event of an emergency in the exceptional adoption of certain delegated acts on, for example, matters of security, health protection and external relations, including humanitarian crises, the European Parliament and the Council must have previously justified the adoption of the urgency procedure in the delegating act and, in such cases, the Commission must:

- immediately inform the EP and the Council of its decision to utilise the urgency procedure to adopt delegated acts, giving grounds for this decision
- the delegated act in question would be notified immediately to the legislator and would apply immediately, unless or until an objection was expressed by Parliament or the Council (preferably within a maximum period of six weeks).

e) In the common understanding, the legal effect of the delegation of powers is to make it mandatory for the Commission to exercise delegated powers. Nevertheless the Commission, before the end of the period of delegation, is not prevented from proposing changes to the delegating legislative act amending the terms of the delegation.

B) The delegated act takes on the same character as the delegating act. Nonetheless, there must be express mention, in its title, of the term "delegated".

a) Before it is formulated, and despite the fact that there are no rules defining the adoption process, and notwithstanding the Commission's considerable autonomy, the three institutions involved have agreed that the Commission must:

- systematically consult experts from the national authorities which will be responsible for implementing the delegated acts³³, setting up ad hoc groups or using existing groups (e.g. experts appointed to implementing committees) or European agencies or respected scientific or technical institutes³⁴
- carry out studies, analyses, hearings and public consultation³⁵ in forms which are best adapted to the areas in question and the deadlines which have been set
- inform the EP and the Council of the work in progress and invite their representatives to preparatory meetings.

b) Delegated acts contain specific recitals explaining the rationale of the acts and are also accompanied by an explanatory memorandum setting out the grounds for the act

³³ As was already stated in the declaration 39 attached to the Final Act of the Intergovernmental Conference for the Lamfalussy process for financial services (cf. declaration No. 8 in the Final Act of the Constitutional Treaty).

³⁴ In some delegating acts there is even an express recommendation to that effect (e.g. Recital 6 of Regulation 640/2010 of 7 July 2010 on the catch of red tuna).

³⁵ See e.g. the public consultation on delegated acts for the implementation of Directive 2011/62/EU on preventing the entry in the chain of distribution of counterfeit medicines (27.04.2012).

concerned and providing information on the preparatory work carried out by the Commission.

- c) After being adopted, the EP and the Council are notified about the delegated act so that they can exercise their powers of scrutiny or object to the delegated act, within the period set down in the delegating act; notification is only deemed to be completed when translation in all languages has been received.
- d) Between 22/12 and 06/01 and between 15/07 and 20/08, the Commission does not have to notify delegated acts except in the event of an urgency procedure.
- e) The EP and the Council may, before the deadline, announce that they do not intend to exercise their right to object, in which case the delegated act can immediately be published in the OJ.
- f) In the event of an objection, the act concerned may not enter into force.
- g) In this case, the Commission has the option of:
 - adopting a new delegated act, where applicable, adjusted to take into account the objections expressed
 - submitting a new proposal for legislation, if objections are based on the fact that the delegated powers have been overstepped
 - or deciding to take no further action.
- h) Delegated acts are published in series L of the EU OJ after the deadline for objections has passed.
- i) In the event of revocation (call back):
 - the institution which decides to launch a revocation procedure must inform the other legislator and the Commission of its intention, at least one month beforehand
 - the institution in question must substantiate its decision, indicating the delegated powers which could be concerned by the revocation, and give its reasons
 - the decision to revoke ends the delegation of powers specified in that decision
 - the decision takes effect immediately, or at a later date specified therein
 - the decision may specify that it does not affect delegated acts already in force or revoke the effects of those acts as of the moment of the publication of the relevant decision
 - the decision enters into force the day following its publication in the EU OJ.
- j) EP and Council decisions to revoke a delegation, to object to a delegated act adopted in the urgency process or to object to the tacit renewal of a delegation should be published in series L of the EU OJ.

- k) Over and above the afore-mentioned mandatory publication, the Commission's Comitology Register endeavours to ensure transparency in the system and the accessibility of information: <http://ec.europa.eu/transparency/regcomitology/index.cfm> , as does its Register of Expert Groups: <http://ec.europa.eu/transparency/regexpert/>.

C) The "**models**"

In order to facilitate the operation of the system, in the above-mentioned communication the Commission is proposing a variety of wordings on the various options for exercising delegations; such models were taken up and reviewed in the Common Understanding.

- 1.1.5 In addition to the cases for revocation and objection, the EP and some legal writers have argued that the monitoring arrangements laid down in Article 290 are purely an example or "illustrative", and that it is possible to "envisage subjecting a delegation of power to other means of control, such as an express approval by Parliament and the Council of each delegated act or a possibility of repealing individual delegated acts already in force"³⁶.
- 1.1.6 The first part of this opinion already explained that, since delegating acts are obviously subject to monitoring by national parliaments under Protocols 1 and 2 of the Treaty of Lisbon, namely for the subsidiarity principle, the same is not the case for delegated acts because they are not adopted under the ordinary legislative procedure and are deemed to be "non-legislative acts".
- 1.1.7 However, delegating acts or delegated acts can be the subject of actions for annulment (TFEU Article 263) or for failure to act (TFEU Article 265) brought before the Court of Justice, for example challenging the competence of the Commission ("*ultra vires*" delegated acts) or the "essential" nature of the elements which are the subject of the delegation, or on the basis of any other of the reasons provided for under Article 263.
- 1.1.8 It is more difficult to know whether, under the current terms of TFEU Article 263 (fourth paragraph), members of the public will be entitled to bring actions for annulment, not only against delegated acts, but also to challenge provisions on the delegation of the corresponding legislative delegating act³⁷.

³⁶ Point 2 of the EP resolution of 5/05/2010.

³⁷ The best doctrine interprets the formula of that precept - "regulatory act which is of direct concern and does not entail implementing measures" as circumscribing the admissibility of actions only against the delegated acts - non-legislative acts of general application - and not against the delegating acts C.f. Gregorio Garzon Clariana, "Los actos delegados en el sistema de fuentes de derecho de la Unión Europea", in Revista de Derecho Europeo Comunitario, n ° 14, 37 year September / December 2010, pp. 721 et seq.

1.2 *Inventory and analysis of delegations and delegated acts*

- 1.2.1 It is in the light of the rules and practices described above that it is important to analyse the results of delegations and delegated acts occurring in the meantime. To this end the appended tables³⁸ are valuable for consultation and information.
- 1.2.2 The first point is the surprising number of delegations granted to the Commission recently and, as a consequence, the quantity of delegated acts. It is estimated that the Commission adopts more legislation "on its own" each year than the Council and the European Parliament combined³⁹.
- 1.2.3 It can also be noted that one single legislative act can contain various delegations, possibly amounting to dozens thereof, which can generate multiple delegated acts. Some examples are illustrative. Thus, Directive 2010/30/EU gave rise to nine delegated acts; Regulation (EU) 513/2011 gave rise to six delegated regulations; Directive 2010/73/EU on the prospectus to be published when financial instruments are offered to the public gave rise to 12 delegated acts; Directive 2010/78/EU in respect of the powers of the European supervisory authorities gave rise to 13 delegated acts; Directive 2011/61/EU on investment fund managers gave rise to 25 delegated acts; and for the proposed Regulation on data protection (COM(2012) 11 final), no fewer than 26 delegated acts are envisaged.
- 1.2.4 Moreover, the duration of the delegations also varies considerably. Although generally speaking the duration of delegations is set at four or five years, exceptionally eight years, and renewable for the same period of time, recently some delegations have been adopted with indeterminate duration. In the latter case, the requirement to issue a report on the use of delegated powers at some point before the end of each period (normally six months beforehand) no longer applies (cf Article 86 of the proposed regulation on data protection).
- 1.2.5 There are different types of delegations of powers. In fact, although delegations generally comply with the requirement for the elements concerned to be clearly "non-essential", in keeping with the definition to be found in Court of Justice case law, there are cases where there is some doubt as to the "non-essential" aspect. This is namely the case with delegated Regulations (EU) 1059/2010, 1061/2010, 1062/2010 and 392/2010, of 28 September 2010 and 1 March 2012 respectively, on the energy labelling of products, applying Directive 2010/30/EU of 19 May 2010; Regulations (EU) 826/12, 918/12 and 919/2012, of 29 June 2012 and 5 July 2012 respectively, on aspects relating to the application of Regulation EU 236/2012 on short selling and certain aspects of credit default swaps; various delegations envisaged in the proposed Regulation on data protection, in the proposed Directive amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC concerning the interconnection

³⁸ Laboriously prepared by our assistant trainee, Dr. Ana Rojo Prada, in an original work of searching, study organization and consolidation, facilitating the difficult access for many acts and positions taken on them by the various institutions.

³⁹ Rose M. D'Sa, «The Legal Framework of the European Union», *European Union Encyclopedia and Directory 2013*, Routledge 2012, 207-223, at p. 215.

between central, commercial and company registers and the proposed Regulation on electronic identification and trust services for electronic transactions in the internal market.

1.3 *Mechanisms for monitoring delegations and delegated acts*

a) Cases of revocation of delegations and objection to delegated acts entering into force

1.3.1 Delegated acts can only enter into force if the Parliament or the Council does not issue a "veto" within the deadline set by the basic legislative act.

Moreover, the treaty stipulates that:

- Parliament decides by a majority of its members
- the Council acts by qualified majority.

1.3.2 In concrete terms this means that, with the current Parliament membership of 754 MEPs, 378 votes are necessary to secure a majority.

In other words, irrespective of whether all MEPs are present in the debating chamber when a vote is held on revocation, the minimum number of votes needed to revoke a delegation is 378.

1.3.3 As far as the Council is concerned, the qualified majority voting procedure is still based on vote weighting. For example, France, Germany, Italy and the United Kingdom all have 29 votes; Malta has three.

Therefore to date and until 1 November 2014, a qualified majority is reached in the Council when at least 255 votes out of 345 are cast, representing at least 14 Member States and at least 62% of the European population.⁴⁰

b) Objections to tacit renewal of delegations

1.3.4 The possibility of tacit renewals of delegations seems to be excluded by the treaty, insofar as Article 290 (1) stipulates that "*the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts*".⁴¹

⁴⁰

Article 238 TFEU provides that from 1 November 2014, the weighting of votes will be repealed and replaced by a double majority system for the adoption of decisions.

A qualified majority is reached if it includes at least 55% of member states representing at least 65% of the population of the European Union.

If the Council does not approve a proposal from the Commission, a qualified majority shall then be at least 72% of member states representing at least 65% of the population.

The Lisbon Treaty also provides a blocking minority composed of at least four Member States representing 35% of the population of the Union representative. This new system of qualified majority voting will apply from 1 November 2014 (but with a possibility to use the voting system defined by the Treaty of Nice on a case until 31 March 2017).

- 1.3.5 Note nevertheless that the April 2011 *Common Understanding*, although not legally binding, does indicate that the delegation conferred on the Commission may be for an indeterminate period of time or be tacitly extended.

It would be legitimate to question whether – in the light of the requirements imposed by the Treaty, such as the minimum number of votes to be reached by the Parliament or the qualified majority needed at the Council, the relatively short deadlines in practice (generally two months, with a maximum of four months) and the technical nature of the subjects dealt with in the delegations – the Parliament and the Council have in reality, any genuine possibility to exercise their ability to review and control delegated acts.

- 1.3.6 The *Common Understanding* established a type of roadmap for the practical implementation of the delegated procedure. It also states that during the preparation phase of delegated acts, the Commission must ensure that it informs both the Parliament and the Council at the same time and in good time, transmitting the draft delegated acts through their General Secretariats.
- 1.3.7 The Commission also undertakes to conduct any consultation necessary with the relevant experts in the course of this preliminary stage in a transparent fashion.

In practice, the Parliament has access to these committees of experts, but only with mere observer status.

To this end, it has based its approach on the interinstitutional agreement, which stipulates that the Parliament can ask the Commission for the possibility to attend the expert committee meetings.

Since it merely has observer status, the Parliament is not authorised to amend the conclusions of the expert committees, but this does not prevent it, in practice, from communicating its concerns unofficially to these committees or from developing beneficial and valuable contacts.

- 1.3.8 Is the overall lack of transparency a cause for genuine concern?

It remains a fact that, to date, neither the Parliament nor the Council has issued any objection to a delegated act or requested that a delegation be revoked. This could be interpreted as meaning there is therefore no cause for concern, or alternatively, that the relevant delegated acts have escaped detail scrutiny and any mischief they may contain has so far not yet come to light.

41 It is clear that some national constitutions do not necessarily provide as strict supervision of the delegation. It seems that the shadow of the Court has weighed on the wording so strict to prevent laxity in the motivation of the basic legislative act. The Court is very demanding on this point.

However if, in the particular case of revocation, the Parliament or the Council were to use their "veto" right, the Commission would be obliged immediately to withdraw the delegated act. In concrete terms, the revocation would take effect the day after publication of the revocation decision in the EU Official Journal.

This would be particularly problematic if it concerned a delegated act adopted by the "urgency procedure". In fact, if that were the case, the delegated act would immediately enter into force even before the Parliament or the Council had been able to exercise its "veto right".

Moreover, the areas concerned are far from trivial: security, health protection, consumer safety and humanitarian crises.

- 1.3.9 To date the EU Court of Justice has not yet had the opportunity to rule on the implementation as such of the Commission's delegated competence. Just one case has been brought before it, on "biocidal products": proceedings for annulment brought by the Commission against Article 80 (1) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, providing for the adoption of an implementing act under TFEU Article 291, aimed at establishing the fees payable to the European Chemicals Agency, and not by a delegated act in accordance with TFEU Article 290.

According to the Commission, the act which it is called upon to adopt on the basis of Article 80 (1) of Regulation (EU) No 528/2012 can be considered to be a delegated act within the meaning of TFEU Article 290, in that it aims to supplement some non-essential aspects of the legislative act.

Since the proceedings were instigated on 19 September 2012, the Court should rule in late 2013/early 2014 at best, once it has heard the conclusions of the Advocate General.

- 1.3.10 Lastly, it appears that to date national parliaments have never issued an opinion on the implementation of TFEU Article 290 on the grounds of subsidiarity.



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Appendix III

[Table 1 and 2:](#)

**Legislative acts under the new framework and their related delegated acts
Ongoing legislation delegating powers under the new framework**

Appendix IV

[Table 3 A:](#)

**Relevant articles of delegating acts sorted by tables - Legislative acts under the new framework
and their related delegated acts**

Appendix V

[Table 3 B:](#)

**Relevant articles of delegating acts sorted by tables - Ongoing legislation delegating powers
under the new framework**

Website: <http://www.eesc.europa.eu/?i=portal.en.int-opinions&itemCode=24245>



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Appendix VI
to the information report on Better regulation:
implementing acts and delegated acts

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