Powers of the European Commission – delegated and implementing acts in practical terms

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Abstract

This Article gives an overview of the legal framework governing delegated and implementing acts as established in Articles 290 and 291 TFEU, as well as of the practice of the institutions on the preparation of such acts and the process leading to their entry into force.

Keywords Article 290 TFEU · Article 291 TFEU · Delegated powers · Implementing powers · Essential elements General and individual application committees

1 Introduction

This article is based on the presentation ‘Powers of the European Commission – delegated and implementing acts in practical terms’ delivered as part of the ERA seminar on legislative procedures in March 2021. The purpose of the article is to provide a basic presentation of the powers of the Commission with regard to delegated and implementing powers and of how the Commission exercises those powers in practice. This contribution does not deal with the situation when, pursuant to the second limb of Article 291 (2) TFEU, implementing powers are conferred on the Council.

This text is written in personal capacity and only contains the views of the author, which may not necessarily express the positions of the European Commission.

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Following the ordinary or a special legislative procedure,¹ the legislator establishes a basic act. Some of its provisions can apply on their own, whereas additional measures may need to be adopted so that other provisions can be applied. Such additional measures may be taken either by the Member States, whereby they would implement Union law,² or by the Commission. When the Commission acts, it is for the purpose to implement the basic acts, supplement or amend them. The Treaty of Lisbon introduced a change, compared with the pre-Lisbon situation, with regard to the powers of the Commission to adopt such acts,³ by providing, in two separate articles, for the powers of the Commission to, on the one hand, either supplement or amend legislative acts, and, on the other hand, implement them. Depending on the nature of the powers given to the Commission, it can adopt respectively either delegated or implementing acts. The idea behind this differentiation is that those powers of the Commission are qualitatively different from each other, which also requires that they are exercised according to different procedures, with different types of involvement of the European Parliament, the Council and the Member States.

2 Common features between delegated and implementing acts

In spite of the different nature and objectives of delegated and implementing acts, which justify different procedures leading to their entry into force, they also have certain features in common, namely the following ones.

2.1 The Commission must be empowered to act

In order to act, the Commission must be given the legal basis for that, and this rule is an expression of the principle of conferred powers under Article 13 (2) TEU.

For delegated acts, Article 290 (1) TFEU provides that *a legislative act* may empower the Commission to adopt delegated acts. Accordingly, only acts adopted by legislative procedure, be it the ordinary or a special legislative procedure, may contain empowerments for delegated acts. Conversely, other types of binding acts may not contain empowerments for delegated acts.

On the other hand, Article 291 (2) TFEU is worded in a broader way in that regard and it provides that implementing powers on the Commission may be provided whenever uniform conditions for implementing *legally binding Union acts* are needed. The notion of ‘legally binding Union acts’ includes also acts, other than legislative acts. Such broader circle of acts which may contain empowerments for implementing acts would appear justified by the very nature of implementing acts. Indeed, when the Commission adopts implementing acts, it steps in on behalf of the Member States; in fact, because Member States have to implement any (legally binding) Union law, it is also correct that the Commission is empowered to act whenever uniform conditions for implementation are needed, independent of the type of act which is at stake.

¹ Article 289(1)–(3) TFEU.

² Article 291(1) TFEU.

³ For a description of the pre-Lisbon situation, please see H. Hofmann, G. Rowe, A. Tuerk, *Administrative law and policy of the European Union*, p. 266 and the following.

The broad wording of ‘legally binding Union acts’ begs the question whether *any* legally binding Union act could contain an empowerment for implementing acts. It is obvious that the Commission could not, in an implementing act which it adopts, empower itself to adopt another implementing acts, because it would be contrary to the principle of conferred powers. On the other hand, it would seem possible that the Commission, in a delegated act, includes an empowerment for itself to adopt implementing acts in order to ensure that the delegated act is implemented in a uniform manner.

In practice, the vast majority of empowerments for implementing acts are included in legislative acts.

The empowerment, for both delegated and implementing acts, may be worded in such a way as to either impose an obligation for the Commission to act,⁴ sometimes combined with certain time limit,⁵ or to give it an opportunity to act when it considers that there is need for that.⁶

2.2 Exhaustive and precise definition of the powers conferred on the Commission

Independent of whether the Commission has an empowerment for delegated or implementing acts, that empowerment must be worded in a precise and clear way, so that it indicates with regard to what aspects concretely the Commission may act. For delegated acts, this is explicitly stated in Article 290 (1), 2nd subparagraph of TFEU.⁷ There is no explicit requirement in that sense in Article 291 TFEU for the implementing acts, but this is equally a requirement for them, as it is an expression of the principles of legal certainty and the conferral of powers.

In practice, even though in some cases the scope of the empowerment may be a matter of interpretation between the institutions, the shared aim of the Commission, Parliament and Council is to include empowerments which are sufficiently detailed.

2.3 No empowerments for the Commission to adopt essential elements

The second sentence of the second subparagraph of Article 290 (1) TFEU explicitly states that the essential elements of an area have to be reserved for the legislative act and cannot be subject of a delegation of power.

The adoption of rules which are essential to the subject-matter envisaged is reserved to the legislature of the European Union; the essential rules governing the matter in question must be laid down in the basic legislation and cannot be delegated.⁸ The Court has defined ‘essential elements’ as provisions which, in order to

⁴The empowering provision would then read along the lines of ‘The Commission *shall* adopt [...]’.

⁵If the Commission does not adopt the act within the time limit laid down in the legislative act, it does not lose the power to act, but it may be brought to the European Court of Justice for a failure to act, cf. T-521/2014, Sweden v Commission, ECLI:EU:T:2015:976.

⁶The empowering provision would then read along the lines of ‘The Commission *shall be empowered* to adopt [...]’ or ‘The Commission *may* adopt [...]’.

⁷The *objective, content, scope* and duration of the delegation of power shall be explicitly defined in the legislative acts.

⁸Case C-355/10, Border Schengen Code, para 64.

be adopted, require political choices falling within the responsibilities of the legislature.⁹ Ascertaining which elements are essential must be based on objective factors amendable to judicial review, and, in that connection, it is necessary to take account of the characteristics and particularities of the domain concerned. In fact, essential elements may even be contained in an annex to the legislative act.¹⁰

Even though Article 291 FEU does not contain any similar sentence as regards essential elements as Article 291(1) TFEU, essential elements cannot be laid down in implementing acts either, as those acts are only meant to execute, to implement what is already contained in the basic act.

3 Quasi-legislative powers: delegated acts

3.1 Legal framework for delegated acts

The basic rules on delegated acts are laid down in Article 290 TFEU.

Unlike Article 291 TFEU for the implementing acts, Article 290 FEU does not contain any legal basis for the adoption of an act which would lay down in advance the rules and general principles of how the Commission exercises delegated powers and how the Parliament and the Council are involved in the process. In addition, because delegated acts were a new instrument introduced by the Treaty of Lisbon and there was no experience with their preparation, there was also no uniform practice of how they are prepared; in particular the Member States were uncertain of their role in that process and were therefore reluctant to agree to empowerments for delegated acts.

Eventually, the European Parliament, the Council and the Commission agreed, in Chapter V of the Interinstitutional Agreement on better law-making of 2016¹¹ and in the Common Understanding on Delegated Acts which is annexed to it, to follow certain common rules for delegated acts. These rules aim to address the concerns of each of the three institutions and they represent the second layer of rules, next to Article 290 TFEU, which the institutions follow with regard to delegated acts. In the Interinstitutional Agreement on Better-Law Making, the Commission committed, in particular, to ensure the involvement of Member States experts and of the Parliament and the Council in the preparation of delegated acts, i.e. *before* the Commission adopts them and *before* it sends them to the Parliament and the Council for scrutiny. The Interinstitutional Agreement also contains more precise rules on how the Parliament and the Council are involved *after* the delegated act is adopted, the possibility for such involvement being explicitly foreseen in Article 290 TFEU.

⁹Case C-355/10, Border Schengen Code, para 65.

¹⁰Joined Cases T-339/16, T-352/16 and T-391/16, Paris, Brussels, Madrid v. Commission, ECLI:EU:T:2018:927, para 118. In its judgement, the Court found that the limits on emissions contained in an annex to the basic act were an essential element of the basic act, and 'in fact the central element, since the sole purpose of the inclusion of all the provisions of the regulation is to ensure that those limits are observed'.

¹¹Interinstitutional 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.

3.2 Defining features of delegated acts

3.2.1 Always adopted by the Commission

Unlike implementing acts for which Article 291 TFEU explicitly provides that they may be adopted by the Council, delegated acts are always adopted by the Commission.

3.2.2 Acts of general application

Delegated acts are always of general application, that is, they apply to objectively determined situations and entail legal effects for categories of persons envisaged generally and in the abstract.¹²

3.2.3 Delegated acts may amend the legislative act

When delegated acts amend the legislative act, the Commission would in fact adopt an act which would directly introduce changes into the act adopted by the legislator, such as replace parts of the text the basic act,¹³ delete provisions¹⁴ or add new ones.¹⁵ The consolidated version of the text would present the text as initially adopted by the legislator and subsequently amended by the Commission. Whenever the legislator has decided to include certain provisions in the legislative act and have empowered the Commission to amend them, the empowerment to that end may only be an empowerment for delegated acts (legislative acts may not be amended by implementing acts).

3.2.4 Delegated acts may supplement the legislative act

The Non-binding criteria for the application of Articles 290 and 291 TFEU¹⁶ define the role of implementing acts as being to lay down ‘additional rules building upon or developing the content while coming within the regulatory framework as defined by the basic act’. 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.

¹²Case T-93/10, *Bilbafina de Alquitranes, SA and Others v European Chemicals Agency (ECHA)*, ECLI:EU:T:2013:106, para 56.

¹³See for example, Commission Delegated Regulation (EU) 2021/399 of 19 January 2021 amending Annex I to Regulation (EU) No 1305/2013 of the European Parliament and of the Council as regards the amounts of Union support for rural development in the year 2021, OJ L 79, 8.3.2021, p. 1–3.

¹⁴See for example, Commission Delegated Regulation (EU) 2021/525 of 19 October 2020 amending Annexes II and III to Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (Text with EEA relevance), OJ L 106, 26.3.2021, p. 3–28.

¹⁵See for example, Commission Delegated Regulation (EU) 2021/715 of 20 January 2021 amending Regulation (EU) 2018/848 of the European Parliament and of the Council as regards the requirements for groups of operators (Text with EEA relevance), OJ L 151, 3.5.2021, p. 1–4.

¹⁶2019/C 223/01.

When the Commission adopts delegated acts to supplement the legislative acts, the delegated act remains a separate act; unlike the case of amending delegated acts, it does not become an integral part of the legislative act. In those cases, the delegated act would lay down rules governing a specifically defined area which falls within the scope of application of the legislative acts and fits within the legal framework as defined by the legislative act.¹⁷

A delegated act may either amend *or* supplement the legislative act; it cannot do both at the same time. Each empowerment for a delegated act must clearly indicate whether the Commission is to amend or supplement,¹⁸ and if empowerments of different kinds are included in the same legislative act, the Commission may not exercise them by adopting one single delegated act.

3.3 Control¹⁹ over the exercise of delegated powers

3.3.1 Involved institutions

When it adopts delegated acts, the Commission actually adopt measures which, even if non-essential, would eventually be of the same level as the basic act (as they would either amend or supplement the basic act). Therefore, it is generally accepted that, when it adopts delegated acts, the Commission steps in for the legislator. This, on its side, justifies why it acts under the control of both the Parliament and the Council and why the Member States do not have any formal role in the process leading to the entry into force of delegated acts.

This also explains why the powers of the Parliament and the Council as the Union legislator to control the Commission's exercise of delegated powers are commensurate to their involvement in the adoption of the legislative act. Most often, legislative acts are adopted following the ordinary legislative procedure, and in those cases the Parliament and the Council have equal rights of control over how the Commission exercises delegated powers.²⁰ On the other hand, even though the number of legislative acts adopted under a special legislative procedure is limited compared to those adopted under the ordinary legislative procedure, there is similar correlation between the powers of the co-legislators in the adoption of the basic act and in their control over the Commission's delegated powers.

¹⁷See for example, Commission Delegated Regulation (EU) 2018/968 of 30 April 2018 supplementing Regulation (EU) No 1143/2014 of the European Parliament and of the Council with regard to risk assessments in relation to invasive alien species, OJ L 174, 10.7.2018, p. 5–11.

¹⁸In the first years after the entry into force of the Lisbon Treaty, empowerments for delegated acts did not specify explicitly whether they were to amend or supplement the basic act. In those cases, it is a matter of interpretation to determine the nature of the empowerment.

¹⁹Both with regard to delegated and to implementing acts, 'control' refers to involvement and right of scrutiny of the concerned institution/ Member States during the procedure of adoption of the act. It does not substitute for review by the Court of Justice of the European Union, who exercises its powers in accordance with the Treaties (Case C-355/10, Schengen Border Code, ECLI:EU:C:2012:516, para 40).

²⁰As reflected in the standard recitals and provisions for delegated acts annexed to the Common Understanding on Delegated Acts.

For example, Council Regulation (EU) 2017/1939²¹ was adopted by the Council with the consent of the European Parliament. Article 49(3) of this Regulation contains an empowerment for the Commission to adopt delegated acts, and Article 115 contains the procedure for the exercise of the delegation. According to this procedure, both the Parliament and the Council may in the same way revoke the delegation of powers to the Commission and each of them may equally object to a delegated act adopted by it. Even though the Council adopted the legislative act alone, the Parliament has the same rights with regard to delegated acts because it had a decisive say (consent) in the process of adoption of the legislative act.

On the other hand, Council Regulation (EU) 2019/1111²² was adopted following a special legislative procedure by the Council alone with the consultation of the European Parliament, i.e. the Parliament did not have a decisive say in the adoption of that Regulation. This role of the Parliament is reflected also in its rights of control over the delegated powers of the Commission:²³ The Parliament is not notified of those acts, and the Council alone may revoke the delegated powers or object to a delegated act adopted by the Commission.

Article 290(2) TFEU requires each legislative act to explicitly lay down the conditions to which the delegation is subject and provides what these conditions could be, namely revocation of the delegation and objection to a delegated act. In the Common Understanding on delegated acts, the three institutions agreed to use as much as possible the standard templates for recitals and provisions contained in an appendix to the Common Understanding. This has led to a rather uniform practice with regard to the process of preparation of delegated acts and of how the Parliament and the Council exercise their control rights.²⁴

3.3.2 Revocation of the delegation

A decision of either the Parliament or the Council to revoke an empowerment for the Commission to adopt delegated acts would put an end to the delegation of powers for the future, but it would not affect the validity of delegated acts which have already entered into force. As reflected in the standard templates annexed to the Common Understanding, the decision of revocation would need to be published in the Official Journal in order for it to take effect. As any act of the Union institutions with legal effect, those decisions would have to be motivated.

At the time of writing, there are no precedents of such decisions.

²¹Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1). For another example, see Council Regulation (EU, Euratom) 2019/1197 of 9 July 2019 on measures concerning the implementation and financing of the general budget of the Union in 2019 in relation to the withdrawal of the United Kingdom from the Union, OJ L 189, 15.7.2019, p. 1–7.

²²Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, p. 1–115.

²³Article 93 of Regulation (EU) 2019/111.

²⁴Individual cases may differ from one another notably with regard to the duration of the period during which the Parliament and the Council may express an objection to a delegated act and with regard to the period for which delegated powers are granted to the Commission.

3.3.3 Objection to a delegated act

If either the Parliament or the Council object to a delegated act, it cannot enter into force. In practice, it would have been adopted by the Commission but would not be published in the Official Journal and would not enter into force.

There are no limitations with regard to the grounds on which the Parliament and the Council may object to a delegated act, and they may invoke either legal grounds²⁵ or political grounds for the objection.²⁶ As an act with legal effect, the decision to object has to be motivated, and this would also allow the Commission to define its course of action, including whether or not to submit a new delegated act with different content which corresponds to the concerns expressed by the objecting institutions or not to act at all.

3.4 Typical lifecycle of a delegated act

On the basis of the elements described above and the provisions in the Interinstitutional Agreement on better law-making, the following steps leading to the entry into force of a delegated act can be discerned.

3.4.1 The Commission prepares the delegated act

The Commission is autonomous when it prepares a draft delegated act. In accordance with the principles of better regulation, it may rely on different sources to gather expertise, such as consulting expert groups,²⁷ carrying out public consultation or commissioning a study.

In addition, in compliance with the commitments made in the Interinstitutional Agreement on Better Law-Making, the Commission would always consult experts of all Member States on the draft delegated act, either in expert groups or in dedicated ad hoc meetings, and would inform them if the material content of the draft delegated act is changed in any way. The Parliament and the Council may send their experts

²⁵For example, because the objecting institutions is of the view that the Commission has exceeded the limits of the delegated powers. See for example, P8_TA(2019)0312 – European Parliament resolution of 27 March 2019 on the Commission delegated regulation of 14 December 2018 amending Annex II to Regulation (EU) No 515/2014 of the European Parliament and of the Council establishing as part of the Internal Security Fund, the instrument for financial support for external borders and visa (C(2018)08465 – 2018/2994(DEA)), and P8_TA(2019)0311 – European Parliament resolution of 27 March 2019 on the Commission delegated regulation of 14 December 2018 amending Annex II to Regulation (EU) No 516/2014 of the European Parliament and of the Council establishing the Asylum, Migration and Integration Fund (C(2018)08466 – 2018/2996(DEA)).

²⁶This is the case when the objecting institutions does not agree with the content of the act adopted by the Commission. See for example, P8_TA(2017)0213 – European Parliament resolution of 17 May 2017 on the Commission delegated regulation of 24 March 2017 amending Delegated Regulation (EU) 2016/1675 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council, as regards deleting Guyana from the table in point I of the Annex and adding Ethiopia to that table (C(2017)01951 – 2017/2634(DEA)).

²⁷For the rules governing expert groups, please see Commission decision C(2016) establishing horizontal rules on the creation and operation of Commission expert groups. Information about expert groups is publicly available on the Register of Commission expert groups and other similar entities (<https://ec.europa.eu/transparency/expert-groups-register/screen/home>).

to the meetings of the Commission and the Member States' experts, and they would receive any documents related to the discussion on draft delegated acts at the same time as the Member States' experts.

Once the draft delegated act is sufficiently stable and unless an exception applies, the Commission will publish it for a four-weeks public feedback on a dedicated webpage.²⁸ Any individual or organisation may provide its comments on the draft delegated act.

3.4.2 The Commission adopts the delegated act

Once the act is ready, it is adopted by the College of Commissioners. However, the act is not yet published and it cannot enter into force.

3.4.3 The Commission sends the adopted delegated act to the Parliament and the Council

From the moment when the Parliament and the Council receive the delegated act, they have the possibility to object to it within a period defined in the legislative act.²⁹

3.4.4 Publication in the Official Journal and entry into force

If neither the Parliament nor the Council have objected to the delegated act within the objection period or if both of them have informed the Commission that they do not intend to object,³⁰ the Commission sends the delegated act for publication. The delegated act enters into force on the day specified in it or, in the absence of such specification, on the 20th day following that of their publication.³¹

3.5 Transparency with regard to delegated acts

There is no horizontal reporting obligation for the Commission on how many delegated acts it adopts in a given year or, in general, how it exercises the delegated powers conferred on it. However, many legislative acts provide that the empowerment of the Commission to adopt delegated acts is for 5 years and the Commission has to produce a report on how it has exercised the delegated powers under the respective legislative act nine months before the end of each 5-year period.

On the other hand, a lot of information about delegated acts is available on the Register of Delegated and Implementing Acts,³² including information about planned acts and about the different actions taken by each of the involved institutions with regard to specific delegated acts.

²⁸https://ec.europa.eu/info/law/better-regulation/have-your-say_en.

²⁹The objection period is usually two months which can be extended by either the Parliament or the Council by another two months.

³⁰The Commission may ask the Parliament and the Council for an 'early non-objection' in cases where the delegated act needs to enter urgently into force.

³¹Article 297(2), 2nd subparagraph TFEU.

³²<https://webgate.ec.europa.eu/regdel/#/home>.

4 Executive powers: implementing acts

4.1 Legal framework for implementing acts

The regulatory framework containing rules on how the Commission exercises implementing powers is composed of several different legal acts of different order.

Article 291 TFEU introduces the concept of implementing powers and lays down the basic rules.

On the basis of Article 291 (3) TFEU, the European Parliament and the Council adopted Regulation (EU) No 182/2011³³ ('Comitology Regulation') which contains the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

Further and more detailed procedural rules concerning the functioning of committees and of the appeal committee, including on convening of a meeting, sending of documents to the committee, how the written procedure for obtaining the committee's opinion works, are contained in their respective rules of procedure. The appeal committee adopted its rules of procedure³⁴ based on the second subparagraph of Article 3 (7) of the Comitology Regulation. Each committee is required to adopt its own rules of procedure on the basis of standard rules of procedure³⁵ drawn up by the Commission after consultation with Member States.

In addition, the Interinstitutional Agreement on Better Law-Making also contains rules regarding the preparation of implementing acts.

³³Regulation (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.

³⁴Rules of procedure for the appeal committee (Regulation (EU) No 182/2011), adopted by the appeal committee on 29 March 2011 (2011/C 183/05).

³⁵Standard rules of procedure for committees (2011/C 206/06).

4.2 Defining features of implementing acts

4.2.1 Adopted either by the Commission or the Council

According to Article 290(2), implementing powers are, as a general rule granted to the Commission, and this is true for the vast majority of cases.

However, in duly justified specific cases³⁶ and in the cases provided for in articles 24 and 26 of the TEU, the Council is entrusted with the exercise of implementing powers.

4.2.2 Either of general or of individual application

While delegated acts are always of general application, implementing acts may be either of general³⁷ or of individual application.³⁸

4.2.3 To implement binding Union law

The Non-binding criteria for the application of Articles 290 and 291 TFEU³⁹ define the role of implementing acts as being to lay down ‘additional rules implementing or giving effect to the rules already established in the basic act in specifying in further detail the content of that act, without affecting the substance of the legislative framework’. 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.

4.3 Control over the exercise of implementing powers

4.3.1 The Commission steps in for the Member States

According to Article 291 (1) TFEU, it is for the Member States to adopt all measures of national law necessary to implement legally binding Union law. That means that Member States are primarily responsible for the implementation of Union law. When,

³⁶For example, Article 6 of Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak (OJ L 159, 20.5.2020, p. 1–7).

³⁷See for example, Commission Implementing Regulation (EU) 2019/1587 of 24 September 2019 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora in accordance with Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 248, 27.9.2019, p. 5–21.

³⁸See for example, Commission Implementing Decision (EU) 2021/60 of 22 January 2021 authorising the placing on the market of products containing, consisting of or produced from genetically modified maize MON 87427 × MON 89034 × MIR162 × NK603 and genetically modified maize combining two or three of the single events MON 87427, MON 89034, MIR162 and NK603, and repealing Implementing Decision (EU) 2018/1111 pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council (notified under document C(2021) 150) (Only the Dutch text is authentic) (Text with EEA relevance), OJ L 26, 26.1.2021, p. 5–11.

³⁹2019/C 223/01.

however, uniform conditions of implementation are needed, implementing powers are granted to the Commission and, in specific cases, to the Council.

Accordingly, when the Commission exercises implementing powers, it steps in for the Member States, it does in fact something that they could do on their own but in order to ensure uniform implementation throughout the Union it is necessary that the Commission act instead of the Member States.⁴⁰

Because the Commission steps in for the Member States when it adopts implementing acts, it is also for the Member States to control how the Commission exercises the implementing powers it is granted. The Member States exercise this control through the involvement of a committee composed of all Member States in the preparation of implementing acts. The detailed rules and procedures in that regard are laid down in the Comitology Regulation.

4.3.2 Member States' control over the Commission's exercise of implementing powers

When the legislator grants implementing powers on the Commission, it needs to decide whether the Commission would adopt implementing acts alone or under the control of the Member States. If the legislator decides that control by the Member States is needed, such control may only take place through one of the procedures provided for in the Comitology Regulation. Those procedures foresee the involvement of a committee composed of all Member States. No ad-hoc procedures of control may be established, be it instead of the ones in the Comitology Regulation or in addition to them, for example to either involve other institutions in the preparation of implementing acts or to give to Member States role different from the one which they would have under the Comitology Regulation.

The Commission may use different sources of expertise to prepare the draft implementing act, including to consult expert groups, to commission a study or to carry out a public consultation. When the act is sufficiently mature, the Commission submits it to a committee, first for discussion and then for a vote, once the Commission considers that this is the final version of the act which it can subsequently adopt.

The Comitology Regulation establishes two procedures, the advisory and the examination, with the possibility for some variations to cater for specific cases (such as involvement of the appeal committee in cases considered too sensitive for the Commission to act without a positive opinion of the committee or the urgency procedure when urgent action needs to be taken).

⁴⁰ A telling example to illustrate this is the authorisation of biocidal products under the Biocides Regulation (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, OJ L 167, 27.6.2012, p. 1–123). A company which wants to place a biocidal product on the market of one or several Member States may ask for an authorisation for that in each concerned Member State separately. Each of those Member States would, on its own and in application of the conditions in the Biocides Regulation, take a decision whether or not to authorise the product to be placed on the market on its own territory. Should a company wish to place the product on the market of more or all Member States, instead of requesting authorisation in each concerned Member State separately, it may request an authorisation from the Commission which, once granted, would be valid for the whole Union territory, unless otherwise specified. Both the Commission and the Member States apply the same conditions when they take decisions granting or refusing authorisations.

Under both the advisory and the examination procedure, the Commission needs to obtain the opinion of a committee on a draft implementing act, but the consequences of the committee's opinion differ depending on the procedure. Because the advisory and the examination procedures have different consequences, they also, as a rule, are chosen to apply in different situations. Article 2 of the Comitology Regulation contains the rules governing the choice between those two procedures.

Under the advisory procedure, the committee delivers its opinion by a simple majority of the members. The Commission can adopt the implementing act taking 'utmost account' of the committee's opinion, without being formally obliged to follow particular course of action depending on whether the opinion is in favour or against the draft act.

Under the examination procedure, the committee delivers its opinion by the same majority with which the Council votes. The actions, which the Commission may take following the opinion of the committee, depend on what that opinion is. If the committee delivers a positive opinion,⁴¹ the Commission *must* ('shall') adopt the draft implementing act;⁴² in case of a negative opinion,⁴³ the Commission *cannot* ('shall not') adopt the draft implementing acts, and in case of a 'no opinion',⁴⁴ the Commission *has the choice to decide* ('may') whether to adopt it or not. In the cases listed in Article 5(4) of the Comitology Regulation, a 'no opinion' outcome in the committee has the same effect as a negative opinion, and the Commission may not adopt the draft implementing act. When faced with a negative opinion or a 'no opinion' with a blocking effect, the Commission may either submit a new draft implementing act to the committee or submit the same draft implementing act to an appeal committee. The appeal committee is also a committee composed of the Member States, which meets at a higher level; the possible consequences of the vote in the appeal committee are described in Article 6 of the Comitology Regulation.

4.3.3 European Parliament and Council involvement

The Parliament and the Council do not control how the Commission exercises implementing powers and they may not attend meetings of the committees. However, they are involved in this process in several different ways.

First of all, the Parliament and the Council would be the ones to grant empowerments to the Commission to adopt implementing acts.⁴⁵ When doing so, they would

⁴¹ A positive opinion is obtained when there is qualified majority in favour of the basic act. Unless a member of the committee objects, the chair may, without proceeding to a formal vote, establish that the committee has delivered a positive opinion by consensus (Article 4(4) of the rules of procedure of the appeal committee, Article 4(3) of the standard rules of procedure for committees).

⁴² For this reason, it is very important that the act submitted to the committee for a vote is the final one.

⁴³ A negative opinion occurs when a qualified majority of the committee's members have voted against the draft implementing act.

⁴⁴ A 'no opinion' arises when there is no majority in the committee either in favour or against the draft implementing act.

⁴⁵ While in practice it is possible that empowerments for implementing acts are contained also in other legally binding Union acts, they would usually be included in legislative acts.

also decide whether control by the Member States is needed or not,⁴⁶ and, if yes, according to which of the two procedures laid down in the Comitology Regulation. If the Parliament and the Council grant implementing powers to the Commission and decide that it needs to be controlled in how it makes use of them, such control may only be exercised by a committee and through one of the procedures foreseen in the Comitology Regulation. On the other hand, comitology committees only exist to control the exercise of implementing powers of the Commission, they may not be given any other tasks.⁴⁷

Secondly, once they have granted implementing powers to the Commission, the Parliament and the Council have the right to be informed about how the Commission exercises them, as described in Article 10 of the Comitology Regulation. The Commission has to keep them informed about the work of the committees and they receive documents sent to the committee at the same time as the documents are sent to the Member States.

Thirdly, based on Article 11 of the Comitology Regulation, throughout the process of preparation of implementing acts and up until their adoption, both the Parliament and the Council have the right to inform the Commission if they consider that a given draft implementing acts exceeds the limits of the implementing powers. Such a decision of the Parliament or the Council does not have a blocking effect and does not prevent the Commission from adopting the act. However, the Commission must give due consideration to the arguments induced by the other institution, and has to inform the Parliament and the Council whether it intends to maintain, amend or withdraw the implementing act.

In practice, the Council does not exercise the right under Article 11 of the Comitology Regulation. The Parliament, on the other hand, does exercise it; in particular, it systematically adopts resolutions opposing to draft Commission regulations authorising the placing on the market of genetically modified food and feed.

4.4 Transparency with regard to implementing acts

The Comitology Regulation provides for two important obligations of the Commission to ensure transparency with regard to the work of committees controlling its exercise of implementing powers. First, the Commission has to keep a register,⁴⁸ which contains a list of all committees and certain documents pertaining to their work, as listed in Article 10 (1) of the Comitology Regulation. While the Comitology Regulation requires the Commission to make the *references* of those documents public, the Commission oftentimes makes the documents themselves public, thereby ensuring a high degree of transparency towards citizens and organisations on the work of the committees. Second, Article 10(2) requires the Commission to publish an annual report on the work of the committees. Those reports contain information about the number of committees' meetings, written procedures, opinions delivered and imple-

⁴⁶The Commission may also adopt implementing acts without being controlled by the Member States through a committee.

⁴⁷Interinstitutional Agreement on Better Law-Making, point 30.

⁴⁸<https://ec.europa.eu/transparency/comitology-register/screen/home>.

menting acts adopted in a given year; they are publicly available and can be reached on the same website which hosts the register of committees.

In addition, in October 2020, the Commission extended the Register of delegated acts to include also implementing acts in it, and this register provides information about the different procedural steps leading to the adoption and entry into force of an implementing act, including about actions taken by either the Parliament or the Council.

5 Delineation between powers of the Commission to supplement and to amend the legislative act

In practice, one of the biggest difficulties and point of content between the institutions is to decide whether a given power is to supplement or to implement the basic act, as in both cases the Commission adopts separate acts and the dividing line between the two may be blurred in some cases.⁴⁹ The decision for either the one or the other type of empowerment needs to be taken based on objective factors, considering the legal framework created by the legislative act and the content and objective of the rules to be adopted by the Commission.

The Parliament, Council and Commission have agreed criteria to guide them in the choice of empowerment, in particular when it comes to a choice between supplementing rules (delegated acts) and implementing rules (implementing acts).⁵⁰ These criteria draw on the case law of the Court of justice and aim to provide definitions and guidance for types of empowerments which, depending on how the empowerment is worded and what its purpose is within the context of the legal framework established by the basic act, could be for either delegated or implementing acts.

6 Conclusion

The questions pertaining to the delegated and implementing powers of the Commission are of enormous importance in practice, and this not only because the Commission is empowered to lay down detailed rules with regard to various aspects of life and the content of those rules is inevitably influenced by the parties which have participated in their development. The choice between these two types of acts is a matter of institutional balance and a matter of balance between the Union and the Member States, and for this reason, it is a dynamically developing area. In this contribution, I have aimed to describe the current practice with regard to the involvement of the Parliament, Council, Commission and the Member States in the development of delegated and implementing acts; this practice, while being based on and respecting the relevant Treaty provisions, at the same time considers the sensitivities of each of the concerned parties.

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⁴⁹C-427/12 Commission v. Parliament and Council, ECLI:EU:C:2014:170, in particular para 40.

⁵⁰Non-binding criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union 0 18 June 2019 (2019/C 223/01).