Delegated versus implementing acts: how to make the right choice?

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Abstract

This article provides an overview of the choices the legislature is faced with when deciding upon empowerments to adopt delegated or implementing acts. In order to understand the divergent positions between the institutions on the application of articles 290 and 291 TFEU, this article will first provide an overview of the historical background of these articles and the institutional developments since the Treaty of Lisbon. The article presents a step by step approach to assess proposed empowerments for the adoption of delegated or implementing acts. The article will conclude with some reflections on current developments.

Keywords Comitology · Article 290 TFEU · Article 291 TFEU · Delineation · Control mechanisms

1 Introduction

The Treaty of Lisbon provides for the possibility for the legislator to confer empowerments to the European Commission (hereafter: “Commission”) to adopt delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU).¹ It is the competence of the legislator to decide whether and to what extent delegated and implementing acts should be used within the limits of the TFEU. However, practice shows that

¹ It should be noted that Art. 291(2) TFEU also provides for the possibility of conferring implementing powers on the Council.

Opinions in this contribution are personal and do not reflect the views of the Dutch government.

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	Delegated acts	Implementing acts
Legal Framework	<ul style="list-style-type: none"> Article 290 TFEU IJA Better Lawmaking (in particular common understanding in annex + standard clauses in appendix) 	<ul style="list-style-type: none"> Article 291 TFEU Comitology Regulation (182/2001) Standard rules of procedure for committees Rules of procedure for the appeal committee IJA Better Lawmaking
concern	Non-essential elements	Non-essential elements
based on	Legislative acts	Legally binding Union acts
author	Only the Commission	The Commission, or in exceptional cases the Council (see article 291(2) TFEU)
application	Only acts of general application	General or individual application
purpose	Adoption of rules to supplement or amend certain (non-essential) elements of the legislative act	providing further detail in relation to the content of a legal act (non-essential elements), in order to ensure that it is implemented under uniform conditions in all Member States.
Procedure (mechanisms of control)	<ul style="list-style-type: none"> Mandatory consultation by the Commission of Member States' experts in the preparation of draft delegated acts Ex post control by Council and European Parliament: <ul style="list-style-type: none"> European Parliament or the Council may object to the delegated act within a period set by the legislative act; Council or Parliament can revoke the power of delegation (note: this revocation does not affect already adopted delegated acts) 	<ul style="list-style-type: none"> Right of scrutiny European Parliament and Council (Article 11 Comitology Regulation) Commission is assisted by a Committee, composed of representatives of the Member States. → 2 types of committee procedure: <ul style="list-style-type: none"> Examination procedure: committee delivers opinion by QMV (in principle binding for Commission), possibility of Appeal committee (QMV); or Advisory procedure: the Commission takes utmost account of opinion of committee (Legally, it is not bound by opinion)

Fig. 1 Delegated and implementing acts compared

the choice between these those instruments is often subject of debate amongst the institutions. Whereas the adoption of implementing acts by the Commission is usually subject to ex-ante control by a committee composed of representatives of Member States, delegated acts are usually subject to ex-post control by the Council of the European Union (hereafter: “Council”) and the Parliament (hereafter: “Parliament”) (see Fig. 1). It is therefore no surprise that, generally speaking, the Parliament has a preference for delegated acts, whereas the Council generally prefers implementing acts because of the control by Member States. Although the choice between the use of delegated and implementing acts, should be made taking into account the objectives, content and context of both the envisaged act and the basic act itself, one should realise that the preferences of the Parliament and the Council are often motivated by the procedural differences in the mechanisms of control.

The purpose of this article is to provide an overview of the choices the legislature is faced with when deciding upon empowerments to adopt delegated or implementing acts. In order to understand the divergent positions between the institutions on the application of Articles 290 and 291 TFEU, this article will first provide an overview of the historical background of these Articles and the institutional developments since the Treaty of Lisbon. The article will conclude with some reflections on current developments.

2 The historical background of articles 290 and 291 TFEU

Prior to the entry into force of the Treaty of Lisbon, the third indent of Article 202 TEC provided for the possibility to “*confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays*

down”.² The provision was introduced by the Single European Act³ with the objective to relieve the legislator of technical or excessively detailed questions and prevent him from being overwhelmed with the burden of legislation relating to the internal market.⁴ Although the provision only referred to acts of the Council, it followed from case law this was to be understood as also comprising acts adopted together with the Parliament under the co-decision procedure.⁵ In addition, Article 202 TEC allowed the Council to reserve the right, in specific cases, to exercise implementing powers itself.

The requirements in respect of the exercise of implementing powers by the Commission were laid down in Council Decision 1999/468,⁶ which provided for three different procedures to scrutinize the exercise of implementing powers by the Commission via committees composed of representatives of Member States (hereafter: “the Comitology Decision”).⁷

During the Convention on the future of Europe, it was considered that there was no mechanism in place which enabled the legislator to delegate technical aspects or details of legislation whilst retaining control over such delegation.⁸ As things stood at the time, the legislator was obliged to either go into the minute detail of legislation itself, or entrust the Commission with the more technical or detailed aspects of the legislation “*as if they were implementing measures*”, subject to the control of the Member States. It was therefore proposed to introduce in Article I-36 of the Constitutional Treaty a new type of “*delegated*” acts which could encourage the legislator to focus on the essential elements of an act by delegating to the Commission an empowerment to “*supplement or amend certain non-essential elements of the law or framework law*.”⁹ Such a delegation of power had to be explicitly defined and could be made subject to the conditions that the Parliament or the Council would have the right to revoke the delegation of powers or the right to object to a delegated European Regulation. The logic behind this was clear; the exercise of these (quasi) legislative powers by the Commission to amend or supplement a legislative act should be subject to control by the authors of that act: Parliament and Council. Article I-37 of the Constitutional Treaty provided for the possibility to confer implementing powers on the Commission (or in duly justified specific cases and in the cases provided for in Article I-40 on the Council), where uniform conditions for implementing legally binding Union acts are needed.

²Treaty establishing the European Community (Consolidated version 2006), OJ C 321E, 29.12.2006, p. 37–186.

³See Art. 10 of the Single European Act (SEA), OJ L 169, 29.6.1987, p. 1–28, amending Art. 145 EEC.

⁴Note from Praesidium to the Convention on “The legal instruments: present system”, CONV 162/02, para. 38. Prior to the SEA, Art. 155 of the Treaty establishing the European Economic Community (1957) already provided that “*the Commission shall [...] exercise the powers conferred on it by the Council for the implementation of rules laid down by the latter*”.

⁵C-259/95 *Parliament v Council*, ECR I-5322, para. 26.

⁶Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.07.1999, P. 23–26.

⁷The advisory procedure (Art. 3), the management procedure (Art. 4) and the regulatory procedure (Art. 5).

⁸Final Report of Working Group IX on Simplification, Brussels 29 November 2002, CONV 424/02, p. 8.

⁹Treaty establishing a Constitution for Europe, OJ C 310, 16.12.2004, p. 3–474.

In December 2002, the Commission presented a proposal to amend the Comitology Decision pending the reform of Article 202 TEC.¹⁰ The Commission considered that the Decision would need to take account of the Parliament's position as a co-legislator and therefore proposed "as a temporary measure" to include a new regulatory procedure for the supervision – on an equal footing – by the Parliament and the Council of implementing measures with a normative content adopted under the co-decision procedure.¹¹ Council Decision 2006/512/EC introduced the "Regulatory procedure with scrutiny" (hereafter: "RPS")¹² for the adoption of

*"measures of general scope designed to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements."*¹³

This procedure comprises of two phases: an initial (executive) phase in which the Commission is responsible for drawing up and submitting draft measures for examination by a RPS-committee composed of representatives of Member States, and a second (supervisory) phase in which the draft will be submitted to the Parliament and the Council to enable them to exercise their right of political supervision (right to oppose the adoption of the measure).¹⁴ It should be noted that the RPS thus "combines" features included in both Article 290 and 291 TFEU. While the executive phase has similarities to a committee procedure for the adoption of implementing acts, the right of objection for Parliament and Council is comparable to the right of objection under Article 290 TFEU.

3 Institutional developments since the entry into force of the Lisbon Treaty

Clearly, Articles 290 TFEU (delegated acts) and 291 TFEU (implementing acts) have been inspired by Articles I-36 and I-37 of the Constitutional Treaty.

On the basis of Article 291(3) TFEU, the Parliament and the Council adopted Regulation (EU) No 182/2011 (hereafter: "the Comitology Regulation").¹⁵ This Regulation provides for two types of committee-procedures for the adoption of implementing acts: an advisory procedure and an examination procedure, and has adapted the

¹⁰COM (2002) 719 final, as amended by COM (2004) 324 final.

¹¹See recital 5 of the (amended) proposal and para. 2 of the explanatory memorandum to COM (2004) 324 final.

¹²Also known by its French abbreviation "PRAC" (Procédure de Réglementation Avec Contrôle).

¹³Art. 2(2) of Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006, p. 11-13.

¹⁴Art. 5a of Council Decision 2006/512/EC.

¹⁵Regulation (EU) No 182/2011 of the European Parliament and of the Council 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, OJ L 55, 28.2.2011, p. 13–18.

“old” comitology procedures in the Comitology Decision to the these new procedures,¹⁶ except for the RPS. Upon adoption of the Comitology Regulation, the Commission issued a statement on the RPS, clarifying that it would prepare appropriate initiatives to complete the adaptation, the objective being that all provisions referring to the RPS would be removed from all legislative instruments, by the end of the 7th term of the Parliament (2009-2014).¹⁷

One month later, a Common Understanding on practical arrangements for the use of delegated acts was agreed upon by the three institutions (hereafter: “the Common Understanding”),¹⁸ providing for (non-binding) consultations by the Commission, including at expert level, when preparing and drawing up delegated acts.

In June and October 2013 the Commission presented three so-called “Omnibus” proposals to align a number of legislative instruments which provide for the use of the RPS to Article 290 TFEU and 291 TFEU.¹⁹ The Commission proposed to use framework regulations for these alignments; references to the RPS in the legislative instruments concerned would be replaced by providing that they should read as references to Article 290 TFEU or Article 291 TFEU.

The Commission’s proposals to adapt a large majority of provisions referring to the RPS to an empowerment for the Commission to adopt delegated acts were not met with enthusiasm by the Council. Replacing the mandatory RPS-procedure, in which the RPS committee would deliver an opinion (by QMV) on a draft implementing measure, by a (non-binding) consultation of Member States on draft delegated acts, was a very sensitive issue for many Member States.

In the Council’s view, the Common Understanding, provided insufficient guarantees about proper consultation of (Member State) experts during the preparation of delegated acts. It pointed out that concerns about this shortcoming, as well as concerns regarding transparency and democratic accountability, had also been voiced by the Parliament, the European Economic and Social Committee, as well as several national parliaments.²⁰ Because of the difficulties experienced with the application of the new procedure, the adoption of key legislative packages, such as the Multiannual Financial Framework, the Common Agricultural Policy reform and the Single Market I and II packages, was delayed because negotiations on these files had been blocked for a considerable time due to disagreement over the issue of delegated acts.²¹

Therefore, the Council sent an initiative to the Presidents of the Parliament and the Commission in February 2014 to complement the Common Understanding with amongst others: an obligation for the Commission to systematically carry out appropriate and transparent ex-ante consultations, including with a group composed of

¹⁶See Art. 13 of the Comitology Regulation which has automatically adapted the old advisory procedure (Art. 3 of the Comitology Decision) to the advisory procedure referred to in Art. 4 of the Comitology Regulation, and the management and regulatory procedures (Art. 4 and 5 of the Comitology Decision) to the examination procedure referred to in Art. 5 of the Comitology Regulation.

¹⁷Statement of the Commission, OJ L 55, 28.2.2011, p. 19.

¹⁸See Council Document 8653/1/11 REV 1.

¹⁹COM (2013) 451 final, COM (2013) 452 final and COM (2013) 751 final.

²⁰Council document 6774/14, p. 2.

²¹Council document 6774/14, p. 2.

experts designated by the Member States; an obligation for the Commission to take the utmost account of the opinion delivered by the expert group; and an obligation for the Commission to keep a register on delegated acts.²² In its reply, the Commission indicated its readiness to contribute to reflections between the three institutions on how to improve the consultation process and to make it more transparent, but also pointed out that the Commission could not accept a mandatory consultation procedure essentially similar to the advisory procedure under the Comitology framework, as this would not be compatible with the Treaty.²³

The Parliament also came up with an initiative in response to the divergent interpretations among the institutions in legislative negotiations on many files: in its resolution of 25 February 2014,²⁴ Parliament set criteria for the application of Articles 290 and 291 TFEU and urged the Commission and Council to enter into negotiations with Parliament in order to reach an agreement on these criteria within the framework of a revision of the Interinstitutional Agreement on Better Law-Making.²⁵ On the same day, the EP adopted its first reading position on the three Omnibus proposals of the RPS alignment package, marking its extensive support for these proposals.²⁶

Meanwhile, the choice between delegated and implementing acts was also subject of court proceedings, the first case being the Biocides judgment.²⁷ Although some had their hopes up that the Court of Justice of the European Union (hereafter: “CJEU”) would give more guidance,²⁸ the Court noted that the legislature “has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU” and limited the scope of its judicial review to “manifest errors of assessment”.²⁹

In June 2014, the Council working party which had been tasked to examine the Omnibus proposals of the Commission, presented a report to Coreper on the results of its examination.³⁰ The report also addressed a number of difficulties which the Group had encountered during the examination of the Omnibus proposals. For example, it was considered that the method chosen by the Commission for the alignment, deprived the legislator from exercising his discretion as regards certain choices that can normally be made during the negotiation of legislative act. The only choice available to the legislator was to align an existing RPS alignment or not, without a possibility to decide whether it would be appropriate to delegate a certain matter to the Commis-

²²Council document 6774/14.

²³Council document 7792/14.

²⁴P7_TA(2014)0127.

²⁵Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003, p. 1–5.

²⁶P7_TA(2014)0114, P7_TA(2014)0113 and P7_TA(2014)0112.

²⁷Case C-427/12, *Commission v. Parliament and Council*, ECLI:EU:C:2014:170.

²⁸See for example: Ritleng, D.: ‘The Dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)*’, *Common Market Law Review* 52, p. 243–258 (2015). See also: Chamon, M.: Clarifying the divide between delegated and implementing acts? *Legal Issues of Economic Integration*, 42(2), 175–190 (2015).

²⁹Case C-427/12 [27], para. 40.

³⁰Council document 11146/14.

sion, or to adjust how the power given to the Commission is circumscribed. Because of this, the Group saw no other choice than to remove certain acts from the Omnibus proposals and to recommend that they would be aligned whenever they would be subject to a legislative revision or by means of a separate alignment proposal. By way of example, the Group referred to the Commission's proposal to align Article 11(3) of Decision 406/2009³¹ which empowered the Commission to "*adopt measures necessary to implement paragraphs 1 and 2*" to Article 290 TFEU. Such an alignment to delegated acts, without being able to adjust the wording, was considered unacceptable. In addition, the Group recalled the Council's initiative to complement the Common Understanding, and underlined that any agreement on the Omnibus proposals would be dependent upon a satisfactory solution for the issue of the consultation of Member State experts during the preparation of delegated acts by the Commission.³² This was followed by a second letter to the Presidents of the Parliament and the Commission in February 2015, inviting them to find a common solution on the basis of the Council's initiative.³³

Eventually, and in accordance with its 2015 Work programme,³⁴ the Commission withdrew its Omnibus-proposals in March 2015³⁵ and presented a proposal for a new Interinstitutional Agreement (IIA) on Better Regulation of that year, including a new Common Understanding to be attached to the IIA with provisions on consultations in the preparation and drawing-up of delegated acts as well as criteria for the application of Articles 290 and 291 TFEU.³⁶ The new IIA which was signed by the Presidents of the three institutions on 13 April 2016,³⁷ indeed included a new Common Understanding improving the consultation of Member States' experts in the preparation of delegated acts.³⁸ The institutions agreed to enter into negotiations on non-binding criteria for the application of Articles 290 and 291 TFEU, without undue delay after the entry into force of the agreement.³⁹ In addition, the three institutions acknowledged the need for a prompt alignment (to be proposed by the Commission by the end of 2016) of all basic acts which still refer to the RPS to the legal framework of the Lisbon Treaty⁴⁰ and committed to set up a joint functional register for delegated acts by the end of 2017.⁴¹

³¹ Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136–148.

³² Council Document 6774/14.

³³ Council Document 6773/15.

³⁴ COM (2014) 910 final.

³⁵ Withdrawal of Commission proposals (2015/C 80/08), OJ C 80/17, 7.3.2015, p. 17–23.

³⁶ COM (2015) 216 final.

³⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

³⁸ Annex and Appendix to the IIA.

³⁹ [37], Para. 28.

⁴⁰ [37], Para. 27.

⁴¹ [37], Para. 29.

Fig. 2 Delegated vs. implementing acts: how to make the right choice?

In line with these commitments, the Commission presented new omnibus-proposals for the RPS alignment in December 2016⁴² and the Interinstitutional register of delegated acts was launched on 12 December 2017.⁴³

On 18 June 2019, the three institutions adopted non-binding criteria for the application of Article 290 and 291 TFEU (hereafter: “non-binding criteria”), which will be discussed in further detail in the next paragraph.⁴⁴

4 How to make the right choice?

Against the historical background of Articles 290 and 291 TFEU and interinstitutional developments discussed in the previous paragraphs, this paragraph will provide an overview on the choices the legislature is faced with when deciding upon empowerments on the basis of Articles 290 or 291 TFEU. It is recommended to follow a step by step approach to assess proposed empowerments for the adoption of delegated or implementing acts (see Fig. 2) starting with the question whether an empowerment concerns essential elements (1a) and whether an empowerment is desirable (1b), followed by the choice between an empowerment to adopt delegated or implementing acts (2) and finally the question which conditions and control mechanisms are considered appropriate (3).

⁴²COM (2016) 799 final; and COM (2016) 798 final.

⁴³<https://webgate.ec.europa.eu/regdel/#/delegatedActs>. Since 28 October 2020 the scope of this register has been extended to Implementing Acts (<https://webgate.ec.europa.eu/regdel/#/implementingActs>) and the existing comitology register to document the work of committees has been replaced (<https://ec.europa.eu/transparency/comitology-register/screen/home>).

⁴⁴Non-Binding Criteria for the application of Art. 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019, OJ C 223, 3.7.2019, p. 1–4. For an overview of the process leading to the adoption of these non-binding criteria see Council document 9343/19.

4.1 Step 1

First of all, it should be noted that when exercising an implementing or delegated power, the Commission must respect the essential elements of the basic act. This is one of the general principles included in the non-binding criteria⁴⁵ and also follows from the text of Article 290 TFEU and case law.⁴⁶ The CJEU has held that which elements are essential must be based on objective factors amenable to judicial review, and has, amongst others, clarified that the adoption of provisions which require political choices falling within the responsibilities of the legislature cannot be conferred on the Commission.⁴⁷ For example, in the ongoing negotiations on the Climate Law, neither the Council nor the Parliament seems to accept the delegated power proposed by the Commission to “supplement” the Climate Law by “setting out a trajectory at Union level to achieve the climate-neutrality objective set out in Article 2(1) until 2050”.⁴⁸

However, practice shows that it is sometimes considered acceptable for a delegated or implementing act to touch upon the essential elements of a basic act, as long as this empowerment is strictly circumscribed.⁴⁹ For example, the legislature has accepted the Commissions’ proposal to prolong the reference period during which the measures provided for by the Regulation establishing measures for a sustainable rail market in view of the COVID-19 pandemic apply,⁵⁰ by clearly circumscribing the objective, content, scope and duration of this delegated empowerment.⁵¹

Secondly, it should always be kept in mind that it is the discretion of the legislature to decide whether it is desirable to empower the Commission to adopt delegated or implementing acts. Even if it is considered that a proposed empowerment does not concern the essential elements of a basic act, the legislature is free to decide whether (and to what extent) to foresee in such a empowerment.⁵²

4.2 Step 2

The second step is the question whether an empowerment has the objective to amend or supplement the basic act (delegated acts) or to implement the basic act (implementing acts).

⁴⁵Non-binding criteria, para. 5

⁴⁶Case C-65/13 *Parliament v. Commission*, ECLI:EU:C:2014:2289, para. 44.

⁴⁷Case C-355/10 *Parliament v. Council and Commission*, ECLI:EU:C:2012:516, paras. 65 and 67.

⁴⁸Compare Art. 3(1) of COM (2020) 80 final with the general approach of the Council (document 14171/20) and the first reading position of the Parliament (P9_TA(2020)0253).

⁴⁹For some interesting reflections on the essentiality requirement, see Chamon, M.: The legal framework for delegated and implementing powers ten years after the entry into force of the Lisbon Treaty. ERA Forum (2021), para. 5.1.

⁵⁰Which is arguably an essential element since this alters the temporal scope of application of the rules.

⁵¹See Art. 5(2) and 6(2) of Regulation (EU) 2020/1429 of the European Parliament and of the Council of 7 October 2020 establishing measures for a sustainable rail market in view of the COVID-19 outbreak, OJ L 333, 12.10.2020, p. 1–5.

⁵²See also para. 3 of the non-binding criteria.

The choice between delegated acts will be discussed on the basis of the non-binding criteria which have been agreed upon by the three institutions. Although non-binding, many of the criteria in fact directly follow from the Treaty provisions or the CJEU's case law.

4.2.1 General principles

First of all, the agreement establishes a number of general principles, the first one being that the non-binding criteria are only intended to provide guidance to the three institutions,⁵³ contrary Commission's original intention who proposed that the criteria "*shall be used in deciding whether an empowerment should be given pursuant to Article 290 [...] or to Article 291(2) [...]*".⁵⁴ Clearly, the institutions intended to only establish some general and indicative criteria,⁵⁵ making sure that the formulation of the delineation criteria would not impede on the discretion of the legislator as recognised in the case law of the CJEU.⁵⁶ This is also apparent from the general principles stating that: "*the criteria should not be considered as exhaustive*";⁵⁷ "*it is the competence of the legislator to decide whether and to what extent to use delegated and implementing acts, within the limits of the TFEU*";⁵⁸ and "*In each case the nature of the envisaged act must be determined taking into account the objectives, content and context of the envisaged act as well as those of the legislative act itself*".⁵⁹

The general principles also reiterate that essential elements of legislation must be determined in the basic act, and that a legislative act may confer the powers to adopt delegated acts only on the Commission.⁶⁰

A final general principle, which is perhaps a little less self-explanatory, is the principle on the use of annexes by the legislator.⁶¹ On the basis of this principle, the legislator may decide (but is never obliged) to provide for annexes in legislative acts and can decide to provide for separate acts instead. However, the structure of a legislative act should be guided by the common commitments and objectives set out in the IIA to have "*simple, clear and consistent legislation, which is accessible, comprehensible to citizens, administrations and businesses, practical to implement and made irrespective of the issue of empowerment*". This principle calls for more explanation which will be provided below when discussing the criteria.

⁵³Non-binding criteria, para 1.

⁵⁴COM (2015) 216 final, Annex 1, para. 4.

⁵⁵It should however be noted that some of the criteria were in fact already legally binding, since they either follow directly from the text of the TFEU or codify existing case-law.

⁵⁶Case C-427/12 [27].

⁵⁷Non-binding criteria, para 7.

⁵⁸Non-binding criteria, para 3.

⁵⁹Non-binding criteria, para 2.

⁶⁰Non-binding criteria, para 5 and 6. It should also be noted that the reference to "legislative act" in Art. 290 TFEU entails that CFSP-acts cannot include delegated powers for the Commission by virtue of Art. 24(1) TEU.

⁶¹Non-binding criteria, para. 4.

4.2.2 Acts of general or individual application

The first criterion is that “*Delegated acts may only be of general application. Measures of individual application may not be adopted by delegated acts*”. This criterion follows from the text of Article 290 TFEU itself. The second criterion clarifies that “*Implementing acts may be of individual or general application*”. Indeed, the application of Article 291 TFEU is not limited to acts of either individual or general application as also follows from the CJEU’s case law.⁶² It is thus clear from these criteria that where the legislature intends to confer powers on the Commission to adopt measures of individual application (for example individual authorisations to be granted to one or more Member States), it may not do so by means of delegated acts. The third criterion explains when an act is to be regarded as being of general application (“*it if applies to objectively determined situations and entails legal effects for persons envisaged generally and in the abstract*”) and is in fact a codification of the case law cited in the footnote to this criterion.⁶³

Establishing whether an act is of general or individual application is sometimes easier said than done, and perhaps best explained if illustrated. For example, annex XIV of the REACH regulation contains a list of substances which are subject to authorization.⁶⁴ Article 58 of this Regulation empowers the Commission to include new substances in accordance with the RPS.⁶⁵ Even if such a decision would only concern one substance, it is to be considered as an act of general application, since the authorization requirement would apply throughout the whole EU (even if the substance would only exist in only one or a few Member States). On the other hand, Article 64(8) of the same Regulation empowers the Commission to take an authorization decision for the use of a substance by means of implementing acts (through the examination procedure). This is a clear example of an act of individual application, which is also apparent from the Commission implementing decision granting an authorisation for a use of bis(2-ethylhexyl) phthalate (DEHP), which was adopted on the basis of this provision and is addressed to a specific company.⁶⁶

4.2.3 Amendments of legislative acts including their annexes

The second group of criteria, concerning amendments of legislative acts including their annexes, also follow directly from the text of the Article 290 TFEU and from the CJEU’s case law cited in the footnotes to these criteria. First of all it is recalled that

⁶²Case C-440/14 P *National Iranian Oil Company v. Council*, ECLI:EU:C:2016:128, para. 36.

⁶³Non-binding criteria A.3.

⁶⁴Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396 30.12.2006, p. 1.

⁶⁵At the time of writing, this provision is not yet aligned to the TFEU.

⁶⁶Art. 3 of Commission implementing decision C(2014) 5551 final.

“If the legislator confers the power to amend a legislative act on the Commission, that power can only be exercised by delegated acts, including where that power to amend relates to the annexes, as they are an integral part of legislative acts.”, and secondly that *“the delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislator in that act”*. Further guidance is given by explaining that *“amendments may include insertions and additions in relation to certain non-essential elements of the legislative act, or deletions or replacements of non-essential elements”*. Indeed, the CJEU has clarified that even the simple insertion of a footnote in an annex to a legislative act, constitutes an amendment of that act within the meaning of Article 290(1) TFEU.⁶⁷ In other words, an amendment of a legislative act, nor matter how small, can never be adopted by means of implementing acts. This perhaps explains why the Council sometimes seeks creative avenues to circumvent the use of delegated acts.

One example which may illustrate this, is the General approach⁶⁸ adopted by the Council in respect of the Proposal for a Directive amending Council Framework Decision 2004/757/JHA.⁶⁹ The Commission proposed that Article 1 of the Framework Decision would define “drug” as (amongst others) *“any of the substances listed in the annex”*. The Council considered it desirable to swiftly address the emergence and spread of harmful new psychoactive substances in the Union by conferring a power upon the Commission to include such new psychoactive substances in the definition of drug.⁷⁰ However, instead of conferring a delegated power on the Commission to amend substances listed in the annex, the Council proposed to confer implementing powers on the Commission and to change the definition of drug in Article 1 to *“a new psychoactive substance, in respect of which an implementing decision has been adopted in accordance with Article 1a”*. In addition the Council provided that the Commission should draw up a list of drugs, as set out in Article 1 of the Framework decision to be published (and updated) in the Official journal of the European Union. This creative attempt by the Council to circumvent the use of delegated acts, was however not considered acceptable by the Parliament, and therefore, Article 1a of the adopted Directive 2017/2103 includes an empowerment for the Commission to amend the list of substances in the Annex to the Framework Decision by means of delegated acts.⁷¹ In light of the general principle referred to in paragraph 4.2.1, one could indeed argue that the use of a list of drugs in an annex would provide for legislation which is more clear and accessible, than a list of drugs in the official journal of the EU which would be separate from the basic act.⁷²

⁶⁷Case C-88/14 *Commission v. Parliament and Council*, ECLI:EU:C:2015:499, para. 31.

⁶⁸Council document 14810/16.

⁶⁹COM (2013) 618 final.

⁷⁰Council document 14810/16, recital 5a.

⁷¹Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of ‘drug’ and repealing Council Decision 2005/387/JHA, OJ L 305, 21.11.2017, p. 12–18.

⁷²The consolidated text of Framework Decision 2004/757 (available at <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX%3A02004F0757-20201203>) provides a clear overview of all the amendments made to the list of drugs.

4.2.4 Additional rules supplementing vs. implementing the basic act

The final set of criteria concern the delineation between acts supplementing and acts implementing the basic act.⁷³ When an empowerment is foreseen for the Commission to adopt additional rules, it is not always easy to determine whether these rules should be regarded as supplementing or implementing the basic act.⁷⁴

Although no reference to the CJEU's case law is made, the guidance given is consistent with it.⁷⁵ With regard to additional rules supplementing the basic act, the criteria clarify that

*“measures that consist in the adoption of additional rules building upon or developing the content while coming within the regulatory framework as defined by the basic act should be laid down in delegated acts. This would be the case for measures affecting in substance the rules laid down in the basic act and allowing the Commission to ‘flesh out’ the basic act, provided that they do not touch on its essential elements.”*⁷⁶

With respect to additional rules implementing the basic act, the criteria clarify that

*“additional rules implementing or giving effect to the rules already established in the basic act by specifying in further detail the content of that act, without affecting the substance of the legislative framework, should be laid down in implementing acts. This would be the case where a sufficiently precise legal framework has been laid down by the legislator, for example where the main conditions and criteria are laid down by the legislator.”*⁷⁷

This general guidance is further specified in three specific cases: (1) acts establishing a procedure, a method or a methodology; (2) acts relating to an obligation to provide information; and, (3) acts relating to authorisations.⁷⁸ In each of these cases it recalled that the choice whether measures should be laid down in a delegated or an implementing act, depends on their “*nature, objectives, content and context*”, followed by an example. For instance, with regard to acts relating to an obligation to provide information it is clarified that measures which build upon the content of an obligation to provide information should be laid down in delegated acts, whereas measures which are aimed at ensuring that an obligation to provide information is fulfilled in a uniform manner (such as format and technical means) should be laid down in implementing act. The negotiations on Article 4 of Regulation (EU) 2016/426 may serve as an example to clarify this delineation.⁷⁹ A compromise was found between

⁷³Non-binding criteria, para. C-G.

⁷⁴This is often referred to as the so-called “grey area”. See also: Craig, P.: Delegated Acts, Implementing Acts and the New Comitology Regulation, *European Law Review* 36, 671-687 (2011).

⁷⁵See in particular Case C-286/14 *Parliament v. Commission*, ECLI:EU:C:2016:183, p. 41 and Case C-65/13 [46], p. 46.

⁷⁶Non-binding criteria, para. C.

⁷⁷Non-binding criteria, para. D.

⁷⁸Non-binding criteria E-G.

⁷⁹Regulation (EU) 2016/426 of the European Parliament and of the Council of 9 March 2016 on appliances burning gaseous fuels and repealing Directive 2009/142/EC, OJ L 81, 31.3.2016, p. 99–147.

the positions of Parliament⁸⁰ and the Council⁸¹ on the empowerment regarding the content and form of Member States' communications on the gas supply conditions in their territory by splitting it into an empowerment to adopt delegated acts "*concerning modifications to the content of the Member States' communications*", and an empowerment to define the "*harmonised form*" of these communications by means of implementing acts.

It is noteworthy that the institutions were not able to find a compromise on all the criteria proposed by the Commission, such as the adoption of annual and multi-annual work programmes implementing financial instruments by means of implementing acts.⁸² The Commissions attempt to find a horizontal approach on this was certainly understandable given the fact that this was one of the stumbling blocks during the negotiations on several acts relating to the previous Multi-annual Financial Framework (2014–2020). A noteworthy example of one of the compromises reached in these negotiations was the declaration of the Commission to conduct a strategic dialogue with Parliament prior to the programming (by means of implementing acts) of the European Neighbourhood instrument.⁸³

4.3 Step 3

After the choice is made between delegated and implementing acts, the next step is to establish which conditions and control mechanisms should be applied for the adoption of those acts. This article will suffice by giving a general overview of the choices that can be made in this respect.

4.3.1 Delegated acts

As already becomes clear from the text of Article 290 TFEU, the objectives, content, scope and duration of the delegation of power have to be explicitly defined. As regards duration, the appendix to the IIA provides for three possible standard clauses on duration: (1) an empowerment for an indeterminate period of time;⁸⁴ (2) an empowerment for a determinate period of time which can be tacitly extended;⁸⁵ or (3) an empowerment for a determinate period of time without the possibility of tacit extension.⁸⁶ In practice, the co-legislators often choose the second option which

⁸⁰P8_TA(2016)0013.

⁸¹General approach, Council document 16259/14.

⁸²Council document 6468/18 REV 1.

⁸³Council document 6661/14 ADD 1.

⁸⁴This means that the Commission will in principle retain the power to adopt the delegated acts as long as the legislative act is in force, unless the Parliament and the Council decide to remove the empowerment through an amendment of the legislative act, or decide to use their right to revoke the empowerment/right of revocation. See for example, Art. 33(2) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility OJ L 57, 18.2.2021, p. 17–75.

⁸⁵See for example Art. 41(2) Regulation (EU) 2016/426 [79].

⁸⁶See for example Art. 6(2) of Regulation (EU) 2020/1429 [51].

includes an obligation for the Commission to draw up a report in respect of the delegation of power no later than nine months before the expiry of the period included in the basic act.⁸⁷ The delegation of power is tacitly extended for a period of an identical duration, unless the Parliament or the Council opposes such extension not later than three months before the end of each period.

As regards mechanisms of control, Article 290 TFEU provides for the option to include a right for the Parliament and the Council to revoke the delegation and/or express objections to a delegated act.⁸⁸ Whilst the exercise of the right of revocation is seen as an act of last resort which neither the Council or the Parliament have used so far, both institutions have occasionally used their right to object to a delegated act,⁸⁹ preventing that act from entering into force.⁹⁰

Finally, it should be noted that the Common Understanding foresees in the possibility to include an urgency procedure in the basic act.⁹¹ Delegated acts adopted under the urgency procedure enter into force without delay and apply as long as no objection is expressed within the period provided for in the basic act. The choice for such a procedure should be justified by the legislator and be reserved for exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises, to be specified in the basic act.⁹²

4.3.2 Implementing acts

As a general rule, the power to adopt implementing acts should be conferred on the Commission. However, Article 291(1) TFEU does provide for the possibility of conferring implementing powers on the Council in duly justified cases and in the cases provided for in Article 24 and 26 TEU. According to the case law, the legislator “*must properly explain, in the light of the nature and content of the basic act [...] why exception is being made to the rule that it is the Commission that, in the nor-*

⁸⁷For an example of a such a report, see: COM (2021) 75 final.

⁸⁸Whilst the Commission (SEC(2011)855/1) and the Legal Service of the Council (see its public opinion in Council document 8970/11) are of the opinion that these are the *only* two conditions to which the legislator may subject the delegation of power, Parliament takes a different point of view (see P7_TA(2010)0127, para. 2). See also, Chamon [49], para. 5.1.

⁸⁹At the time of writing the Parliament and the Council have raised an objection on 16 occasions, see the register of delegated acts. Most recent is the Council’s objection on 22.2.2021 to the delegated act adopted on the basis of the LULUCF-Regulation (Council document 6281/21).

⁹⁰A delegated act only enters into force if no objection has been expressed by either the Council or Parliament within the period set by the legislative act (usually two months, extendable for each institutions by two months at its initiative 2 months, see part V of the Common Understanding). A delegated act may enter into force before the expiry of that period if both institutions have informed the Commission that they will not object. For such an example, see <https://webgate.ec.europa.eu/regdel/#/delegatedActs/1472>.

⁹¹See Part VI and the standard clause in the appendix (Art. B).

⁹²For a recent example of an act adopted under an urgency procedure, see: Commission Delegated Regulation (EU) 2020/1477 of 14 October 2020 amending Council Regulation (EEC) No 95/93 as regards the temporary extension of exceptional measures to address the consequences caused by the COVID-19 pandemic, OJ L 338, 15.10.2020, p. 4–6. This act was adopted on the basis of art. 10a(4) and (6) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (as amended by Regulation (EU) 2020/459).

*mal course of events, is responsible for exercising that power”.*⁹³ Recent examples of such Council implementing powers are Article 25a(5) of the Visa Code empowering the Council to adopt an implementing decision on a proposal from the Commission in case a third country does not cooperate sufficiently on readmission⁹⁴ and Article 6(10) of the MFF “*Rule of law conditionality Regulation*” which empowers the Council to adopt, on proposal by the Commission, an implementing decision on appropriate measures where it is established that breaches of the principles of rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.⁹⁵

Although it is legally possible for the legislator to confer powers on the Commission without requiring any control by Member States there should be good arguments for doing so, relating to the nature of the implementing act in question.⁹⁶ The Comitology Regulation lays down the rules and general principles concerning mechanism for control by Member States of the Commission’s exercise of implementing powers. It foresees in two types of procedure, the advisory and the examination procedure, and lays down general criteria for the selection of these procedure.⁹⁷ The examination procedure applies, in particular, for the adoption of acts relating to the areas set out in Article 2(2)(b), as well as acts of general scope. The advisory procedure, as a general rule, applies for the adoption of implementing acts not falling within the ambit of para. 2.⁹⁸ Given the broad scope of cases in which the examination procedure is generally assumed to apply, it is not surprising that this procedure applies in the majority of cases.⁹⁹ The most important difference between the two procedures is that, under the advisory procedure the Commission is not bound by the opinion of the Committee,¹⁰⁰ whereas it is in principle prevented from adopting a draft implementing act if the committee delivers a negative opinion under the examination

⁹³Case C-440/14 P [62], para. 60.

⁹⁴Recital 14 and Art. 1(19) of Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code, OJ L 188, 12.7.2019, p. 25–54.

⁹⁵See also recitals 20 and 23 of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1–10.

⁹⁶See Implementing acts — Guidelines for the services of the Commission, SEC(2012)617/1. See also, Chamon [49], para. 5.2. For an example of such an “independent” empowerment of the Commission, see Art. 3(6) of Council Regulation (EU) No 1370/2013 of 16 December 2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products, OJ L 346, 20.12.2013, p. 12–19. A recent example of an implementing act adopted on the basis of this provision is: Commission Implementing Regulation (EU) 2019/98 of 21 January 2019 opening a tendering procedure for buying-in skimmed milk powder during the public intervention period from 1 March to 30 September 2019, OJ L 20, 23.1.2019, p. 1–2.

⁹⁷Art. 2 of the Comitology Regulation.

⁹⁸Art. 2(3) provides that the advisory procedure may apply for the adoption of implementing acts referred to in Art. 2(2) in duly justified cases.

⁹⁹See the Commission’s report on the implementation of Regulation (EU) 182/2011, COM (2016) 92 final; and the most recent Commission report (2019) on the working of committees, COM (2021) 69 final.

¹⁰⁰Art. 4 Comitology Regulation.

procedure.¹⁰¹ In the latter case, the Commission may either submit an amended draft implementing act to the committee, or submit the act to the appeal committee. In some instances no opinion¹⁰² is delivered by the committee in which case the Commission may adopt the draft implementing act, except in the instances provided for in the second subpara. of Article 5(4).¹⁰³ If an implementing act is deemed to be necessary, the Commission has the possibility to submit an amended version to the committee or to submit the act to the appeal committee.¹⁰⁴

Finally, it should be noted that Article 8 of the Comitology Regulation provides for the possibility to include an urgency procedure in the basic act. This means that the Commission may adopt immediately applicable implementing acts (without prior submission to a committee) on duly justified imperative grounds of urgency to be set out in the basic act. At the latest 14 days after the adoption of an act, the Commission should submit the act to the relevant committee in order to obtain its opinion.¹⁰⁵ A recent example of such an immediately applicable implementing act is the Commission implementing decision providing for an authorisation mechanism for exports of COVID-19 vaccines.¹⁰⁶

5 Concluding remarks

Although the non-binding criteria may provide a helpful tool to guide negotiations on delineation and are supposed to take repetitive issues off the negotiating table, practice shows that the choices made often still reflect general institutional preferences with regard to the applicable procedures. Moreover, as mentioned in para. 4.2.4 there are also some areas in which the institutions were not able to establish general criteria, such as empowerments for programming in financial instruments. It was therefore no surprise that this was again one of the subjects of debate during the negotiations on several acts relating to the current MFF (2021–2027).¹⁰⁷ A perhaps somewhat re-

¹⁰¹ Art. 5 Comitology Regulation.

¹⁰² Meaning that there is no QMV in favor or against the adoption of the implementing act.

¹⁰³ This includes the possibility for the legislator to include a so-called “no-opinion”-clause in the basic act to prevent the Commission from adopting a draft implementing act in the absence of an opinion from the committee.

¹⁰⁴ Practice shows however that in this scenario, the appeal committee usually also delivers no opinion (see COM (2021) 69). This is the main reason why the Commission has proposed a number of targeted changes to the functioning of the appeal committee to address no opinion situations in sensitive areas (notably in relation to decision-making on genetically modified organisms and genetically modified food and feed and plant protection products). See COM (2017) 085 final. Although Parliament has recently adopted its first reading position on this proposal (P9_TA(2020)0364), up until now there has been less appetite within the Council to pursue this proposal (Council document 10127/18).

¹⁰⁵ In case an examination committee delivers a negative opinion, the Commission shall immediately repeal the implementing act.

¹⁰⁶ Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation OJ L 311, 30.1.2021, p. 1–8. This implementing act was adopted on the basis of Art. 5(1) of Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports, OJ L 83, 27.3.2015, p. 34–40.

¹⁰⁷ See for example: Council document 13717/20 on the European Social Fund Plus (ESF+) Regulation and Council document 13599/20 on the EU4Health Programme.

markable outcome is the agreement reached on the Union Anti-Fraud Programme to empower the Commission to adopt the work programme by means of implementing acts without a committee procedure.¹⁰⁸ By contrast, in some discussions concerning the use of implementing and delegated acts, the battle was settled by introducing some (novel) extra procedural safeguards. Noteworthy is the recently adopted Regulation establishing the Recovery and Resilience Facility, which not only foresees in an obligation for the Commission to ask the Economic and Financial Committee for its opinion on the satisfactory fulfilment of relevant milestones and targets, prior to taking an implementing decision (in accordance with the examination procedure) authorising the disbursement of the financial contribution to a Member State, but also includes a possibility for one or more Member States who consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets to request the President of the European Council to refer the matter to the next European Council. In such “*exceptional circumstances*” no decision authorising the disbursement of financial contribution and, where applicable, of the loan should be taken “*until the next European Council has exhaustively discussed the matter*”.¹⁰⁹

It should also be noted that the alignment of the RPS is still not finalised. A partial alignment was adopted at the end of the 8th parliamentary term, which mainly concerned alignments to delegated acts of RPS empowerments to amend annexes to a legislative act (which as explained above cannot be done by means of implementing acts).¹¹⁰ In other words: the most difficult alignments were saved for the discussions between the Council and a new Parliament. In spite of the commitment to continue to work on the alignment of the remaining acts,¹¹¹ little progress has been made so far.¹¹² The alignment of acts referring to RPS which were not included in the Omnibus-proposals because they were (or were going to be) subject to a separate vision, is also not always going very smoothly.¹¹³ Illustrative in this regard, is the discussion on the Article 5 (3) of Regulation (EC) No 715/2007.¹¹⁴

It is thus clear that in spite of the agreement reached by the institutions on the IIA and the non-binding delineation criteria, the choice between delegated and implementing acts, still continues to be a subject of debate between the institutions.

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¹⁰⁸Council document 5330/21.

¹⁰⁹Art. 24(4)(5) and recital 52 of Regulation (EU) 2021/241 [88]. See also Recital 26 of Regulation (EU, Euratom) 2020/2092 which foresees in a possible discussion in the European Council, prior to the adoption of a Council implementing decision on appropriate measures.

¹¹⁰Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Art. 290 and 291 of the Treaty on the Functioning of the European Union, OJ L 198, 25.7.2019, p. 241–344.

¹¹¹Joint Statement by the Parliament, the Council and the Commission, Council document 9424/19 ADD 1.

¹¹²Council document 13832/20, para. 5.

¹¹³See a list of these acts in point 3 of the Explanatory Memorandum of COM (2016) 799 final.

¹¹⁴Council document 13041/20.