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#### **INFORMATION NOTE**

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from: Council Legal Service  
to: COREPER (1st part and 2nd part)  
Subject: Case before the Court of Justice  
- Case C-427/12 European Commission v. European Parliament and Council  
("Biocides Case")

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#### **Introduction**

1. On 18 March 2014, the Court handed down its judgment in the Biocides Case, concerning the use of implementing acts instead of delegated acts. In its judgment, the Court upheld the Council's arguments and dismissed the Commission's action. The representative of the Legal Service informed Coreper I of the main elements of the judgment at its meeting on 19 March 2014; the present note expands on the intervention made on that occasion.

## **Background**

2. Throughout the legislative procedure leading to the adoption of Regulation 528/2012 ("the Biocides Regulation"), the Commission and the European Parliament objected that the Council was insisting on too many implementing acts. The Commission objected, in particular, to the use of implementing acts for the approval of active substances and for the adoption of the fees regulation for the European Chemicals Agency ("ECHA"). The Council's position at the end of the legislative procedure prevailed in these respects. However, ultimately, it was only in relation to the power to adopt a regulation on the fees payable to ECHA, contained in Article 80(1) of the Biocides Regulation, that the Commission actually brought proceedings. The Commission claimed that the power in Article 80(1) should have been a delegated act, since, according to the Commission, the power thus conferred was in the nature of "supplementing" the basic act.

## **The judgment**

3. The Court began its analysis by pointing out<sup>1</sup> that Article 291 TFEU does not provide a definition of the concept of "implementing act", and that it is "*only where uniform conditions for implementing legally binding Union acts are needed*" that implementing powers would be conferred on the Commission. After recalling that "*the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from Article 290 TFEU*"<sup>2</sup>, the Court then made a general statement as to the effect of the Lisbon Treaty as regards powers conferred on the Commission by the co-legislators.

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<sup>1</sup> At paragraph 33 of the judgment.

<sup>2</sup> At paragraph 35 of the judgment.

4. According to the Court: "*Before the entry into force of the Treaty of Lisbon, the expression 'implementing powers' in the third indent of Article 202 EC covered the power to implement, at EU level, an EU legislative act or certain EU provisions and also, in certain circumstances, the power to adopt normative acts which supplement or amend certain non-essential elements of a legislative act. The European Convention proposed making a distinction between those two types of power, which is found in Articles I-35 and I-36 of the Draft Treaty establishing a Constitution for Europe. That amendment was ultimately incorporated in the Treaty of Lisbon in Articles 290 TFEU and 291 TFEU.*"<sup>3</sup>
5. In the opinion of the Legal Service, this is a crucial passage of the judgment. The Commission, in its written pleadings, had argued that Article 290 TFEU had created a new, "*quasi-legislative*", power in the hierarchy of norms<sup>4</sup>. If accepted, this would have led, in all probability, to an implied preference for delegated rather than implementing acts in cases of doubt. From paragraph 36 of the judgment it is clear that the Court in fact accepted the Council's submission that the nature of the power referred to in Article 290 TFEU was previously encompassed by the concept of implementing powers in Article 202 EC<sup>5</sup>.

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<sup>3</sup> At paragraph 36 of the judgment.

<sup>4</sup> For example, see paragraph 22 of the judgment.

<sup>5</sup> The wording used in paragraph 28 of the Council's defence, which was circulated to delegations in draft prior to lodging with the Court, reads: "*La nouveauté de l'article 290 TFUE ne réside pas dans sa nature, mais dans les modalités pour son exercice qui y sont prévues. Ce qui est envisagé par les articles 290 et 291 TFUE dans leur ensemble n'est rien d'autre que ce qui était jadis englobé dans l'article 202 du Traité CE.*"

6. The Court then provided some general guidance regarding the contrasting legal natures of delegated and implementing acts. Thus, according to the Court, the purpose of the power to adopt delegated acts "*... is to achieve the adoption of rules **coming within the regulatory framework** as defined by the basic legislative act*", whereas with implementing powers under Article 291 TFEU, "*... the Commission is called on to **provide further detail in relation to the content of a legislative act**, in order to ensure that it is implemented under uniform conditions in all Member States.*"<sup>6</sup>
7. Moreover, although the Commission denied the existence of any "grey zone"<sup>7</sup> between Article 290 and Article 291<sup>8</sup>, the Court followed the Council's submissions, in holding that "*...**the EU legislature has discretion**<sup>9</sup> when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. Consequently, **judicial review is 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 regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 **needs only the addition of further detail**, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.*"<sup>10</sup>

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<sup>6</sup> See paragraphs 38 and 30 of the judgment. Emphasis added.

<sup>7</sup> The Commission had argued "*... the respective scopes of Articles 290 TFEU and 291 TFEU are different and mutually exclusive (...)*" (paragraph 23 of the judgment).

<sup>8</sup> See also paragraph 21 of the opinion of the Legal Service of 10.12.2013, doc. 17599/13.

<sup>9</sup> In the original French, the term used was "*pouvoir d'appréciation*".

<sup>10</sup> See paragraph 40 of the judgment. Emphasis added.

8. The Court examined in some detail the actual wording and structure of the relevant provisions in the basic act<sup>11</sup>, and found that "...**the EU legislature could reasonably take the view that Regulation No 528/2012 lays down a complete legal framework...**"<sup>12</sup>. Moreover, "... since the system of fees referred to in Article 80(1) of Regulation No 528/2012 relates to fees payable to an EU agency, **the conferral of an implementing power on the Commission under Article 291(2) TFEU may be considered reasonable** for the purposes of ensuring uniform conditions for the implementation of that system within the European Union."<sup>13</sup>

### **Comment**

9. Whilst the purpose of the present note is not to provide an exhaustive and definitive analysis of the judgment in the Biocides Case, the Legal Service nevertheless considers it useful to draw to delegations' attention some preliminary remarks, particularly in view of the possible impact on the day-to-day work of the Council's preparatory bodies.
10. The practical effect of the judgment may be summarised as follows. Except in clear cases whereby a basic act is formally amended and thus, according to Article 290 TFEU, a power conferred on the Commission must be a delegated act, the legislature has a discretion as to whether or not a particular power to be conferred on the Commission is to be regarded as a delegated act or an implementing act. In this sense there is a "grey zone" between Articles 290 and Article 291 TFEU. The Court will only interfere with the choice made by the legislature in the event of manifest errors of assessment.

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<sup>11</sup> See paragraphs 41 to 51 of the judgment.

<sup>12</sup> See paragraph 48 of the judgment. The same reasoning is reflected in paragraphs 40 and 52 of the judgment.

<sup>13</sup> See paragraph 53 of the judgment.

11. On the basis of the parties' written pleadings and the arguments presented at the oral hearing as well as the questions from the Court, the Legal Service is of the opinion that the degree of detail in the basic act is of considerable significance in determining whether a power to be conferred on the Commission should be regarded as a power to adopt a delegated or an implementing act. In fact, taking into account the degree of detail in the basic act, the legislator, as held by the Court in the Biocides Case, could reasonably take the view in favour of one or another type of power. This is borne out by the attention the Court paid to the detailed provisions concerning the framework within which the fees regulation was to be adopted<sup>14</sup> pursuant to Article 80(1) of the Biocides Regulation.
12. In this respect also, the judgment confirms the line taken by the Legal Service in the Council's preparatory bodies, and indeed, in interinstitutional negotiations on legislative files. If delegations wish to see a power, which falls in the "grey zone", to become a power to adopt implementing rather than delegated acts, then attention should be given to appropriate drafting in the Council's preparatory bodies. The Legal Service is, of course, ready to assist in this regard with appropriate drafting suggestions as necessary.
13. In trilogues, it has often been asserted by the European Parliament that whenever the exercise of a power would entail discretion on the part of the Commission then only a delegated act could be used. Indeed, it has even been asserted by the European Parliament, that reporting rules, for example, should be subject to a delegated act, unless the rules in question merely concern the format of a report.<sup>15</sup> No legal support for these - manifestly political - positions can be found in the judgment in the Biocides Case<sup>16</sup>.

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<sup>14</sup> See paragraphs 41 to 51 of the judgment.

<sup>15</sup> See the European Parliament resolution of 25.2.14, P7\_TA-PROV(2014)0127.

<sup>16</sup> Indeed, it is curious that the Parliament chose to vote such a resolution at a time when the institutions had already been notified that the Court was going to hand down its judgment some three weeks later. The resolution has clearly been overtaken by events.

14. Finally, as delegations will be well aware, the appropriate dividing line between delegated and implementing acts is merely one of several interinstitutional issues with which the Council and its preparatory bodies are frequently confronted in legislative files. In view of the length and complexity of the Biocides Regulation, the Legal Service considers it useful to draw to delegations' attention that:

- a) the Biocides Regulation provides for mandatory upstream consultation of Member States' experts (who, as members of the Biocidal Products Committee referred to in Article 85 of the Biocides Regulation, establish the opinion of the European Chemicals Agency, which is required before the adoption of certain implementing and delegated acts);
- b) the "no-opinion" comitology clause was used without any special justification in the recitals; and
- c) the Biocides Regulation had an annex removed with the sole purpose of transforming what would have been a power to adopt delegated acts in relation to authorised substances, into a power to adopt implementing acts.

It may be worth noting, in view of the fact that the Commission sometimes raises objections and makes statements concerning similar practices, that the legality of those practices was not challenged before the Court in the Biocides Case, although the latter did offer an opportunity to submit to the Court the Commission's objections.

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