

## **Improved consultation practices in the preparation of delegated and implementing acts and the distinction between delegated and implementing acts**

In order to avoid burdening the legislator with detailed administrative and technical tasks relating to EU law and to allow for updating to keep pace with developments, the Treaty provides for the European Parliament and the Council to give powers to the Commission to adopt delegated and implementing acts for these purposes. Despite their technical nature, these delegated and implementing acts have often an important impact on a specific sector, or even for the whole society, which creates the need for greater transparency and consultation before they are adopted.

Legislative acts can empower the Commission to adopt "quasi-legislative" acts – delegated acts<sup>1</sup> – supplementing the basic act on non-essential elements or providing for amendments to annexes of EU laws in order to adapt them to technical or scientific progress and to adopt implementing acts<sup>2</sup>, such as individual financing decisions or decisions authorising the placing on the market of certain products based on criteria defined in the basic act. Delegated and implementing acts contribute to simple and up-to-date legislation and its efficient and speedy implementation.

The Treaty of Lisbon established different rules for the two categories of acts:

- For the preparation of "delegated acts" the Commission is autonomous, while in practice it consults experts in the decision-making process. Nevertheless, the European Parliament and Council each have a right of control over the Commission's powers in the form of a right of objection. They can also revoke the right to adopt delegated acts.
- For "implementing acts", the Commission's powers are subject to the control of committees of representatives of the Member States through two procedures (advisory and examination). The European Parliament and the Council do not have a right of control over the Commission's implementing powers, but do enjoy a right of scrutiny to examine whether the Commission did not act *ultra vires*.

There are two major areas in which greater clarity is required in the implementation of these Treaty provisions: consultation during the preparation of delegated acts and the delineation between implementing and delegated powers. In addition, the considerable impact of certain delegated and implementing acts requires further transparency in the preparation of the adoption of such acts.

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<sup>1</sup> Art. 290 TFEU

<sup>2</sup> Art. 291 TFEU

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With regard to consultation prior to the adoption of delegated acts, the Commission is committed to gathering all necessary expertise, including through the consultation of experts from the Member States. This is in line with the Commission's general obligation to consult under Article 11(3) TEU, with the Common Understanding on delegated acts and it is integral to the Commission's smart regulation objectives.

Consultation prior to the adoption of delegated acts has been a long-standing practice of the Commission since the entry into force of the Lisbon Treaty. However, experience has shown that existing practices need to be harmonised and refined to make consultation in relation to delegated acts more consistent and transparent across all policy areas.

This paper outlines the steps the Commission will take to improve consultation practices. It responds to concerns expressed by Member States, the European Parliament and stakeholders. The proposals concern the preparatory phase only and fully respect the Treaty provisions as regards the Commission's autonomy in the adoption of delegated acts. The Commission proposes that the basic principles of these changes are reflected in the updated Inter-institutional Agreement on Better Law-making later this year.

As regards delineation, the Commission strives to distinguish, in its legislative proposals, between implementing and delegated powers in accordance with objective and clear factors based on the provisions of the Treaty. It is in the shared interest of the European Parliament, the Council and the Commission to jointly establish Treaty-compliant criteria on whether a power that is to be conferred on the Commission is of implementing or delegated nature. This paper sets out the parameters for a horizontal discussion between the three institutions.

### **I. Improved transparency and consultation practices in the preparation of delegated acts**

#### **1. Early preparation of draft delegated acts**

In line with smart regulation principles, before drafting delegated acts the Commission will conduct all necessary preparatory work, such as studies, stakeholder consultation, consultation of experts, including experts from national administrations and gathering of scientific advice (i.a. by agencies) in a transparent way. The Commission will carry out impact assessments for delegated acts which are expected to have significant direct impacts.

The consultation of experts from national administrations during the early preparatory phase, in the context of a general stakeholder consultation, does not substitute for their specific consultation on the final draft text.

#### **2. Consultation of Member State experts**

Experts designated by all Member States will be consulted in the preparation of the draft delegated act via meetings with representatives of all Member States. Draft delegated acts will be prepared by the Commission services in view of these consultations. They will be shared with the Member States.



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The Commission will send invitations to such meetings via the Permanent Representations. It is for the Member States to decide on the experts to participate. Experts will be provided with the relevant documents in sufficient time to prepare.

At the end of any meeting with Member State experts or in the follow-up to such meetings, the Commission services will explain the conclusions they have drawn from the discussions and how they intend to proceed. These conclusions will be recorded in the minutes of the meeting. If the draft which was in public consultation changes in any way Member State experts will be given the opportunity to react to the final version of the draft delegated act.

Without prejudice to the application of Regulation 1049/2001 and in particular the rules relating to the protection of classified documents, documents relating to these meetings, including agendas, minutes and documents circulated to Member States, are to be made public.

### **3. Public consultation on draft delegated acts**

Draft delegated acts will be made public on a dedicated page on the Europa website for a period of 4 weeks in order to allow for comments from interested stakeholders. This consultation will usually take place following the consultation of Member State experts.

The public consultation requirement shall not apply to cases where the Commission has no margin of discretion relating to the content of the delegated act (for instance, where the act derives from the obligation to translate in a delegated act an international standard already adopted) or to cases where the drafts have been prepared by an EU agency or body and have been subject to full public consultation before being submitted to the Commission and for which the Commission does not have the intention to significantly modify them. It shall also not apply to cases where the delegated act is adopted under the urgency procedure.

To facilitate stakeholder planning, an indicative list of planned delegated acts will also be made available on the Europa website.

### **4. Information of the European Parliament and the Council**

In line with the Common Understanding on delegated acts, the Commission will ensure the simultaneous, timely and appropriate transmission of relevant documents to the Parliament and the Council throughout the process of the preparation of delegated acts.

The European Parliament can request that its experts be invited to meetings with the experts of the Member States discussing draft delegated acts, in accordance with the Framework Agreement on the relations between the European Parliament and the European Commission. The Commission will handle these requests in line with the Framework Agreement on relations between the European Parliament and the Commission. The European Parliament may also, at any stage of the process, want to discuss the matter and the Commission will provide all appropriate explanations in the relevant Parliamentary committee.

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A summary of the consultation process is included in the explanatory memorandum of the delegated act. The Commission is ready to examine the feasibility of enhancing transparency on delegated acts still further through a dedicated register that could also ensure the publication of draft delegated acts.

## **II. Improved transparency and consultation in the preparation of implementing acts**

For implementing acts a clear and comprehensive framework providing for Member State control and scrutiny by the co-legislators is in place.

Whenever broader expertise is needed in the early preparation of draft implementing acts, the Commission makes use of expert groups, consults targeted stakeholders and/or carries out public consultations. The Commission will carry out impact assessments for implementing acts which are expected to have significant direct impacts.

The Commission will increase transparency by making draft implementing acts public in the Comitology Register at the same time as they are submitted for the opinion of the Committee, without prejudice to the application of Regulation 1049/2001 and in particular the rules relating to the protection of classified documents. The Comitology Register can be adapted to easily identify draft implementing acts prior to the vote.

In addition, all draft implementing acts expected to have significant economic, social and environmental impacts and other draft implementing acts that require the opinion of a Committee will be made public for a period of 4 weeks prior to submitting them for the vote of the Committee in order to allow for comments from interested stakeholders. At this stage of the procedure the Commission can when necessary and justified still adapt the draft implementing act before submitting it for the opinion of the Committee. Such consultation will be carried out unless the draft implementing acts concern financial management (e.g. grants, annual work programmes), are based on scientific opinions from an agency or scientific committee on which a public consultation has already taken place and where the Commission follows the agency findings, when the drafts have been prepared by an EU agency and have been subject to full public consultation before being submitted to the Commission and have not been significantly modified by the Commission subsequently, the Commission has no margin of discretion (e.g. due to international obligations), or the consultation is not appropriate for other duly justified reasons (e.g. involving business secrets or security threats, influence on markets).

To facilitate stakeholder planning, an indicative list of planned implementing acts which will be subject to a public consultation will also be made available on the Europa website.

### **III. Delineation between implementing and delegated powers**

The Treaty makes a clear distinction between delegated and implementing powers in Articles 290 and 291 TFEU. However, the Court held in the biocides case<sup>3</sup> that the legislator has a margin of discretion within the limits of a manifest error of assessment, meaning that, outside the cases for which there can be no reasonable doubt that they fall within the Treaty definition of implementing or delegated acts, the legislator can choose the type of empowerment it wants to give to the Commission.

The services of the European Parliament, Council and Commission started identifying, in technical discussions in 2013, concrete criteria to provide guidance on whether powers to be foreseen in basic acts are of implementing or delegated nature. The European Parliament set out non-exhaustive "criteria for the application of Articles 290 and 291 TFEU" in its resolution of 25 February 2014 based on the Szájer report. The Italian Presidency of the Council reported that, in the Friends of the Presidency Group on the Functioning of the EU, "there was also support for resuming the interinstitutional dialogue on the delineation between delegating and implementing powers, even though there was considerable understanding of the difficulty of this exercise."

The Commission believes that the criteria set out in the Szájer report are a good starting point to establish criteria and categories that the institutions would lay down in the Interinstitutional Agreement on Better Law-Making. Such criteria would help to facilitate negotiations in individual legislative procedures.

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<sup>3</sup> C-427/12



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### **Preparation of delegated acts**

Preparatory work by the Commission services, with IA if major impacts and stakeholder consultations, including consultation of MS experts



Consolidation of a draft by the Commission services



Final draft submitted to expert group (Member State experts)

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4-week public consultation on the final draft



Adoption by the Commission

### **Preparation of implementing acts**

Preparatory work inside the Commission, with IA if major impacts and stakeholder consultation as appropriate



Consolidation of a draft by the Commission



4-week public consultation on final draft in selected cases



Submission of draft to the comitology committee



Vote in the comitology committee



Adoption by the Commission