Understanding delegated and implementing acts

SUMMARY

Law-making by the executive is a phenomenon that exists not only in the European Union (EU) but also in its Member States, as well as in other Western liberal democracies. Many national legal systems differentiate between delegated legislation – adopted by the executive and having the same legal force as parliamentary legislation – and purely executive acts – aimed at implementing parliamentary legislation, but that may neither supplement nor modify it.

In the EU, the distinction between delegated acts and implementing acts was introduced by the Treaty of Lisbon. The distinction, laid down in Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), seems clear only at first sight. Delegated acts are defined as non-legislative acts of general application, adopted by the European Commission on the basis of a delegation contained in a legislative act. They may supplement or amend the basic act, but only as to non-essential aspects of the policy area. In contrast, implementing acts are not defined as to their legal nature, but to their purpose – where uniform conditions for implementing legally binding Union acts are needed. Under no circumstances may an implementing act modify anything in the basic act.

Delegated acts differ from implementing acts in particular with regard to the procedural aspects of their adoption – the former after consulting Member States’ experts, but their view is not binding; the latter in the comitology procedure, where experts designated by the Member States, sitting on specialised committees, can object to a draft implementing act. In the case of delegated acts, however, the Parliament and Council can introduce, in the delegation itself, a right to object to a draft act or even to revoke the delegation altogether.

Both delegated and implementing acts are subject to judicial review by the Court of Justice of the EU which controls their conformity with the basic act.

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Executive law-making in the EU prior to the Lisbon Treaty

The practice of executive law-making (executive Rechtsetzung) had existed in the European Communities as early as 1962. First appearing with the introduction of the common agricultural policy, it expanded greatly thereafter with the construction of the internal market as from the mid-1980s.1 Executive legal acts were adopted by the European Commission under the supervision of specialised committees, composed of experts delegated by governments of the Member States. Following the adoption of the Single European Act (1986), this procedure became known as 'comitology',2 and the term was used in an official manner in Advocate General Darmon's opinion in Case 202/87, known as the Comitology case. Academics point out that from the very beginning, comitology was 'a classic instrument of intergovernmental control of supranational institutions', allowing the Member States to exert 'control over the Commission's executive powers'.3 The necessity of creating executive law-making in the European Communities was dictated by the need to allow for quick adoption of detailed rules in rapidly changing policy areas, such as agriculture.4 Comitology was the 'European alternative to centralised regulation agencies on the one hand, and regulatory competition or mutual recognition on the other'.5 The European Court of Justice (ECJ) played an important role in the development of the comitology legal framework. In Case 25/70 Köster, the ECJ formulated the requirement that 'the basic elements of the matter' ought to be formulated in the basic (legislative) act, whereas 'the details' may be provided for in 'provisions implementing the basic regulations'. In Case 23/75 Rey Soda, the Court added that the Commission enjoys 'wide powers of discretion and action' in that regard. Although executive law-making acts could not touch upon essential elements of the basic act (Case 230/78 Eridania), the Commission could still add new elements, such as a system of sanctions – even if the basic act did not envisage this (Case C-240/90 Germany v Commission) – and, if authorised by the basic act, to amend it (Case 100/74 CAM v Commission).

Treaty basis prior to Lisbon

As confirmed by the ECJ in Case 25/70 − Köster, the legal basis for comitology was to be found in Article 155 of the Treaty of Rome (later Article 211 EC), which provided that 'in order to ensure the proper functioning and development of the common market, the Commission shall: […] exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.' That general legal basis for Commission implementing acts was strengthened with the adoption of the Single European Act, which provided for the fully fledged constitutionalisation of comitology in Article 145 of the EEC Treaty (later Article 202 EC), which explicitly allowed Council to 'confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down', and to 'impose certain requirements in respect of the exercise of these powers', requiring that the procedures need to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of Parliament.

Under Article 145 of the Treaty establishing the European Economic Community (EEC), the Council had to lay down 'principles and rules' for the exercise of implementing powers by the European Commission. Such principles and rules were laid down in the first Comitology Decision (87/373), later replaced by the second Comitology Decision (1999/468), in force until the Treaty of Lisbon (2009). Under the second decision, there were three types of comitology procedures: (1) the management committee procedure (where Member State experts voted in the same way as in the Council, and, in the case of negative vote, the matter was referred to the Council); (2) the regulatory committee procedure (where the matter was referred to the Council, unless Member State representatives voted in favour of the Commission's proposal); and (3) the advisory committee procedure (where the committee gave a non-binding opinion on the proposed executive act). In 2006, by virtue of Decision 2006/512/EC, a new type (4) regulatory procedure with scrutiny (RPS) finally granted the Parliament the right of veto regarding a proposed European Commission executive act. This fourth procedure, broadly seen as the predecessor of today's delegated acts,6 applied whenever the basic instrument provided for the adoption of measures of general scope.
designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument with new non-essential elements. Today, such acts are treated as ‘delegated acts’, and are no longer subject to comitology (although experts from Member States and interests groups are involved in an advisory role).

Before the Lisbon Treaty, comitology was the method used to adopt executive law-making acts not only with regard to implementing acts but also with regard to what have become delegated acts today. However, the system was criticised by both the European Commission and European Parliament, the latter for the lack of sufficient democratic legitimacy at EU level, the former for its perception of the management and regulatory committees as constraining its executive autonomy. The idea to do away with comitology with regard to delegated legislation (in post-Lisbon terminology: delegated acts) was adopted by the Convention on the Future of Europe. Craig and de Búrca emphasise that 'there was scant deliberation … because of time constraints and because the subject matter was felt too technical', and they are of the view that it is 'unlikely that the Member States appreciated the possible demise of comitology in the terrain where it has been used for nearly fifty years'. Christian Joerges and Jürgen Neyer defend the comitology system, as it engenders a form of 'deliberative supranationalism'. For Maciej Szpunar, the reform of EU executive law-making was not a consequence of a lack of effectiveness or lack of transparency in comitology, but followed from the context of reforming the system of legal acts in EU law in response to the European Parliament criticism of its insufficient oversight of comitology, with the goal of boosting the democratic legitimacy of delegated acts.

**Changes brought about by the Lisbon Treaty**

The Lisbon Treaty brought about **fundamental conceptual changes** regarding the way that executive law-making is framed in EU law. In Article 289 of the Treaty on the Functioning of the European Union (TFEU), the concept of a ‘legislative act’ was defined, denoting any legal act (directive, regulation, decision) that is adopted in a legislative procedure (ordinary or special). The Lisbon definition of a legislative act is purely formal, i.e. it is based on the procedure leading to the adoption of an act, and not on the content. In terms of the **hierarchy of sources** of EU law (see Figure 1), legislative acts come directly after the Treaties (including the Charter of Fundamental Rights) and the general principles of EU law. As such, legislative acts stand above any other (non-legislative acts) of the EU institutions, agencies, and bodies. Prior to the Lisbon Treaty, there was no internal differentiation of executive (secondary) acts issued by the European Commission or Council whenever one of these two institutions was authorised to do so by a basic instrument (the primary act). The Lisbon Treaty differentiated such executive acts between **delegated and implementing acts**, defining them in Articles 290-291 TFEU. The rationale for the differentiation between delegated and implementing acts ‘was to distinguish between
secondary measures that were "legislative" in nature, delegated acts, and those that could be regarded as more "executive," implementing acts'. However, this divide was 'never fully thought through in the deliberations on the Constitutional or Lisbon Treaty, and it is doubtful whether the objective has been realised'.

Table 1 – Main differences between delegated and implementing acts

<table>
<thead>
<tr>
<th></th>
<th>Delegated acts (Article 290 TFEU)</th>
<th>Implementing acts (Article 291 TFEU)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal nature</td>
<td>Act of general application only</td>
<td>Act of general or of individual application</td>
</tr>
<tr>
<td>Purpose</td>
<td>To amend or supplement non-essential elements in the basic act</td>
<td>To ensure uniform conditions for implementing legally binding EU acts</td>
</tr>
<tr>
<td>Type of basic act</td>
<td>Legislative act only</td>
<td>Legislative or non-legislative act</td>
</tr>
<tr>
<td>Modification of basic act</td>
<td>Yes, if concerning non-essential elements</td>
<td>Excluded</td>
</tr>
<tr>
<td>Author of executive act</td>
<td>European Commission</td>
<td>European Commission or Council (in the common foreign and security policy (CFSP) and in exceptional situations)</td>
</tr>
<tr>
<td>European Parliament and Council’s rights</td>
<td>Objection and/or revocation of delegation (if provided by the basic act)</td>
<td>Scrutiny</td>
</tr>
<tr>
<td>Member States’ involvement</td>
<td>Member States’ experts present in expert groups, with purely advisory role</td>
<td>Member States’ experts sit on comitology committees (provided for by the Comitology Regulation) and may veto the proposed measure by qualified majority voting (QMV)</td>
</tr>
</tbody>
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Source: EPRS.

Delegated acts: Legal framework and practice

The concept of a delegated act

Article 290 TFEU defines delegated acts as those that: (1) are adopted by the European Commission; (2) are of general application; (3) ‘supplement or amend certain non-essential elements’ of the basic act; (4) are based on an explicit delegation of power (contained in a legislative act) that lays down the objectives, content, and scope of the delegated act, and is of specific duration; and (5) may not be concerned with ‘essential elements of an area’ regulated by the basic act. The delegation contained in the basic act may attach one or both of the following conditions: (1) the power of the European Parliament or the Council to revoke the delegation; (2) the entry into force of the delegated act only if no objection is expressed by the European Parliament or the Council within a period set by the basic act. In both cases, Parliament acts by a majority of its component members, and Council by qualified majority voting (QMV – i.e. ‘at least 55 % of the members of the Council,
comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union, as provided in Article 16(4) TEU. In contrast to implementing acts, delegated acts may not be issued for individual cases, e.g. those that apply to a single Member State or only to a group of Member States.\textsuperscript{15} The concept of ‘essential elements’ and the prohibition of delegating these to executive law-making has been taken over from ECJ case law on comitology.\textsuperscript{16} For instance, in Case C-240/90 \textit{Sheepmeat}, the Court defined this concept as denoting ‘provisions which are intended to give concrete shape to the fundamental guidelines of Community policy’.\textsuperscript{17} The essential elements comprise the scope of the provisions regarding their subject matter, geographical and temporal scopes.\textsuperscript{18} In Case C-355/10 \textit{Schengen Border Code}, the Court highlighted that essential elements should be understood as referring to ‘political choices falling within the responsibilities of the European Union legislature’, which entail ‘the conflicting interests at issue to be weighed up on the basis of a number of assessments’. Typical non-essential changes include additions to the basic act updating it on technical progress, making amendments to annexes, or introducing new test procedures.\textsuperscript{19}

Delegated acts may only be adopted by the European Commission (and no longer by the Council, as was the case prior to the Lisbon Treaty), and a delegation may be placed only in a legislative act.\textsuperscript{20} Sub-delegation of this power by the European Commission is excluded.\textsuperscript{21} Formally speaking, delegated acts are not legislative acts (in light of the definition found in Article 289 TFEU) but can nonetheless be described as legislative acts in the substantive sense (\textit{Akte materieller Gesetzgebung}).\textsuperscript{22}

The term \textit{supplementing} is understood as fleshing out the details regarding the non-essential elements of a legislative (basic) act, keeping the entirety of the act in mind. This particularly includes specifying the meaning of vague concepts found in the basic act. \textit{Amending} encompasses the possibility not only to change the non-essential elements of the basic act, but also to repeal them (Case C-286/14 \textit{Connecting Europe Facility}). This means that the European Commission can update the non-essential elements of the legislation without repeating the entire legislative procedure. The \textbf{delegation must contain specifications for the Commission} on how to make use of it, by indicating the direction the delegated act should take, i.e. it must specify the objective of the delegation.\textsuperscript{23} The lack of such specification or excessive vagueness, effectively amounting to allowing a free-hand in law-making authorisation, would render the authorisation null and void.\textsuperscript{24} However, the delegation need not predefine the content of the delegated act, as this would be contradictory to the very idea of delegation. \textit{Lege non distinguente}, any delegated act (directive, regulation and decision) may contain a delegation. Any type of binding EU legal instrument (directive, regulation and decision) can be a delegated act (a delegated directive, delegated regulation and delegated decision). The EU co-legislators are never obliged to resort to delegated acts, they can always decide to regulate all matters in the legislative act, without granting any delegated (or implementing) powers to the Commission.\textsuperscript{25}
System of *ex-ante* and *ex-post* controls

With regard to delegated acts, the comitology system has been replaced by *ex-ante* and *ex-post* controls.26 *Ex-ante* controls are laid down in Article 290(1) TFEU, which requires that ‘the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts’. *Ex-post* controls are laid down in Article 290(2) TFEU, which enables the co-legislators to include, in the basic act, a right of revocation of the delegation and/or the right to objection (veto) towards a concrete act by Parliament and Council and the right of revocation of delegation. However, the possible *ex-post* controls operate not by virtue of the Treaty provisions, but by virtue of their explicit inclusion in the basic act; their inclusion is not obligatory, and they need not be included cumulatively.27 Although it is not entirely clear whether the forms of *ex-post* control may only be those mentioned in Article 290(2) TFEU, or whether additional ones may be devised by the co-legislators, most authors consider the list to be exhaustive.28 Additional forms of conditionality imposed upon delegated acts could in fact violate the institutional balance.29 If the basic act is adopted in a special legislative procedure, the instruments of *ex-post* control may be vested in the Council alone, not in Parliament, as the latter did not act as a co-deciding co-legislator in this instance.30 The exercise of the *ex-post* control instruments by each of the two institutions is not in any way mutually dependent.31

However, whereas the Council can exercise its *ex-post* control instruments by QMV, the Parliament has to vote by a majority of its constituent members according to Article 290(2) TFEU, which is a higher threshold than the default (majority of votes cast) prescribed by Article 231 TFEU. Furthermore, the time to launch a veto is usually relatively short (two to three months, as set by the basic act), which does not facilitate the exercise of this right.32 Some academics argue that under such conditions, Parliament cannot effectively control the Commission’s adoption of delegated acts.33 In contrast, it is easier for the Council to exercise a veto or revoke the delegated measures, as QMV is the default voting arrangement in that institution.34 The right to object to a draft delegated act does not entail any right to amend it.35

The Council and Parliament’s rights of revocation should not be viewed as a sanction against the Commission for acting *ultra vires*, but as an indication that the political situation has changed and one of the two co-legislators believes that the matter in question should no longer be the object of executive law-making.36 Importantly, no substantive premises are attached. The only precondition to exercise the right of revocation is purely formal: i.e. the attainment of the majority prescribed by the Treaty.37 The revocation operates only *pro futuro* and has no retroactive effect on the delegated acts already adopted – they would need to be repealed by a separate legislative act, not merely by an act of revocation. Apart from the (optional) system of *ex-post* controls exercised by the co-legislators, delegated acts are subject to judicial review, and are susceptible to being annulled by the ECJ if they do not conform to the delegation provided for in the basic act.

The 'common understanding' and rise of 'expertology'

In contrast to implementing acts, where procedural issues are governed by a dedicated regulation, there is no general legal act laying down the general procedural rules and principles applicable to delegated acts. Nonetheless, following a 2009 *communication on the use of delegated acts*, the rules to be followed were agreed by Parliament, Commission and Council in a *Common Understanding on Delegated Acts* (CU) in March 2011. An updated version of the CU was annexed to the 2016 *Interinstitutional Agreement on Better Law-Making*, adopted on the basis of Article 295 TFEU. The goal of the CU is to set out the practical arrangements and agree on clarifications and preferences applicable to delegations of legislative powers. The three institutions undertake to ‘cooperate throughout the procedure with a view to a smooth exercise of delegated power and an effective control of that power’ by Parliament and Council. A set of standard clauses, to be used in basic acts, is appended to the CU. The CU provides for an ‘expertology’ regime, whereby the Commission undertakes to consult experts designated by the Member States, and
to share draft delegated acts with them, thereby horizontally extending the principle laid down in Declaration No 39 for the financial sector, in what could be described as a spill-over effect. These consultations can take place either through existing expert groups, or in ad hoc meetings with experts from the Member States, for which the Commission sends invitations via the Permanent Representations. In contrast to comitology (both pre- and post-Lisbon Treaty), however, the opinions of Member State representatives sitting on expert groups can never be legally binding on the Commission. Nonetheless, some authors describe this process as a reintroduction of comitology ‘through the back door’, and approach it with criticism.

The CU explicitly stipulates that it is for the Member States to decide which experts are to participate, just as has been the case with comitology. Member States’ experts are provided with the draft delegated acts, the draft agenda and any other relevant documents in sufficient time to prepare. Following a meeting with Member States’ experts, the Commission services draw up conclusions that indicate how they will take the experts’ views into account. Experts need to be re-consulted if the Commission amends the draft delegated act. The CU provides that Parliament and Council will receive all documents sent to experts, including the draft delegated acts. The two institutions can also send their own experts to the meetings of the expert groups. The CU also lays down detailed rules on the duration of the delegation: this can be granted for an indeterminate or determinate period of time. In the latter case, the basic act should, in principle, provide for a tacit renewal of the delegation, unless Parliament or Council are opposed. The period of Parliament or Council objection should be set at two months, which can be extended by another two months. The CU provides for an urgent procedure, which may be enshrined in basic acts in exceptional cases only, such as those concerning security and safety matters, the protection of health and safety, or external relations, including humanitarian crises. A delegated act adopted under the urgent procedure enters into force without delay and applies as long as no objection is expressed within the period provided for in the basic act. If an objection is expressed by Parliament or Council, the Commission may repeal the act immediately. For some academics, the resort to expert groups instead of traditional comitology committees is problematic in terms of accountability, as those groups have no formal voting powers, yet provide the Commission with ‘essential scientific knowledge and expertise’ without being subject to the same transparency and accountability standards that apply to comitology.

The Commission hosts an interinstitutional register of delegated and implementing acts, which includes a section on the meetings of the expert groups (which, for delegated acts, have replaced the comitology committees). This register is blended with the Commission’s own register of Commission expert groups and other similar entities. The work of expert groups, including those working on delegated acts, is governed by a Commission Decision of 30 May 2016, establishing horizontal rules on the creation and operation of Commission expert groups. Expert groups are divided into formal expert groups set up by a decision of the Commission, and informal expert groups set up by a Commission directorate general, following the agreement of the competent Commissioner, Vice-President and Secretariat-General. Expert groups may comprise members

Delegated acts in practice

According to a 2019 EPRS study on parliamentary scrutiny of the Commission, the number of delegated acts received by Parliament annually has grown from 4 in 2010, to 119 in 2018, and between 100 and 200 as of 2014. The study, drawing on internal information received from the Parliament’s Legal Service, found (as of mid-2019) that Parliament has never revoked a delegation and that it objected to a delegated act 10 times. Concerning the time-limits for delegation, according to the Legal Service statistics, a delegation for an indeterminate period was given in 36 cases, a determinate period with tacit extension in 212 cases, and a determinate duration with no extension in 42 cases. Parliament had never opposed a tacit renewal of a delegation of power.

According to the EUR-Lex database, there were 1 460 delegated regulations, 91 delegated directives, and 44 delegated decisions in June 2021.
appointed by the Member States' governments (by analogy to comitology committees) as well as stakeholders representing interest groups. Parliament addressed the question of Commission expert groups in its resolution of 14 February 2017, calling upon the Commission to progress towards a more balanced composition of the groups, and deploring that no express distinction is drawn between experts representing economic and non-economic interests. To this end, the Commission, when creating new groups or changing the composition of existing ones, should state clearly in the public call for applications how it defines a balanced composition, which interests it seeks to be represented, and why. In its Summary Report 2021, Parliament's Conference of Committee Chairs called for detailed and timely information from the Commission on the preparation and transmission of delegated acts, asking the Commission to limit the number of requests for early non-objection procedures, in order to allow for proper scrutiny of the acts by Parliament. The Committee Chairs also noted that Council often remains reluctant to use delegated acts, even in cases where the conditions under Article 290 are clearly met.

Implementing acts: Legal framework and practice

The concept of an implementing act

According to Article 291(2) TFEU, 'implementing powers' (i.e. the competence to adopt implementing acts) may be conferred, in principle, on the Commission by a basic act 'where uniform conditions for implementing legally binding Union acts are needed'. The concept of 'implementation', used in Article 291 TFEU, refers to both acts of general application and to individual acts applying the law to concrete cases. Since the implementation of EU law, as a matter of principle (Article 291(1) TFEU), rests with Member States, the exercise of implementing powers by the Commission is viewed as an exception and is, therefore, subject to Member State supervision under the comitology system. Scholars emphasise that the principle of subsidiarity must be taken into account when determining whether uniform implementing conditions, established by the Commission, are necessary in a given situation. The need to establish 'uniform conditions' remains to be proven and is subject to judicial review 'limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down … needs only the addition of further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of [the basic act] require uniform conditions for implementation' (Case C-427/12 Biocidal Products). If uniform conditions of implementation are necessary, the co-legislators are legally obliged to confer implementing powers upon the Commission. The Commission's mandate to perform tasks of the executive stems from Article 17(1) TEU, which provides that this institution 'shall exercise coordinating, executive and management functions, as laid down in the Treaties'. In line with established ECJ case law on comitology, the limits of the Commission's implementing powers 'must be determined by reference amongst other things to the essential general aims of the legislation in question' and within those limits 'the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to it' (Joined cases C-14/06 and C-295/06 Denmark and Parliament v Commission).

Whereas, in general, the European Commission is the institution empowered to adopt implementing acts, in the area of EU common foreign and security

Comitology committees' activity

According to the latest available Comitology Report (2018), there were 275 committees overall. Some 23 committees followed the examination procedure, 100 the advisory procedure, 21 the pre-Lisbon Treaty regulatory procedure with scrutiny, and 130 more than one procedure. In 2018, the committees met a total of 660 times, and 880 written procedures took place. That year, the committees adopted 1 633 opinions, 1 456 implementing acts and 90 measures under the regulatory procedure with scrutiny. According to the EUR-LEX database, there were 9 439 implementing regulations, 3 424 implementing decisions and 114 implementing directives in June 2021.
policy (CFSP), the implementing powers are vested in the Council. The latter institution can be empowered to adopt implementing acts also beyond CFSP, but only ‘in duly justified specific cases’, subject to judicial review. As the ECJ pointed out, this justification is subject to the obligation to state reasons (Article 296 TFEU) and the ‘Council must properly explain, in the light of the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that it is the Commission that, in the normal course of events, is responsible for exercising that power’ (Case C-440/14 P National Iranian Oil Company). Despite Article 291 TFEU remaining silent on that matter, the ECJ considers that agencies and bodies of the Union can also be vested with implementing powers, as is the case with delegated acts (Case C-270/12 UK v Parliament and Council). An empowerment to adopt implementing acts can be contained in both a legislative and non-legislative act, in particular in a delegated act.\(^6^6\) In contrast to delegated acts, where the specificity of the delegation is required by the wording of Article 290 TFEU, in the case of implementing acts, the ECJ’s more liberal case law on comitology is deemed applicable by the doctrine\(^47\) whereby the basic act ‘may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act’ (Case C-374/96 Vorderbrüggen). Implementing acts are subject to judicial review, especially with regard to respecting the procedural rules contained in the basic act (Case C-212/91 Angelopharm). Under no circumstances may an implementing act modify the basic act, not even its non-essential elements (C-65/13 EURES Network; C-88/14 Visa Reciprocity).

**Procedural arrangements: Comitology Regulation**

The procedural arrangements for the adoption of implementing acts are laid down, as required by Article 291(3) TFEU, in the Comitology Regulation (Regulation 182/2011). It provides for two types of procedure: the **advisory procedure**, and the **examination procedure**. The type of procedure is usually determined in the basic act, but if that is not the case, the regulation indicates when the examination procedure must be applied. Comitology is based on specialised committees for given topics, attached to the Commission’s directorates-general (DGs). These committees are composed of one representative appointed by each Member State, and are chaired by a representative of the Commission without the right to vote. The two procedures differ as to the legal force attached to the committee’s opinion – non-binding in the case of the advisory committee, binding in the case of the examination procedure. However, whereas in the advisory procedure, the simple majority applies, in the examination procedure, the committee decides by QMV (Article 5 of the Comitology Regulation), along the same lines as decisions taken in Council. If the committee approves the Commission’s draft implementing act, the Commission must adopt it; if the committee rejects the draft, the Commission may not adopt the act, and if the committee cannot reach QMV for either a positive or negative opinion, the Commission may adopt the act, but, in principle, is not under a duty to do so. In the case of a negative opinion, the Commission may appeal to the Appeal Committee (AC), which follows the same procedure, i.e. can approve or reject the proposed act by QMV or, as per the first instance committee, it may not reach an opinion supported by QMV. In some situations, for instance in taxation, financial services, health protection or human, animal or plant safety policies, the Commission may not adopt an act in the case of a no-opinion scenario at the first instance committee and must address the AC if it wants to adopt the act in question. Rules allow adoption of acts despite a negative opinion or a no-opinion deadlock if they need to be

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**Commission proposal to amend the Comitology Regulation**

In 2017, the European Commission adopted a proposal to amend the Comitology Regulation to increase transparency and accountability in the decision-making process. In March 2018, the Council’s Legal Service issued an opinion on the proposal, in which certain solutions put forward in the proposal are described as incompatible with the Treaties. A set of amendments at first reading was adopted by the European Parliament on 17 December 2020 and the file was referred back to the Committee on Legal Affairs (JURI) for interinstitutional negotiations.
adopted without delay in order to avoid creating significant agricultural market disruption or present a risk to the financial interests of the Union. In such cases, the act in question is submitted immediately to the AC (Article 7).

The Comitology Regulation obliges the Commission to maintain a register of committee proceedings, with full access for Parliament and Council, and partial access for the public. Parliament or Council may 'at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act'. If that is the case, the Commission has a duty to review the implementing act and to inform Parliament and Council on its intention to maintain, amend or withdraw the implementing act in question. However, this does not amount to a right of revocation of delegation or objection to the act in question, as provided for delegated acts.

Choosing between delegated and implementing acts

The distinction made in the Lisbon Treaty between delegated and implementing acts is clear only on the surface. Academics emphasise that the 'very nature of the divide ... is very problematic', especially considering that the definitions contained in Articles 290 and 291 TFEU have different structures — in the case of delegated acts, the Treaty stipulates their juridical nature, whereas in the case of implementing acts, it sets out only when they can be issued. As a result, the main difference between them lies in whether the executive law-making measure in question is to 'amend' or 'supplement' the basic legislative act (delegated acts), or only to 'implement' it, but without modifying or expanding its content. However, the 'supplementation' criterion is itself deeply problematic as 'all secondary measures involve some addition to the primary act' that equally applies to implementing acts, since 'the very specification of uniform conditions of implementation will be "adding something" to the enabling provision in the legislative or delegated act'. As a consequence, an ever more vague criterion — that of 'essence' (of the basic act) — is the ultimate consideration. Its application, in turn, depends on the assessment of how 'definitive' the content of the enabling norm of the basic act is, a criterion which 'is difficult to regard ... as satisfactory'. What is more, Craig and de Búrca argue that it is impossible to determine whether an executive act will add something 'essential' or not prior to its enactment, especially because the draft delegated or implementing act can be amended prior to its adoption. Gellermann also argues that the main area of potential overlap between delegated and implementing acts lies in the sphere of supplementation, which is due to the broad understanding of the concept of 'implementation'. Ultimately, therefore, the decision whether to regulate all details of a given subject-matter in the basic legislative act, or to delegate some non-essential aspects to the Commission, or to authorise the Commission to adopt implementing acts 'is often a political decision based on different institutional interests.' Overall, it can be said that the Council prefers implementing acts, as Member States make an indirect impact upon the Commission (through their experts), whereas the Commission and Parliament prefer delegated acts, as the Commission has greater discretion and is more independent of the Member States, whereas the Parliament enjoys the right of objection and revocation. In practice, the three institutions frequently clash on whether to opt for delegated or implementing acts.

In 2014, Parliament adopted a resolution in which it enumerated a list of 14 non-exhaustive criteria that it would follow in differentiating between the two types of acts, providing inter alia that 'delegated acts should be used where the basic act leaves a considerable margin of discretion to the Commission to supplement the legislative framework laid down in the basic act,' whereas 'implementing acts should not add any further political orientation and the powers given to the Commission should not leave any significant margin of discretion'. Thus, the Commission should use an implementing act to grant an authorisation, if the authorisation in question is 'fully based on criteria' laid down in the basic act; in contrast, the Commission should use a delegated act to grant an authorisation if the basic act 'still allow[s] the Commission to make further non-essential/secondary political or policy choices'. Parliament also called on the Commission to always provide 'an explicit and sustainable justification as to why' it is proposing a delegated, or...
alternatively, an implementing act. In 2019, the European Parliament, the Commission and the Council concluded an interinstitutional agreement laying down non-binding criteria for the application of Articles 290 and 291 TFEU. It provides, inter alia, that ‘the power to adopt rules entailing political choices falling within the responsibilities of the Union legislature, for example in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments, may not be conferred on the Commission’. The agreement also contains a number of detailed criteria for choosing implementing or delegated acts for specific subject-matters.

The ECJ is ‘unwilling to become deeply embroiled in adjudicating on the nature of the divide’ between delegated and implementing acts. This became evident in Case C-427/12 Biocidal Products, where the Commission argued that it should have been empowered to adopt a delegated, rather than an implementing act, according to the basic regulation on biocidal products. The Court stated that ‘the EU legislature has discretion when it decides to confer a delegated power … or an implementing power … Consequently, judicial review is limited to manifest errors of assessment’ as regards the choice made by the co-legislators on the type of the executive act. Academics argue the ECJ’s preference for ‘low-intensity review’ is prone to ‘discourage claimants from challenging the correctness of the use of delegated or implementing acts, because of the difficulty of proving manifest error’. In the Visa Reciprocity case (C-88/14), the Court reiterated that the EU legislature enjoys discretion regarding the choice between implementing and delegated powers, as long as the conditions laid down in Articles 290 and 291 TFEU are met. In contrast to the European Parliament resolution of 2014, the Court indicated that ‘neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU’.

MAIN REFERENCES

ENDNOTES
5 Joerges and Neyer (no 1), p. 277.
12 Craig and de Búrca, EU law …, pp. 141-145.
14 Craig and de Búrca, EU law …, p. 146.
17 See also Case 25/70 Köster; Joined Cases C-63/90 and C-67/90 Spain and Portugal v Council (Fishing Quotas); Case C-133/06 Parliament v Council (Refugee status standards).
29 Schoo, ibid., paragraph 18.
30 Barcz, ‘Akty...’, p. 11.
31 Gellermann, ibid., paragraph 10.
32 Craig and de Bürca, EU law..., p. 172.
35 Craig and de Bürca, EU law..., p. 172.
36 Gellermann, ibid., paragraph 11.
37 Ruffert, ibid., paragraph 17.
38 Gellermann, ibid., paragraph 13.
39 Ruffert, paragraphs 17 and 16b.
42 Gellermann, ibid., ad Article 291 TFEU, paragraph 10.
43 Ruffert, ibid., ad Article 291 TFEU, paragraph 2; Gellermann, paragraph 1.
44 ibid. paragraph 6.
45 Gellermann, ibid., paragraph 12.
46 Ruffert, ibid., ad Article 290 TFEU, paragraph 2.
47 Gellermann, ibid.,paragraph 15.
48 Craig and de Burca, EU law..., pp. 172 and 146.
50 Craig and de Burca, EU law..., p. 149; Gellermann, ad Article 291 TFEU, paragraph 2.
51 Schoo, ibid., ad Article 290 TFEU, paragraph 5.
52 Christiansen and Dobbels (no 60), p. 55; Schoo, paragraph 5.
53 Craig and de Burca, EU law..., p. 150.
54 ibid., p. 151.

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