



Council of the
European Union

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INST 113

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: Non-binding criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union

DRAFT - NON-BINDING CRITERIA FOR THE APPLICATION OF ARTICLES 290 AND 291 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION- [TO ADD THE DATE OF LAST ENDORSEMENT BY THE THREE INSTITUTIONS]

THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COMMISSION

Whereas:

- (1) The European Parliament, the Council and the Commission (“the three Institutions”) concluded on 13 April 2016 the Interinstitutional Agreement on Better Law-Making ¹ (“the Agreement”).
- (2) The three Institutions underlined in paragraph 26 of the Agreement the important role played by implementing and delegated acts in Union law, and that, used in an efficient, transparent manner and in justified cases, they are an integral tool for Better Law-Making, contributing to simple, up-to-date legislation and its efficient, swift implementation.
- (3) The three Institutions envisaged in paragraph 28 of the Agreement to supplement the Common Understanding on Delegated Acts annexed to the Agreement by providing for non-binding criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).
- (4) The implementation of those criteria may be the subject of annual discussions at both political and technical level as part of the general monitoring of the implementation of the Agreement in accordance with paragraph 50 thereof.
- (5) While Article 291(2) TFEU provides that, where uniform conditions for implementing legally binding Union acts are needed, those acts are to confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council, the purpose of the non-binding criteria is to delineate between delegated acts and implementing acts, and not between the institutions on which implementing powers are conferred. These non-binding criteria are not designed to define or restrict in any respect the conditions under which an institution exercises the powers conferred on it in accordance with relevant Union law, including the basic act.
- (6) The Court of Justice of the European Union has already on several occasions addressed specific issues relevant for the application of Articles 290 and 291 TFEU ¹. That case-law might further

¹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

develop in the future. Where appropriate, the non-binding criteria may need to be reviewed in the light of the developments of the case-law,

HAVE AGREED AS FOLLOWS:

I. GENERAL PRINCIPLES

1. These non-binding criteria provide guidance to the three Institutions as to whether in legislative acts an empowerment should be of a delegated or an implementing nature, and should thus be given pursuant to Article 290 TFEU for the adoption of a delegated act or Article 291 TFEU for the adoption of an implementing act.
2. In each case the nature of the envisaged act must be determined taking into account the objectives, content and context of the envisaged act as well as those of the legislative act itself.
3. It is the competence of the legislator to decide whether and to what extent to use delegated or implementing acts, within the limits of the TFEU. In that regard, it is for the legislator to determine whether to empower the Commission to adopt delegated acts as well as to assess whether there will be a need for powers to ensure uniform conditions for implementing the legislative act.
4. If the legislator considers that a provision should be an integral part of the basic act, it may decide to include that provision in an annex. The legislator is never obliged to provide for annexes in legislative acts and can decide to provide for separate acts instead, but the three Institutions recall that the structure of a legislative act should be guided by the common commitments and objectives set out in the Agreement to have simple, clear and consistent legislation, which is accessible, comprehensible to citizens, administrations and businesses, practical to implement and made irrespective of the issue of empowerment. This, in no way, restricts the powers of the legislator.
5. The essential elements of legislation must be determined in the basic act. Therefore, 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

¹ Inter alia: Judgment of the Court of Justice of 18 March 2014, *Commission v Parliament and Council* (known as “the Biocides case”), C-427/12, ECLI:EU:C:2014:170; Judgment of the Court of Justice of 17 March 2016, *Parliament v Commission* (known as “the Connecting Europe Facility/CEF case”), C-286/14, ECLI:EU:C:2016:183; Judgment of the Court of Justice of 16 July 2015, *Commission v Parliament and Council* (known as “the Visa Reciprocity Mechanism case”) C-88/14, ECLI:EU:C:2015:499.

Commission ¹. When it exercises delegated or implementing powers, the Commission must fully respect the essential elements of the enabling act ².

6. A legislative act may confer the power to adopt delegated acts only on the Commission.
7. The criteria should not be considered as exhaustive.

II. CRITERIA

A. ACTS OF GENERAL OR INDIVIDUAL APPLICATION

1. Delegated acts may only be of general application. Measures of individual application may not be adopted by delegated acts.
2. Implementing acts may be of individual or general application.
3. An act is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract ³.

B. AMENDMENTS OF LEGISLATIVE ACTS INCLUDING THEIR ANNEXES

1. If the legislator confers the power to amend a legislative act on the Commission, that power can only be exercised by delegated acts ⁴, including where that power to amend relates to the annexes, as they are an integral part of legislative acts.
2. The delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislator in

¹ Judgment of the Court of Justice of 5 September 2012, *Parliament v Council*, C-355/10, ECLI:EU:C:2012:516, paragraphs 64, 65 and 76; Judgment of the Court of 26 July 2017, *Czech Republic v Commission*, C-696/15 P, ECLI:EU:C:2017:595, paragraph 78; Judgment of the Court of Justice of 11 May 2017, *Dyson v Commission*, C-44/16 P, ECLI:EU:C:2017:357, paragraphs 61 and 62.

² Judgment of the Court of Justice of 11 May 2017, *Dyson v Commission*, C-44/16 P, ECLI:EU:C:2017:357, paragraph 65.

³ Judgment of the General Court of 14 June 2012, *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission*, T-338/08, ECLI:EU:T:2012:300, paragraph 30; Judgment of the General Court of 7 March 2013, *Bilbaina de Alquitranes and others v ECHA*, T-93/10, ECLI:EU:T:2013:106, paragraphs 32 and 56.

⁴ Judgment of the Court of Justice of 15 October 2014, *Parliament v Commission*, C-65/13, ECLI:EU:C:2014:2289, paragraph 45 ; Judgment of the Court of Justice of 16 July 2015, *Commission v Parliament and Council*, C-88/14, ECLI:EU:C:2015:499, paragraph 31.

that act ¹. Amendments may include insertions and additions in relation to certain non-essential elements of the legislative act, or deletions or replacements of non-essential elements.

C. ADDITIONAL RULES SUPPLEMENTING THE BASIC ACT

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

D. ADDITIONAL RULES IMPLEMENTING THE BASIC ACT

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

E. ACTS ESTABLISHING A PROCEDURE, A METHOD OR A METHODOLOGY

1. Measures establishing a procedure (that is to say a way of performing or accomplishing something in order to achieve a certain result defined in the basic act) can be laid down either in a delegated act or in an implementing act (or can even be an essential element of the basic act), depending on their nature, objectives, content and context.

For instance, measures establishing elements of a procedure which build upon or develop the content of the basic act and which come within the regulatory framework as defined by the basic act should be laid down in delegated acts.

By contrast, measures ensuring the uniform implementation of a rule laid down in the basic act by establishing a procedure should be laid down in implementing acts.

¹ Judgment of the Court of Justice of 17 March 2016, *Parliament v Commission*, C-286/14, ECLI:EU:C:2016:183, paragraph 42.

2. Similarly, an empowerment to determine a method (that is to say a way of doing something in particular in a regular and systematic way) or methodology (that is to say rules to determine a method) may provide for delegated or implementing acts depending on its nature, objectives, content and context.

F. ACTS RELATING TO AN OBLIGATION TO PROVIDE INFORMATION

Measures relating to an obligation to provide information can be laid down either in a delegated act or in an implementing act (or can even be an essential element of the basic act), depending on their nature, objectives, content and context.

For instance, measures that determine additional rules building upon the content of an obligation to provide information should be laid down in delegated acts. This will generally be the case of additional non-essential elements affecting in substance an obligation to provide information.

By contrast, measures which are aimed at ensuring that an obligation to provide information is fulfilled in a uniform manner, such as format and technical means, should be laid down in implementing acts. For instance, where the basic act determines in a sufficiently precise manner the substance of the obligation to provide information, measures that specify in further detail the information to be provided in order to ensure comparability of data or effective enforcement of obligations should be laid down in implementing acts.

G. ACTS RELATING TO AUTHORISATIONS

Measures relating to authorisations, for example of products or substances, can be laid down either in a delegated act or in an implementing act (or can even be an essential element of the basic act), depending on their nature, objectives, content and context.

Authorisations of individual application may only be adopted by implementing acts. Authorisations of general application for which the Commission decision is based on criteria defined in the basic act in a sufficiently precise manner should be adopted by implementing acts.

Authorisations of general application that supplement the basic act, in that they are not limited to the application of the criteria laid down in the basic act but at the same

time build upon the content of the basic act (within the limits of the empowerment conferred), should be adopted by delegated acts.

III. MONITORING OF THE APPLICATION AND REVIEW OF THESE CRITERIA

1. The three Institutions will jointly and regularly monitor the application of these criteria.

The three Institutions will review the criteria in accordance with their respective internal arrangements, where applicable through their bodies having specific competence in this area, if necessary and appropriate in the light of developments in the case-law of the Court of