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Delegated act or implementing act: clearly delineated?

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Almost a decade after the Lisbon Treaty introduced the division, the European Parliament, the Council and the Commission agreed on non-binding criteria to delineate between delegated and implementing acts. These criteria provide guidance and take repetitive issues off the negotiating table. They are also instructive on how to negotiate better in pursuit of one's preferences with regard to the use of delegated or implementing acts.

What type of powers should be given to the Commission?

The Lisbon Treaty introduced a revolutionary change to the binding acts that the European Commission may be empowered to adopt by the Council and the European Parliament.

Two new legal instruments were established to replace the existing range of 'implementing measures'. 'Delegated acts' would 'supplement or amend' basic EU laws, while 'implementing acts' would ensure 'uniform conditions for implementing' them. Prior to adopting an implementing act, the Commission would, as before, submit a draft for approval by member state representatives in a 'comitology' committee; Parliament would have no powers. By contrast, the Commission would adopt delegated acts after consulting national experts and stakeholders, and then submit these acts for ex post control by the Council and the Parliament, each of which would have the right of veto.

It did not take long for issues to arise, in view of the scant definitions given in the treaty as to the scope of application of these acts, and differences in interpretation and preference among the institutions. Positions in legislative negotiations often reflected general institutional preferences with regard to procedures. Council members have generally felt more comfortable with the ex ante control afforded by 'comitology', and favour implementing acts wherever possible. The Parliament prefers delegated acts that give it the right as EU legislator to supervise the EU executive. Moreover, negotiations have depended on linkages between this issue and other parts of the legislation under discussion.

As a result, negotiations over delegated and implementing acts still often seem to be conducted as if this were the first time – more than a decade since the two types of acts were introduced, and despite provisions for their subsequent adoption being included in just under half of concluded legislative acts under the ordinary legislative procedure since 2010. Legislative procedures are often delayed, outcomes have not always been consistent and inter-institutional tensions have been high.

One of the main concerns has been 'delineation'. When should one kind of act be used rather than the other? Is there overlap? Does the legislator (i.e. the Council and the European Parliament) have any discretion? Could objective criteria be established?

Proposals for criteria were made by the Parliament and the Commission, but not taken up. In its first ruling on the matter in 2014, the [Biocides](#) case, the Court of Justice of the EU (CJEU) helped establish basic principles, but also discouraged pursuit of agreement on criteria, by saying (paragraph 40) that the EU legislator does have ‘discretion’ when it decides which power to confer on the Commission. The [Interinstitutional Agreement on Better Law-Making](#) (IIABL) of April 2016, and the revised Common Understanding on Delegated Acts annexed to it, resolved most issues regarding delegated and implementing acts, but left delineation criteria for later negotiations.

In June 2019 the three institutions finally agreed on a general set of [non-binding criteria](#) to guide them when discussing which kind of empowerment should be given to the Commission. In the following paragraphs we explain how they can be used, and discuss their limitations.

The non-binding criteria as guidance for negotiators

Striking the right balance

In the first place, the new criteria need to be understood as providing guidance. It is not in the interest of the institutions to put a strait jacket on themselves. They need to strike a balance between prescriptiveness and flexibility, while observing the Treaty and the interpretation provided by the CJEU. In this sense it is vital for criteria to be all-encompassing, clear and unequivocal, even if this leaves them at the level of the abstract, and not specific regarding all possible situations.

The document strikes this balance by first presenting a common list of general principles on delegated and implementing acts, as originally stated in the Treaty, clarified in the relevant judgements of the CJEU and agreed in the IIABL. Most notably it recalls that political choices fall within the responsibility of the legislator and that only non-essential elements can be delegated to the Commission.

Second, it provides for several types of empowerments.

Two clear and automatic general criteria are included. An *amendment* of a legislative act can only be made through a delegated act. Measures of *individual application* can only be implementing acts.

General guidance is provided concerning ‘additional rules’. Delegated acts should be chosen if these ‘supplement’ the basic act (defined as ‘measures affecting in substance the rules laid down in the basic act and allowing the Commission to “flesh out” the basic act’). Implementing acts should be used if the additional rules are intended merely to implement or to give effect to the rules already contained in the basic act (defined as ‘specifying in further detail the content of that act, without affecting the substance of the legislative framework [as] would be the case where a sufficiently precise legal framework has been laid down by the legislator’).

Furthermore, guidance is applied to three specific cases: (i) acts establishing procedures, methods, or methodology; (ii) acts relating to an obligation to provide information; and (iii) acts relating to authorisations.

To illustrate with the case of information, the criteria distinguish between ‘additional rules building upon the *content of an obligation* to provide information [which] should be laid down in delegated acts’, and ‘measures which are aimed at ensuring that an obligation to provide information is fulfilled in a *uniform manner*’, which are to be adopted as implementing acts (emphases added).

Comprehensive, but not specific

Two types of specific subsequent measures are missing from the adopted criteria: those acts leading to the choice of priorities, objectives or expected results, and the annual and multiannual programmes.

These are precisely the types of acts to be adopted subsequently based on legislation governing the management of EU funds in accordance with the Multiannual Financial Framework (MFF).

One might argue that it would be more efficient to state that annual work programmes are always to be adopted as an implementing act, or that priorities are only to be decided via a delegated act. Yet not all annual programmes are equal, neither are all priorities of the same reach. The scope of conferral of implementing powers on the Commission has long differed from policy to policy (as confirmed by the CJEU in several judgments, e.g. C-23/75, C-22/80, C240/90). With the rapidly changing challenges and demands on institutions to deliver tailor-made solutions, the ability to understand and translate variation and flexibility into a negotiated legal text matter even more.

It is therefore not surprising that in several MFF-related legislative acts (for the MFF covering the period 2021 – 2027) the choice between delegated and implementing acts has represented the stumbling block in negotiations. However, this should not be understood as a zero-sum game in which one institution gains at the expense of another. This may rather be seen as an exercise in drafting the provisions in a legislative act, finding the compromise spot on the continuum between what is said in the legislative act and what is left for the preferred type of subsequent act or acts.

Even if there is a risk of coming up with different solutions for similar situations, case-by-case negotiations in such cases allow compromises and permit solutions better in tune with individual legislative acts and their objectives.

Conclusions

The criteria have taken off the table several issues that had been the subject of repeated discussion.

They make it easier to fine-tune provisions on procedures, methods, the provision of information and authorisations in line with agreed criteria for delineation.

They also provide guidance as to how one should delineate between delegated and implementing acts when framing empowerments to the Commission, so as to conform to the terms of the treaty as interpreted by the CJEU and correspond to institutional preferences. This has had an impact on how negotiations are conducted. Rather than relying on hard bargaining, success in negotiations depends more on winning support through both subject-matter expertise and legal drafting skills.

Finally, it must be borne in mind that the criteria are non-binding. They provide guidance, facilitate negotiations, force negotiators to search for the most appropriate wording and for support based on the quality of arguments. However, they do not prevent the institutions from searching for alternative solutions, within the boundaries of the treaty, that may lead to a compromise.