

Introduction to Delegated and Implementing Acts

Background

Delegated and implementing acts are the names given to two types of instrument the European Commission may adopt in order to ensure the implementation of EU law. Overseeing the implementation process has always been one of the Commission's main tasks, and the creation by the Commission of detailed rules to add substance to higher-level legislation such as Regulations and Directives is therefore nothing new. In carrying out this function, the Commission has long made use of the assistance of informal committees made up of experts from Member States, in a process that became known as "comitology".

In recent years, the process of comitology has been formalised with a view to making it more efficient and accountable. The most recent set of reforms – creating the current system of delegated and implementing acts – were contained in the Lisbon Treaty, which came into force in December 2009. Post Lisbon legislation uses this system. Older legislation may, in some cases, still be subject to the previous slightly different rules, which are beyond the scope of this briefing.¹

What are delegated and implementing acts?

The Lisbon Treaty makes a distinction between two sets of Commission acts – delegated acts, and implementing acts. Delegated acts are dealt with by Article 290.² They are defined as non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. Implementing acts are dealt with by Article 291.³ These are to be used where uniform conditions for implementing legally binding Union acts are required.

The rationale for making a distinction between these two types of act is as follows. Delegated acts are considered closer to actual law-making – they may supplement or amend something of the original legislation. In layman's terms, delegated acts should legislate upon the 'what'. They

¹ For more information on the history of delegated and implementing acts and an outline of previous rules see ClientEarth Memo "The path towards transparency in the implementation of the Commission executive powers" (M Ballesteros, 31 March 2011).

² Article 290 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon.

³ Article 291 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon.

represent an explicit decision by the EU legislators (Parliament and Council) to grant the Commission power to act on a certain issue. The extent of the delegation has to be clearly determined in the original legislation and the Commission can only legislate within those boundaries. Their content is more likely to be politically sensitive. An implementing act on the other hand is considered to be inherently more procedural (templates, procedures, deadlines), a pure, practical implementation of rules that already exist in the original legislation. In layman's terms, implementing acts should legislate upon the 'how' implementation should take place. As outlined in the next section of this document, the differences in nature between these two types of act result in different treatment in terms of which processes and EU institutions are involved when they are created.

In reality, when something should be considered as appropriate subject matter for a delegated act and when for an implementing act can be difficult to decide. The differences in definition can be hard to apply. For example, a delegated act is distinguished by the fact it may "supplement" the original legislative act, but it is hard to imagine an implementing act that does not also "supplement" the original text, according to the ordinary meaning of that word.⁴

Procedures for adoption of delegated and implementing acts

As noted above, premised on their different nature, delegated and implementing acts are subject to different procedures for their adoption. A major difference in the respective frameworks is that a Regulation⁵ has been passed detailing the process to be followed for adopting an implementing act, whilst there is no such Regulation describing the process for adopting a delegated act. The only legally binding rules governing this process are such as are stated in the Treaty itself, in Article 290.

Delegated acts

The Treaty states that the objectives, content, scope and duration of a delegation of power to the Commission must be set out in the original legislative act.

Because the power to adopt a delegated act is considered to be quasi law-making, it was decided that the European Parliament and Council should have the power to scrutinise and control the process. The Treaty therefore makes it possible for the Parliament and/or Council to:

1. make an objection to a particular delegated act, which will prevent it from coming into force;

⁴ See Delegated Acts, Implementing Acts, and the new Comitology Regulation (Craig, Oxford University Press) for a full discussion.

⁵ Regulation (EU) 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p.13)

2. revoke the delegation of power altogether. This would mean delegated acts already passed would still be valid, but no further would be possible.

Whether or not these veto powers are applicable is also set out in the original legislation granting the delegation. To exercise either their right of objection or revocation, a majority in Parliament is necessary, or a qualified majority in Council. An objection to a particular delegated act must be made within two months of the Commission adopting the act. A revocation may be made at any time. There are no specific restrictions on what the grounds of objection or revocation may be. Committees (see below on implementing acts) are not involved.

Although there are no detailed rules of procedure for adopting delegated acts, there is a non-binding Communication⁶ from the Commission providing guidance on the decision making process and the Commission's working methods. It refers to consultation with stakeholders and groups of experts. The Commission states that it will usually involve expert groups in its work on the preparation of delegated acts, giving sufficient time for effective consultation.⁷ This will however be a consultative, not a decision making role.

Implementing acts

Given that implementing acts are (in theory at least), more strictly procedural, and that implementing EU law is considered to be a task for Member States, oversight by Member States rather than by Council and Parliament has been chosen as the primary method for controlling the Commission's activities in this context. This comes in the form of committees of representatives from each Member State such as civil servants and experts from the relevant government departments (giving rise to the term "comitology").

Rules for how implementing acts are to be adopted are set out in a dedicated piece of legislation - Regulation 182/2011. This describes different types of committee and how they are to operate. The rules are detailed and are described here in summary only. For a complete picture it is necessary to look at the text of the Regulation itself.

There are two main procedures and types of Committee. The first, and simplest, is the Advisory Procedure. In this, the Commission presents a draft implementing measure to an Advisory Committee, which decides by simple majority vote whether to adopt a positive opinion on the measure. The Commission is obliged to take the result of this vote into account, but is not legally bound to abandon or amend the proposal if no positive opinion is delivered.

⁶ Communication of 9 December 2009 from the Commission to the European Parliament and the Council on implementation of Article 290 of the Treaty on the Functioning of the European Union (COM(2009)673)

⁷ Ibid pages 6-7

The second key procedure is the Examination Procedure. This is used in a number of instances, including for measures relating to the environment, and the Common Agricultural and Fisheries Policies. The Commission presents an Examination Committee with its proposed implementing act, and if the Examination Committee delivers, by qualified majority vote,⁸ a positive opinion on the proposal, it may be adopted. If it delivers a negative opinion, the proposal may not be adopted. In this case, the Commission can submit an amended proposal, or resort to an Appeal Committee. The Appeal Committee may itself decide by majority whether to accept the proposal.

It is also possible for the Examination Committee to deliver no opinion on a draft act. In this case, different consequences may apply. The default position is that the Commission could adopt the act, unless a simple majority of Committee members opposed this. However the Regulation makes certain exceptions to this rule – particularly, the original legislation may state that the act may not be adopted if no opinion is delivered. In this case, the Commission may either present an amended version or have recourse to the Appeal Committee (as if the opinion had been negative).⁹

A further procedure to be aware of is for the adoption of immediately applicable implementing acts, on imperative grounds of urgency. A different procedure applies for these, set out in Article 8 of Regulation 182/2011. Essentially it involves the adoption of the act without recourse to the committees in the first instance, with opportunity for the committees to repeal the measure afterwards.

While the involvement of the Parliament and Council in the adoption of implementing acts is much smaller than their involvement with delegated acts, they do still have a limited right of scrutiny. Either can at any time indicate to the Commission its belief that in respect of a draft implementing act, the Commission has exceeded the power granted to it in the basic legislative act. The Commission must then review the draft act and inform the Parliament/Council whether it intends to maintain, amend or withdraw it.

⁸ A majority which represents a certain percentage of Member States as well as a certain percentage of the population of the EU.

⁹ See Articles 23 and 47 of the CFP