



Delegated and Implementing Acts

(Articles 290 and 291 Treaty on the Functioning of the European Union)

GUIDELINES FOR THE SERVICES OF THE COMMISSION

November 2020

TABLE OF CONTENTS

I. COMMON ELEMENTS FOR DELEGATED AND IMPLEMENTING ACTS	4
1. Introduction	4
2. General principles relating to the scope of Articles 290 and 291 TFEU	7
2.1. Sources of the empowerments	9
2.2. Discretion of the legislator.....	9
2.3. Limits of the empowerments to non-essential elements	10
2.4. Binding nature of delegated and implementing acts.....	11
2.5. Margin of discretion left to the Commission	12
2.6. Acts of general or individual application.....	12
2.7. Amendments of legislative acts including their annexes	12
2.8. Additional rules supplementing the basic acts versus implementing the basic act 14	
2.9. Nature of the obligations of the Commission.....	16
3. Better Regulation and political oversight of delegated and implementing acts 17	
3.1. Better Regulation Principles.....	17
3.2. The 4-week feedback for delegated and implementing acts	17
3.3. Validation and political scrutiny mechanism	18
4. Technical Barriers to Trade notifications – Sanitary and Phytosanitary Measures notifications	19
II. GUIDANCE IN RELATION TO DELEGATED ACTS	21
1. Including empowerments for delegated acts in legislative acts	21
1.1. Wording of the empowerment.....	21
1.2. Duration of the delegation.....	22
1.3. Rights of the Legislator.....	23
2. The preparation, adoption and entry into force of delegated acts	26
2.1. Consultation of Member State experts	26
2.2. Information to the legislator.....	28
2.3. Bundling.....	30
2.4. Adoption of delegated acts.....	31
2.5. Transmission of delegated acts upon adoption.....	32
2.6. Publication in the Register of Delegated Acts.....	32
2.7. Transmission to the service responsible for publication.....	33
2.8. Exercise of the rights of the Legislator.....	33
2.9. Publication and entry into force	39
2.10. Reports on the exercise of the delegation	39
III. GUIDANCE IN RELATION TO IMPLEMENTING ACTS	41
1. Including empowerments for implementing acts in legislation	43
1.1. Necessity for control.....	43
1.2. Nature of control	44
2. The preparation and adoption of implementing acts	47
2.1. Comitology committee	48
2.2. Comitology register	49
2.3. Common rules of procedure for committees	50

2.4	Attendance of European Economic Area (EEA) countries and/or Switzerland in committees.....	52
2.5	Advisory procedure.....	53
2.6	Examination procedure.....	53
2.7	The Appeal Committee.....	57
2.8	Urgency procedure for immediately applicable implementing acts.....	59
2.9	Role of the Parliament and the Council.....	60
2.10	RPS/PRAC.....	61
2.11	Recapitulation of procedures.....	62

I. COMMON ELEMENTS FOR DELEGATED AND IMPLEMENTING ACTS

1. The present guidelines address both, delegated and implementing acts. The first part addresses issues that are common to delegated and implementing acts and the delineation of the two instruments, the second and third parts then address delegated and implementing acts respectively, first the empowerment stage and then the preparation of the delegated and implementing acts themselves.
2. These guidelines replace the earlier guidelines on delegated and implementing acts ⁽¹⁾ and further guidance provided in 2012 and in particular following the judgment of the Court in Case C-427/12 (Biocides) ⁽²⁾. The present guidelines therefore serve as a unique reference tool for the services. These guidelines are not of a definitive nature; they are necessarily a work in progress which may be updated when necessary. Information on delegated and implementing acts and further practical help can also be found in GoPro (<https://webgate.ec.europa.eu/fpfis/wikis/display/REGISTRY/Home>) and on the Secretariat-General's website on delegated and implementing powers (<https://myintracomm.ec.europa.eu/sg/comitology/Pages/index.aspx>).

1. INTRODUCTION

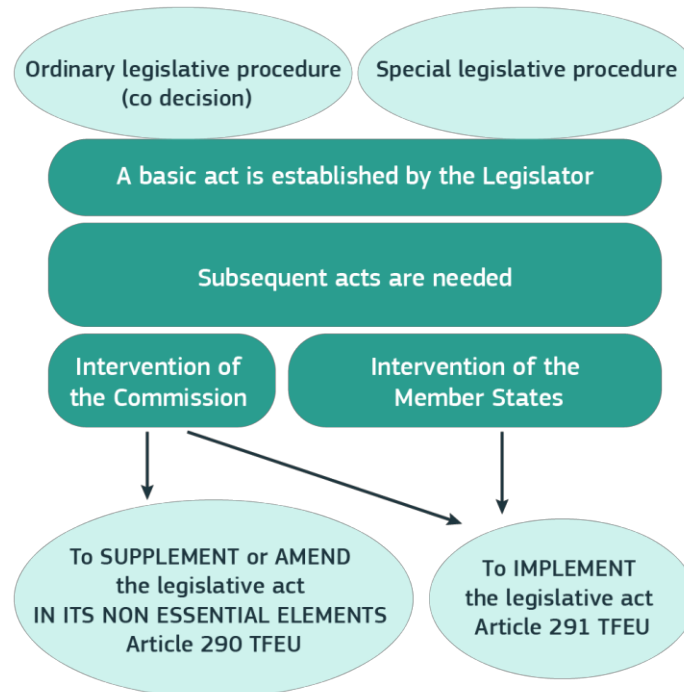
3. The vast majority of the Union's legal acts adopted each year are acts adopted by the Commission in accordance with the powers conferred on it by the legislator in basic legislation ⁽³⁾. These Guidelines focus on situations where the legislator has conferred powers to adopt delegated acts and implementing acts on the Commission.
4. Vested with the right of initiative, the Commission proposes the empowerments for delegated or implementing acts and the legislator confers the respective powers to the Commission. It is then for the Commission to adopt the delegated and implementing acts on the basis of the empowerments granted by the legislator and under the respective control mechanisms.
5. The Treaty of Lisbon has substantially modified the structure as regards the powers that can be conferred on the Commission by the legislator. It provides a **distinction between acts of a quasi-legislative nature, on the one hand, and, on the other hand, acts which implement the provisions of a basic act. It also provides an entirely different legal framework for each type of act.**

¹ SEC(2011)855, Guidelines on Delegated Acts, 24 June 2011 and SEC(2012)617, Guidelines on implementing acts, 25 October 2012.

² SEC(2012)537, Delegated and implementing acts - further guidance, 14 September 2012 and SEC(2014)455, Delineation between delegated and implementing acts - Further guidance following the judgment of the Court in Case C-427/12, 25 July 2014.

³ In 2018 the Commission adopted 115 delegated acts, 98 measures under the regulatory procedure with scrutiny (in French, *procédure de réglementation avec contrôle*, hereinafter, 'PRAC/RPS') and 1503 implementing acts adopted under one of the procedures set out in Regulation 182/2011.

6. The two provisions in question are Articles 290 and 291 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), as introduced by the Treaty of Lisbon that entered into force on 1 December 2009 ⁽⁴⁾.



7. **Article 290 (delegated acts)** allows the legislator to delegate to the Commission the power to adopt legal acts of general application to supplement or amend certain non-essential elements of a legislative act. In these cases, the Commission acts instead of and under the control of the legislator.
8. In order to avoid a piecemeal approach and to establish a framework for the exercise of delegated powers following the entry into force of the Lisbon Treaty, the Commission adopted a Communication to the European Parliament and to the Council on 9 December 2009 ⁽⁵⁾ on the implementation of Article 290 TFEU. The Council responded with a declaration adopted on 14 December 2009 ⁽⁶⁾ and the European Parliament adopted a resolution on 5 May 2010 ⁽⁷⁾. In 2011 the three institutions then agreed on a Common Understanding on delegated acts.
9. On 13 April 2016 the three institutions adopted a new Interinstitutional Agreement on Better Law-Making ⁽⁸⁾, which includes an updated Common Understanding, replacing

⁴ OJ C 306, 17.12.2007.

⁵ COM(2009)673.

⁶ Document n° 17477/09.

⁷ P7_TA(2010)0127.

⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016 (OJ L 123,

the one adopted in 2011. The Common Understanding sets out the practical arrangements, agreed clarifications and preferences applicable to delegations under Article 290 TFEU. It contains detailed rules in relation to the consultation of Member State experts in the preparation of delegated acts, in relation to the information of the European Parliament and the Council and it introduces new standard clauses to be used in basic acts.

10. Legal acts adopted by the Commission in this way are referred as 'delegated acts'. Therefore, the adjective 'delegated' shall be inserted in the title of delegated acts (TFEU, Article 290(3)).

Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

11. **Article 291 (implementing acts)** underlines in its first paragraph that Member States are primarily responsible for the implementation of Union Law. In its second paragraph, this provision states that where uniform conditions for implementing legally binding Union acts are needed, those acts must confer implementing powers on the Commission (or on the Council in exceptional cases). When adopting implementing acts, the Commission acts instead of and under the control of the Member States.
12. The rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers have been laid down in a 'Comitology Regulation' adopted by the European Parliament and by the Council ⁽⁹⁾, which has replaced as from 1st March 2011 the Council Decision 1999/468/EC (hereinafter, 'the Comitology Decision') amended in 2006 to introduce the regulatory procedure with scrutiny.
13. Legal acts adopted by the Commission under the procedures set up by the Comitology Regulation from 2011 are referred as 'implementing acts'. Therefore, the word 'implementing' shall be inserted in the title of implementing acts (TFEU, Article 291(4)).

12.5.2016, p. 1). See also the 'implementing guidelines for the inter-institutional agreement on better law making' (Ares(2016)2378249).

⁹ Regulation No (EU) 182/2011, OJ L 55, 28.2.2011, p. 13.

Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall 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.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.

2. GENERAL PRINCIPLES RELATING TO THE SCOPE OF ARTICLES 290 AND 291 TFEU

14. There is no overlapping between Articles 290 and 291: a Commission act is either a delegated act or an implementing act, it cannot be both at the same time. However, a legislative act might need both delegated acts and implementing acts to be properly put into operation.
15. Delegated and implementing acts can only be adopted based on empowerments in the basic act. The Commission proposes the empowerments for delegated or implementing acts in its legislative proposals, and the legislator confers the respective powers on the Commission. There are a number of basic rules when it comes to the delineation between delegated and implementing powers. It is crucial that services preparing legislative proposals follow an approach based on objective and clear factors, use the guidance below and base themselves on the non-binding delineation criteria agreed between the three institutions in 2019 ⁽¹⁰⁾.
16. **A case-by-case approach is necessary, and 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.**
17. In the 'Biocides judgment' ⁽¹¹⁾, the Court of Justice recognised that the legislator has a **margin of discretion** 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. Accordingly, *'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 [...] needs only the addition of further detail, without its non-essential elements having to be amended or*

¹⁰ The delineation criteria were negotiated and agreed between the Parliament, Council and Commission pursuant to a commitment to that end in point 26 of the Interinstitutional Agreement on Better Law-Making. The criteria are published in OJ C 223, 3.7.2019, p. 1.

¹¹ Case C 472/12 Commission v European Parliament and Council.

supplemented and, secondly, that the provisions of [that legal framework] require uniform conditions for implementation' ⁽¹²⁾.

18. The limited judicial control over the choice between supplementing in the meaning of Article 290 TFEU and implementing in the meaning of Article 291 TFEU entails that the legislator has discretion regarding the choice between delegated and implementing acts. This means that the delimitation does become to a certain extent – i.e. within the limits of the manifest error of assessment – a matter of political choice.
19. In the delineation criteria, the three institutions laid down the general criteria guiding the decision of whether an empowerment should be of a delegated or an implementing nature, including general guidance for cases which fall between the two, such as acts establishing a procedure, a method or a methodology, acts relating to an obligation to provide information and acts relating to authorisations. **The institutions should follow these criteria in negotiations.**
20. Vested with the right of initiative, **the Commission has a primary role to play in this regard.** When it submits its proposal to the legislator, the Commission should know in an unequivocal way the nature of the power it needs. The global architecture of any new legislative proposal must take into consideration the demarcation line between Article 290 and Article 291 TFEU, and the choices made by the Commission should be clearly motivated as part of the detailed explanation of the specific provisions of the proposal in the explanatory memorandum.
21. During the legislative process, the Commission services must loyally defend the proposals of the Commission regarding the delegation as such and the qualification of delegated or implementing act.
22. **The collegiality principle needs to be respected at all times** and the usual procedures for endorsement by the College through the *Groupe des relations interinstitutionnelles* (GRI) are applicable. In particular, it needs to be signalled to the GRI if either the Parliament or the Council propose changes to the empowerments proposed by the Commission (deletion of empowerments, change of the nature of the empowerment) or propose to depart from the non-binding delineation criteria (OJ C 223, 3.7.2019, p. 1).
23. When it appears that the co-legislators' modifications would amount to manifest errors of assessment, this should be signalled without delay to the Secretariat-General and the Legal Service. In such a case, the Commission should in principle object to the change on legal grounds.
24. If there is no manifest error, this issue should be addressed as part of the normal discussions between the Commission and the two branches of the legislator with the aim of finding a compromise. This means that where the two co-legislators agree on a position contrary to that originally proposed by the Commission, there are no legal obstacles to the Commission accepting it where it follows the guidance in the delineation criteria and where deemed appropriate. On this last regard, being given the task of amending, supplementing and implementing EU legislation, the Commission must ensure that it can comply with the tasks and responsibilities conferred on it.

¹² Case C 472/12 Commission v European Parliament and Council, § 40.

25. Outcomes of negotiations which entail that a single empowerment proposed by the Commission is split in a way that requires intrinsically interlinked matters to be addressed in a delegated and an implementing act should best be avoided. In such cases, during negotiations Commission services should raise the potential difficulties for exercising the split empowerments and the problems in terms of complexity of the ensuing legal framework.

2.1. Sources of the empowerments

26. A delegation of power in the sense of Article 290 may be conferred **only by a legislative act** ⁽¹³⁾, i.e. regulations, directives and decisions adopted by ordinary or special legislative procedure. Acts which are not adopted by such procedures ⁽¹⁴⁾ cannot delegate powers to the Commission under Article 290.
27. Implementing powers in the sense of Article 291 may be conferred on the Commission by 'legally binding Union acts'. This includes legislative acts and acts of the Parliament or the Council or both which are not adopted in a legislative procedure. It is even not theoretically excluded that a delegated act, which is a 'legally binding Union act' within the meaning of Article 291, could confer implementing powers on the Commission. However, although that scenario was proposed in some cases, it has proven difficult in practice to demonstrate that implementing powers given by the Commission to itself are not in fact a means of 'bypassing' or 'exceeding' the delegation. Services should therefore not use a delegation of power under Article 290 or a power conferred on the Commission before the Lisbon Treaty under the PRAC/RPS to 'create' implementing powers under Article 291, unless the empowerment in the legislative act explicitly authorises the Commission to confer on itself implementing powers. Rather, the services should seek to identify clearly in the proposal for a legislative act where both delegated and implementing powers may be needed.

2.2. Discretion of the legislator

28. It is the competence of the legislator to decide whether and to what extent to use delegated and implementing acts, within the limits of the TFEU. This is underlined in section I.3 of the delineation criteria (OJ C 223, 3.7.2019, p. 1).
29. **The legislator is never obliged to delegate powers to the Commission.** Article 290 opens an option for the legislator. There are certainly circumstances where a delegation of power is very much needed in order to prevent the entire legislative process from being jammed with matters of detail – for instance where there is a need to update regularly some technical requirements – and it is for the Commission to make appropriate legislative proposals to this effect. The Interinstitutional Agreement on Better Law-Making (point 26) recognises the important role played by delegated acts and that they are an integral tool of better law-making. Commission services

¹³ See the definition of legislative acts in Article 288 of TFEU.

¹⁴ Such as Council decisions concluding international agreements pursuant to Article 218 TFEU or Council regulations based on Article 31 TFEU fixing autonomous Common Customs Tariff duties.

should defend and explain the need for empowerments in negotiations. However, legally speaking, the legislator is entirely free to keep such powers for itself. Delegated acts have many advantages, in terms of speediness and effectiveness, but the recourse to such mechanism remains in the hands of the legislator. Therefore, if the legislator decides not to delegate certain powers such a decision cannot be challenged before the Court.

30. Similarly, while it can be argued that in line with Article 291 once it is established that uniform conditions for implementing legally binding Union acts are needed, empowerments to adopt implementing acts should be given to the Commission (or the Council), the legislator is not prevented from regulating that matter itself by including the necessary provisions in the basic act.
31. It is for the legislator to decide how to structure the basic act and whether to include certain matters as an integral part of the basic act, including in an annex to it. This may result in the Parliament insisting on certain matters to be included in an annex amendable by a delegated act or the Council pleading for an empowerment for the Commission to regulate the same type of matters in an implementing act. In some cases this has meant that issues that were originally addressed in an annex were taken out of the annex. While section I.4 of the delineation criteria (OJ C 223, 3.7.2019, p. 1) addresses these situations, differences of views between the institutions may still occur. The view of the Commission is that while the legislator has a discretion on the choice of empowerments and on how best to structure a legislative act, that discretion should not be exercised in a way that a legislative act is structured solely with the view to provide for or avoid certain types of empowerments. Instead, the structure of a legislative act should be guided by the common commitments and objectives set out in the Interinstitutional Agreement on Better Regulation (point 3) and in section I.4 of the delineation criteria 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.
32. So, for example, legislation should not include empty annexes which are to be subsequently filled by the Commission by means of delegated acts, nor should the legislator delete annexes to existing legislation for the sake of having the same matters regulated in an implementing act of the Commission.

2.3. Limits of the empowerments to non-essential elements

33. **The essential elements of legislation must be determined in the basic act,** section I.5 of the delineation criteria addresses this issue. The case law of the Court of Justice has defined the concept of essential elements as *'rules which (...) are essential to the subject-matter envisaged'* and *'which are intended to give concrete shape to the fundamental guidelines of Community policy'* ⁽¹⁵⁾. Case law also confirmed that the concept of essential elements is not in the hands of a purely discretionary power of the EU legislature. Deciding whether a matter must be categorised as essential must be based on objective factors amenable to judicial review. Finally, the Court considers that political choices fall within the responsibilities of the legislature. And the Court defines

¹⁵ Case C-240/90 Germany v. Commission, §§ 36 and 37.

such a political choice as being one which 'requires the conflicting interests at issue to be weighed up on the basis of a number of assessments' ⁽¹⁶⁾.

34. **Delegated and implementing acts cannot modify or lay down essential elements of the area and must be limited to non-essential elements.** This is clearly stated by Article 290(1), second subparagraph, last sentence, with regard to delegated acts. The same applies to implementing powers under Article 291 TFEU.
35. The concept of 'non-essential elements' is not new: measures adopted in the past through comitology procedures have always been limited to non-essential elements, insofar as the Commission, even vested with extensive executive powers, was not authorized to define the core elements of legislation. The confines of this concept have to be defined in each policy area by the legislator, which enjoys a wide margin of appreciation in this regard.

The adoption of rules conferring enforcement powers on border guards in the framework of the Schengen Border Control system has been considered as an essential element, as has been the method of calculating the energy performance of vacuum cleaners in the context of energy efficiency legislation ⁽¹⁷⁾. Equally, limits on car emission values were considered an essential element of the basic act which the Commission was not empowered to amend, even though those limits were laid down in an annex to the basic act ⁽¹⁸⁾. In the particular case at hand, the General Court looked into the recitals and enacting terms and found that the emission limits laid down in an annex to the basic act were an essential, and 'even a central element of the act', because the purpose of all the other provisions of that act was to ensure respect of those limits, and there was no explicit provision empowering the Commission to amend them.

2.4. Binding nature of delegated and implementing acts

36. The binding nature of the delegated and implementing acts was not addressed in the delineation criteria. It is generally agreed between the three institutions that **only legally binding acts may be adopted by means of delegated acts under Article 290**. These acts take the form of regulations, directives or decisions, in conformity with Article 288 TFEU.
37. The Commission considers that the same is true for implementing acts under Article 291: the only way to ensure a uniform implementation of legally binding Union act is indeed to adopt binding measures, such as regulations, directives and decisions. Non-binding acts cannot achieve the objective set out in Article 291.
38. However, the European Parliament and the Council are of a different opinion and have, before and after the Lisbon Treaty, conferred on the Commission the power to adopt, by means of implementing acts, non-binding measures, such as guidelines or

¹⁶ Case C-355/10 European Parliament v. Council, §§ 67, 76 and 77. See also case C-696/15 P, Czech Republic v. Commission, paragraphs 77 and 78.

¹⁷ Case T-544/13, Dyson v. Commission.

¹⁸ Joined cases T-339/16, T-352/16 and T-391/16.

recommendations. Services should firmly oppose such empowerments, especially where the non-binding character is explicitly stated. Where the European Parliament and the Council, despite the opposition of the Commission, confer on the Commission the power to adopt non-binding measures, this must be signalled as a serious concern via the GRI Fiche ⁽¹⁹⁾.

2.5. Margin of discretion left to the Commission

39. There is **no link between the political importance of an act and the nature of the powers to be given to the Commission for its adoption**. Very technical and non-controversial measures must be adopted by a delegated act if the conditions of Article 290 are fulfilled and likewise highly political decisions could take the form of an implementing act, if, again, the conditions of Article 291 are fulfilled.
40. The Court of Justice, in the 'Visa Exemption judgment' held that **neither the existence nor the extent of the discretion conferred on the Commission by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU**. For the Court, it follows from the wording of Article 290(1) TFEU that the lawfulness of the EU legislature's choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative act ⁽²⁰⁾. Therefore, the margin of appreciation left to the Commission is not a criterion for the choice of empowerment; i.e. there is no rule that in case of a certain margin an empowerment for a delegated act must be chosen.

2.6. Acts of general or individual application

41. Delegations of power under **Article 290** can only cover **acts of general application**. Individual measures cannot be subject to such delegations. Conversely, **Article 291** does not foresee such a limitation: implementing acts can be **of an individual or of a general nature**. Acts of general application concern objectively determined situations and produce legal effects with respect to categories of persons generally and in the abstract, for example by establishing a methodology for risk assessment. Acts of individual application are for example authorisation decisions directed to one particular authorisation holder (see section II A of the delineation criteria - OJ C 223, 3.7.2019, p. 1).

2.7. Amendments of legislative acts including their annexes

42. The verb '**amend**' in Article 290 has a precise meaning. It means **to make changes to a legislative act by deleting, replacing or adding non-essential elements**, see

¹⁹ In cases in which the Commission is nevertheless empowered to adopt 'recommendations' or 'guidelines' via implementing acts, such acts will take the form of a Commission implementing decision setting out those recommendations or guidelines, usually in an annex.

²⁰ Case C-88/14 Commission v European Parliament and Council, § 32.

also section II, B 2 of the delineation criteria (OJ C 223, 3.7.2019, p. 1). The procedure provided for under Article 290 thus applies where the legislator envisages the basic act being amended by the Commission by the addition of new non-essential elements or by the replacement or deletion of non-essential elements whether in an article or in an annex of the legislative act.

43. In contrast a delegated act '**supplementing**' the basic act will remain **a separate act** and will not formally change the basic act. The Court, in the 'Connecting Facility judgment', confirmed that the two categories of powers laid down in Article 290(1), to supplement or to amend, are clearly distinguished ⁽²¹⁾. It is therefore crucial that the empowerment is worded in such a way that it is clear whether a power to amend or to supplement is given. A distinction must be drawn between delegated powers to 'amend' and those to 'supplement' a legislative act in so far as the power to supplement a legislative act can only be exercised by adopting a delegated act which is separate from the legislative act and new non-essential elements can only be added to a legislative act itself where the power has been delegated to 'amend' that act.
44. Whether a delegated power is a power to 'amend' or 'supplement' is in some cases of legislative acts adopted just after the entry into force of the Treaty of Lisbon a question of interpretation, as the empowerment is not clearly worded, and does not refer only to the power to supplement or to amend. For reasons of clarity and legal certainty and for the avoidance of doubt, one of the two terms used by the Treaty, 'supplement' or 'amend', should be used in the recitals to new legislative acts and in the articles to clearly identify the delegated power. **Wording** such as '*The Commission is empowered to adopt delegated acts in accordance with Article ... to amend Annex...*' for amending acts and '*The Commission is empowered to adopt delegated acts in accordance with Article ... to supplement this Regulation/ Directive/ Decision by establishing the ...*' for supplementing acts should be used. If the Commission is to have power to amend the basic act, this should be expressively stated in the articles. In the absence of the word 'amend', the power is to adopt a separate, autonomous act to supplement the basic act.
45. As explained, the Court's definition of the power to 'amend' set out in paragraph 42 of the abovementioned Connecting Facility judgment ('...to modify or repeal...') does not exclude the possibility for the co-legislators to empower the Commission to amend a legislative act by **adding** new non-essential elements to it (see also section II, B 2 of the delineation criteria - OJ C 223, 3.7.2019, p. 1). The addition of new non-essential elements to the legislative act itself must be seen as a form of modification, and this power should be conferred by using the verb 'amend', and not the verb 'add'. This applies whether the non-essential elements are added to articles or to annexes of the legislative acts.
46. The modification of annexes of legislative acts falls within the scope of delegated acts in that an annex is an integral part of the legislative act and in theory its very purpose is to contain elements of a general and normative nature ⁽²²⁾. Thus, an amendment of a legislative act might relate not only to one or more articles in the enacting terms but

²¹ Case C-286/14 European Parliament v Commission, § 40.

²² The insertion of 'empty annexes' should be avoided (see above, 32). If the legislator considers that annexes are needed, it should be in a position to 'fill' them and to delegate powers to the Commission only to amend them.

also to an annex. The fact that the annex contains purely technical measures does not change its nature as being part of the legislative act. Even the mere addition of a footnote in an annex should be understood as an amendment of the legislative act, as confirmed in the 'Visa Exemption judgment' ⁽²³⁾. On the other hand, not every modification to an annex can be done by a delegated act; in certain cases, annexes could contain essential elements which can only be amended by an act of the Parliament and the Council ⁽²⁴⁾.

The Commission may only amend the basic act, including its annexes, by delegated act, not by implementing act.

47. Sometimes legislation foresees the need to make public the updating of important information, without any input from the Commission. For example, the Commission may in certain cases be under the obligation to act as a scribe and only reproduce the information notified by the Member States, without having the right to question the contents or format of that information. In such circumstances the Commission does not exercise any 'power' but merely, for example, transmits information to the *Official Journal of the European Union* and the Commission, instead of being asked to amend annexes via delegated acts, should simply be tasked to 'make public' the relevant information (using wording such as '*The Commission shall make the information publicly available through any appropriate means, in particular through ...*')(25).

2.8. Additional rules supplementing the basic acts versus implementing the basic act

48. Since the entry into force of the Treaty of Lisbon the greatest hurdle to surmount has been that of distinguishing between the verb 'supplement' (Article 290 TFEU) and the verb 'implement' (Article 291). Sections II C and D of the delineation criteria (OJ C 223, 3.7.2019, p. 1) address these two concepts.
49. Article 290 defines delegated acts but Article 291 does not operate in the same way as regards implementing acts. There is no substantive definition of implementing acts in Article 291. The reference to 'uniform conditions for implementing legally binding Union acts' is not a definition of implementing acts but rather the trigger for the need to confer implementing powers on the Commission: where there is no need to implement a legally binding Union act in a uniform way, Member States keep their primary role in the implementation of Union law; conversely, where uniform implementation is necessary, Article 291 requires that the Commission is to be empowered to take the necessary implementing measures. Based on the wording of Article 291, a description of implementing rules was included in section II, D of the delineation criteria (OJ C 223, 3.7.2019, p. 1). Further 'uniform conditions' of general application which would serve to

²³ Case C-88/14 Commission v European Parliament and Council, § 43.

²⁴ Joined judgments T-339/16, T-352/16 and T-391/16.

²⁵ See for example Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p.1, Articles 75 and 76; Directive (EU) No 2014/40 of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127 29.4.2014, p. 1, Article 4(2), last subparagraph.

supplement or amend a legislative act would be delegated acts in accordance with Article 290 – and it would not be possible to use implementing acts in such cases as implementing acts cannot modify or supplement legislative acts.

50. Uniform conditions in the sense of implementing acts often imply a centralised system to be applied at Union level. This would be the case, for example, where the legislator confers on the Commission the power to apply criteria laid down in the basic act to defined situations (for example to grant authorisations for products). It is the fact that the implementation is taken at Union level, in a centralised manner, which in itself, amounts to 'uniform conditions'.
51. Such acts by the Commission can be either of a general nature or be individual decisions. The Court of Justice has recalled that with regard to Article 291, the concept of 'implementation' comprises both the drawing-up of general implementing rules and the application of rules to specific cases by means of acts of individual application.
52. The word 'supplement' is not readily or easily defined. Section II, C of the delineation criteria (OJ C 223, 3.7.2019, p. 1) contains further details. Basically, **a delegated act which supplements a legislative act takes the form of a separate act imposing new non-essential rules, new norms**. The Court has confirmed that a supplementing delegated act must in all instances be a separate act ⁽²⁶⁾. **The premise of a delegation is that the co-legislators have decided not to legislate comprehensively**: they have established the essential elements and thereafter, by way of delegated powers, they leave it to the Commission to 'flesh out' these essential elements, to supplement them ⁽²⁷⁾. A delegated act will always deal with the content, the substance of the legislation.
53. **In contrast the verb 'implement' envisages the situations in which there is a sufficiently precise legal framework already established in the basic act** (see section II.D of the delineation criteria - OJ C 223, 3.7.2019, p. 1) and the sole purpose of any implementing act is to give effect to the rules which have already been laid down. An implementing act brings into life the legislation without changing its contents; it merely gives effect to the rules. In doing so, the Court has stated in the Biocides Judgment that an implementing act may '*provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions*' ⁽²⁸⁾.
54. When the Commission makes use of the legislative rules and simply applies them to a specific situation this is typically implementation.

For example, where the Commission is empowered to authorise the use of a chemical product on the basis of criteria defined in the legislative act in a sufficiently precise manner, that decision implies implementation by the Commission (see section II G of the delineation criteria - OJ C 223, 3.7.2019, p. 1).

55. When the Commission establishes further rules that complete the substance of the basic act this has to be done by means of a delegated act.

²⁶ Case C-286/14 European Parliament v Commission, § 56.

²⁷ Case C-286/14, European Parliament v Commission, § 44.

²⁸ Case C-472/12 Commission v European Parliament and Council, § 39.

For example, if the Commission is entitled to establish further criteria, notably to take into account technical or scientific progress, its decision will change the contents of the legislation and add to it a new rule of general application. This has to be done by means of a delegated act.

56. **A good tool** to help in distinguishing 'supplementing' and 'implementing' in many situations is to **ask whether the power conferred on the Commission is to determine 'what' the Member States – or other persons or entities directly concerned by the legislation – must do or to determine 'how' they are to act in carrying out their obligations under the legislative act.** A positive answer to the 'what' question would imply in general that the act establishes an additional set of substantive rules of general application which belongs to the legislative sphere and thus falls within the scope of Article 290. Conversely, a decision to determine 'how' the Member States are to proceed would in principle not alter nor modify the core obligations established by the legislative act; such decision would normally remain within the ambit of Article 291.

For example, if the basic or essential obligation laid down by the co-legislators is that the Member States 'shall provide information', an act which determines the types of information (in other words 'what' information the Member States are obliged to provide) and thus determines additional rules building upon the obligation to provide information will be a delegated act (see section II F of the delineation criteria). It enters into the substance of the obligation placed on the Member States. It fleshes out, it supplements that obligation.

On the other hand, an act setting up a standard form for giving such information ('how' the information is to be provided) would be decided by means of an implementing act. That act does not affect the essential obligations placed on the Member States but merely permits them to give effect to those obligations in a uniform manner.

2.9. Nature of the obligations of the Commission

57. Attention has to be paid to the legal obligations entailed by the delegated or implementing powers conferred on the Commission. Very often an empowerment creates an obligation to act.
58. One element to be taken into consideration in this regard is the wording of the empowerment itself. For example, the standard clauses for delegated acts foresee two possible formulations: either the Commission '*shall adopt*', or it '*is empowered to adopt*'. Comparable formulations exist for implementing acts. In some cases the legislator may also impose a specific date by which an empowerment is to be used. If such date is included in the legislation the services have to be aware that the non-respect of such obligation may result in a failure to act which could result in a legal case in the Court of Justice⁽²⁹⁾; however, the empowerment remains and may be exercised even beyond the date set in the basic act. It is therefore generally preferable for the Commission to propose the formula 'is empowered to adopt' and to not propose

²⁹ See Case T-521/14 Sweden v Commission, concerning a measure to be taken under PRAC/RPS.

a fixed date. If during the legislative negotiations nevertheless such requirements are added, services should ensure that this is limited to cases where there are objective reasons to do so and that it is realistic for the Commission to deliver.

3. BETTER REGULATION AND POLITICAL OVERSIGHT OF DELEGATED AND IMPLEMENTING ACTS

- 59.** Delegated and implementing acts are standard instruments which contribute to speedy and efficient decision-making provided that they are used in an efficient, transparent manner and in justified cases. This is also recognised in the Interinstitutional Agreement on Better Law-Making. They can however also have important economic, environmental or social impacts and, while the vast majority of these measures are uncontroversial, a few cases can be politically sensitive. It is therefore crucial that better regulation principles are properly applied and that the necessary political oversight within the Commission takes place.

3.1. Better Regulation Principles

- 60.** Better Regulation covers the whole policy cycle – policy design and preparation, adoption, implementation (transposition, complementary non-regulatory actions), application (including enforcement), evaluation and revision, and also applies to delegated and implementing acts. For each phase of the policy cycle, there are a number of Better Regulation principles, objectives, tools and procedures to make sure that the EU has the best regulation possible. These relate to planning, impact assessment, stakeholder consultation, implementation and evaluation. When preparing delegated and implementing acts services have to take full account of the Better Regulation Guidelines and the Toolbox ⁽³⁰⁾.

Better regulation principles apply to delegated and implementing acts and services should refer to the Better Regulation Guidelines and Toolbox (http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en).

3.2. The 4-week feedback for delegated and implementing acts

- 61.** In the Communication 'Better regulation for better results - An EU agenda' ⁽³¹⁾ the Commission committed that all stakeholders will be able to provide feedback on draft acts setting out technical or specific elements that are needed to implement the legislation adopted by the European Parliament and the Council. Since 30 June 2016 draft texts of delegated and implementing acts ⁽³²⁾ are displayed to the public at large on the Commission's website for four weeks ⁽³³⁾. Contributions to the 4-week feedback

³⁰ http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en , see also Tool #40 on Delegated and Implementing Acts

³¹ COM(2015)215 final.

³² This also applies to measures under the regulatory procedure with scrutiny.

³³ http://ec.europa.eu/info/law/better-regulation/have-your-say_en.

period can be provided via the website ⁽³⁴⁾, where all contributions received will be made public.

62. There are exceptions in which it is not necessary to submit a draft act to the feedback mechanism. The feedback process and the exceptions are explained in the Better Regulation Toolbox ⁽³⁵⁾.
63. No specific consultation document in addition to the draft act needs to be prepared by the service. The feedback period can only be launched after the interservice consultation on the draft act is concluded. It is compulsory to obtain the appropriate hierarchical validation before the draft act is published; the required hierarchical level for validation is decided by the Director-General of the responsible DG ⁽³⁶⁾. The feedback period can run in parallel with the Technical Barriers to Trade notifications (see below under section I, 4).
64. For delegated acts the publication for feedback must be carried out before the adoption by the College, and for implementing acts and measures under the regulatory procedure with scrutiny before the submission to the vote of the Committee. For delegated acts, discussions in the expert group can precede or run in parallel to the feedback period, depending on the nature of the act and the amount of technical expertise required for its preparation. In any case, **Member State experts shall be given the opportunity to see the last version of the draft** (i.e. the one incorporating the feedback), prior to the launch of the adoption procedure by the College.
65. For implementing acts discussions can already take place in the Committee (or if early preparation requires broader expertise in an expert group), but the actual submission for an opinion of the committee can only be done following the feedback period.
66. The key input from the feedback process must be reflected for delegated acts in the explanatory memorandum, which should give a short and proportionate summary of the consultation. In case of implementing acts the committee will be informed about the input from the consultation and the discussion will be reflected in the minutes of the meeting and in the summary record that is available in the Comitology register.

Draft delegated and implementing acts are open to the public at large on the Commission's website for a four-week feedback period.

3.3. Validation and political scrutiny mechanism

67. Services have to follow any internal instructions regarding political scrutiny over the various stages of preparation of delegated acts, implementing acts and measures adopted via the regulatory procedure with scrutiny ⁽³⁷⁾.

³⁴ http://ec.europa.eu/info/law/better-regulation/have-your-say_en

³⁵ http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en, see Tool #56.

³⁶ http://ec.europa.eu/info/better-regulation-guidelines-and-toolbox_en, see Tool #56.

³⁷ See 'The Working Methods of the European Commission', 1.12.2019, P(2019)2.

68. Whenever Commission services share early draft acts or any other preparatory document related to such acts with Member States prior to interservice consultation, be it with the comitology committee in the case of implementing acts or in an expert group in the case of delegated acts, these documents must be presented in such a way that they cannot be confused with an act or draft act endorsed or adopted by the College. This has to be reflected in the visual presentation of such documents, notably the European Commission logo should not be used nor should such documents have an official cover page. Instead, the 'Draft' watermark and the following standard disclaimer must be used on the cover page:

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission. The information transmitted is intended only for the Member State or entity to which it is addressed for discussions and may contain confidential and/or privileged material.

A specific option in Legiswrite is available for this purpose.

4. TECHNICAL BARRIERS TO TRADE NOTIFICATIONS – SANITARY AND PHYTOSANITARY MEASURES NOTIFICATIONS

69. The Agreement on Technical Barriers to Trade (TBT Agreement) is one of the 13 Multilateral Agreements on Trade in Goods listed in Annex 1A to the WTO Agreement of 1994. All WTO Members are parties to the TBT Agreement.
70. This agreement contains transparency provisions and in particular the obligation to notify technical regulations and conformity assessment procedures at a draft stage. The objective of the notification procedure is to inform other WTO Members of upcoming changes of legislation on industrial and agricultural products and give them the opportunity to comment on the planned changes. The EU, as a WTO Member, is bound by this international obligation.
71. According to Article 2.9.2 of the TBT Agreement such notifications must take place at an 'early appropriate stage', when amendments can still be introduced and comments taken into account. According to Article 2.9.4 WTO Members must allow reasonable time for other Members to make comments in writing, discuss these comments upon request and take these written comments and the results of these discussions into account.
72. While the TBT Agreement does not specify how long a 'reasonable time' for comments from other Members should be, WTO Members have agreed in the TBT Committee that a reasonable time should be at least 60 to 90 days and that developed Members are encouraged to provide more than 60 days. In all newly negotiated Free Trade Agreements with third countries, the EU commits itself to give at least a 60 days comments period.
73. **It is therefore important that services, when planning the adoption of delegated or implementing acts containing technical regulations or a**

conformity assessment procedure, provide for the necessary time for the TBT notification ⁽³⁸⁾.

74. Such notifications have to take place after the interservice consultation and, respectively, before the vote in the committee for implementing acts, and before the adoption by the Commission for delegated acts.
75. These international obligations will require a careful planning by the services in order to respect the time lines for notification, namely the time needed to make the notification, the comment period of 60 to 90 days, plus the time to analyse and to discuss any comments from third countries. The notification will normally run in parallel with the publication for feedback described under section I, 3.2 above.
76. The notification obligation under the WTO Agreement on the application of Sanitary and Phytosanitary measures (the SPS Agreement) is very similar and delegated acts and implementing acts containing sanitary and phytosanitary measures should be notified to the WTO as explained above under the TBT Agreement.

Services need to plan in the TBT and SPS notifications where applicable.

³⁸ For detail on the procedure please see:
https://myintracomm.ec.europa.eu/dg/grow/how/manage/horiz_pol/intl_affairs/TBT_notification_procedure/Pages/tbt_notif_procedure.aspx.

II. GUIDANCE IN RELATION TO DELEGATED ACTS



1. INCLUDING EMPOWERMENTS FOR DELEGATED ACTS IN LEGISLATIVE ACTS

77. A number of issues regarding the empowerments for the Commission to adopt delegated acts need to be included in the legislative act and therefore need to be included first in the Commission proposal.

1.1. Wording of the empowerment

78. Above all, services are obliged to use in draft legislative acts **the standard clauses annexed to the Common Understanding as updated in the Interinstitutional Agreement on Better Law-Making of 13 April 2016 (see Annex)**. These standard clauses contain specific wording on the consultation of Member State experts and the information of the European Parliament and the Council, issues that were controversial for a long time. It is crucial for the Commission to ensure that also the co-legislator fully respects these standard clauses, which were commonly agreed. The Commission should not accept any deviations on these in the legislative process. If such deviations are proposed by the other institutions, they need to be signalled via the GRI.
79. The conferral of power on the Commission of whatever nature should be made clear and explicit. The recitals must explain unequivocally whether the Commission is given the power to amend the legislative act itself or to supplement it by adopting a separate autonomous act. It is in particular important to make this clear by using specifically the words 'amend' or 'supplement' ⁽³⁹⁾.
80. **The legislator must explicitly and precisely describe the powers it intends to delegate to the Commission.** Vague formulations – such as: 'the Commission shall be empowered to adopt delegated acts to amend or supplement this Regulation/Article'

³⁹ See also Case C-286/14 European Parliament v Commission and see above, in particular I.2.7.

– are not possible. Equally powers should not be conferred on the Commission simply by setting up a non-exhaustive list of measures to be taken. The use of formulae such as 'in particular', 'amongst others' or 'including' should only be used, if needed, in conjunction with a clear and precise general definition of the delegated powers and as examples of the types of actions to be taken. The case-law requires in particular that the definition of the power conferred is sufficiently precise, in that it must indicate clearly the limits of the power and must enable the Commission's use of the power to be reviewed by reference to objective criteria fixed by the EU legislature. The requirement in the first sentence of the second subparagraph of Article 290(1) TFEU is intended precisely to ensure that such a power emanates from an express decision of the legislator and that its use by the Commission respects the bounds the legislator has itself fixed in the basic act. For that purpose, the basic act must, in accordance with that provision, lay down the limits of its conferral of power on the Commission, namely the objectives, content, scope and duration of the conferral ⁽⁴⁰⁾.

81. If there is a need for that, an empowerment for the Commission to adopt acts under the urgency procedure, needs to be explicitly included in the basic act.
82. As it has been already emphasised above, services should clearly reflect on what powers they think the Commission would need for the purposes of the proper running of the relevant Union policy. They should have a clear idea as to the objectives they want to achieve with the powers they will ask the legislator to confer on the Commission: does the Commission need powers merely to give effect to the norms established by the legislator? Or does it want to 'substitute' for the legislator by creating new non-essential norms, new non-essential rules, which amend or supplement those already established by the legislative act?

1.2. Duration of the delegation

83. The stated preference of the Commission is to have **delegations of power of indeterminate duration** (see point 16 of the Common Understanding on Delegated Acts annexed to the Interinstitutional Agreement on Better Law-Making of 13 April 2016: '*The basic act may empower the Commission to adopt delegated acts for an indeterminate or determinate period of time*'). Article 290 requires above all that a clear and predictable framework be established for the delegated powers; but it does not require the Commission to be subject to strict cut-off dates or 'sunset clauses'. The legislator must be able to strike a balance between the need to establish a strict framework for the delegated powers and the need to ensure the continuity of the adoption of legal acts that are needed for the swift implementation of EU policies. Forcing the Commission to periodically present new legislative proposals to renew a delegation of power would be contrary to the very objectives of efficiency and speed that justify the use of delegated acts in the first place.
84. If a service considers that specific circumstances could justify another solution, they have to explain those circumstances in detail in the draft proposal they intend to submit to an interservice consultation.

⁴⁰ Case C-696/15 P *Czech Republic v. Commission*, §§ 49 and 51.

85. It is appropriate to provide for a right of revocation ⁽⁴¹⁾ in particular where the delegation of power is of an indeterminate duration.
86. **If it appears** – during the preparation of the proposal of a legislative act, or during its negotiation – that a **specific expiry date** for the delegation of power has to be provided for, **the following options are recommended**:
– A **fixed duration** – for example of 5 years – with **automatic renewal**: in such a case, the Commission has the obligation to present a report before the expiry of the delegation.
– If a real and strict 'sunset clause' (i.e. a fixed duration without renewal) is inevitable, then the Commission should make it clear to the legislator that it is necessary to allocate sufficient time to give full effect to the powers delegated to it – for example, **seven or ten years**.
87. The three options contained in the relevant standard clause annexed to the Common Understanding (see Annex, Article [A], paragraph 2) capture these possibilities. In cases where the legislator decides not to accept an indeterminate duration, the 'fixed duration + tacit renewal' option is the Commission's preferred option.
88. Where the option with a fixed duration and a tacit renewal is chosen:
–The Commission must fulfil its obligation to present a report in due time (point 17 of the Common Understanding);
–The decision of the European Parliament or of the Council to oppose the tacit renewal is a specific use of the revocation right which does not affect the general right of revocation at any time. This decision to oppose the tacit renewal nevertheless has to follow the same rule as regards the majority required (QMV in Council and majority of component members in the European Parliament);
–The decision to oppose the tacit renewal of a delegation of power will be published in the *Official Journal of the European Union* (point 25 of the Common Understanding), at the initiative of the institution responsible for the opposition.

1.3. Rights of the Legislator

a) Legislative acts adopted in accordance with the ordinary legislative procedure

89. Article 290(2) of TFEU specifies the **only two conditions** to which the legislator may subject the delegation of power: firstly, the right to revoke the delegation of power, and secondly the right to express objections. The legislative act must explicitly provide for them; they do not stem automatically from the Treaty.
90. The legislator is not obliged to impose these two conditions cumulatively; they are independent of one another. However, in principle a delegation of power would be subject to the two means of control established by Article 290. Both of them are mentioned in the standard clauses annexed to the Common Understanding on Delegated Acts, as updated by the Interinstitutional Agreement on Better Law-Making of 13 April 2016, which the institutions must use.

⁴¹ See below, section 1.3 (ii).

(i) Right of objection

91. Regarding the **right of objection**, the basic act must **fix the deadlines** thereof. The European Parliament or the Council may object to a delegated act within the time period laid down in the legislative act. Usually, this time period is of two months from the moment when the Commission transmits the adopted act to the European Parliament and to the Council in all the language versions (extendable by two months at the initiative of the European Parliament or the Council – see in Annex Article [A], paragraph 6).
92. The period for objection is defined on a case-by-case basis for each empowerment in each legislative act and may in some cases depart from this standard. One could imagine longer, but also shorter, time limits, depending on the complexity of the delegated acts the Commission is empowered to adopt.
93. There is the possibility for what is called an 'early non objection' ⁽⁴²⁾; this implies that **the legislator may explicitly decide 'not to express objections'**. This is reflected in the model Article [A], paragraph 6 (in bold and underlined characters):

*'6. A delegated act adopted pursuant to Article[s] ... shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of [two months] of notification of that act to the European Parliament and the Council **or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object.** That period shall be extended by [two months] at the initiative of the European Parliament or the Council.'*

94. When an act is adopted under the urgency procedure, the right of objection can be exercised after the Commission has adopted, published and applied immediately a delegated act.

(ii) Right of revocation

95. **Revocation** is a unilateral power given to the European Parliament or to the Council to call back wholly or partly the powers delegated to the Commission.
96. Whereas objection is a veto directed at a specific delegated act, which leaves untouched the delegated powers given to the Commission by the legislator, revocation is a withdrawal of the delegated powers given to the Commission. Revocation is probably to be seen as a more exceptional measure, prompted, for example, by the occurrence of factors that undermine the very basis of the delegation of power.

⁴² See Rule 105(6) of the Rules of Procedure of the European Parliament and see below, section 2.8.a).(iv).

b) *Legislative acts adopted in accordance with a special legislative procedure*

97. The rights described above do not always apply in the same way to the European Parliament and to the Council where the delegation of power is conferred by a legislative act adopted in accordance with a special legislative procedure.

(i) *Adoption by Council, consultation of European Parliament*

98. Where a legislative act is **adopted solely by the Council after the consultation of the European Parliament**, only the Council enjoys the right of revocation and the right of objection. Insofar as in such cases the European Parliament cannot actually impose its views in the legislative procedure, it seems logical to exclude the possibility for it to interfere in the preparation ⁽⁴³⁾, adoption and entry into force of the acts designed to amend or supplement the legislative acts.

99. In such a case the European Parliament is only informed of the adoption of delegated acts by the Commission, of any objection formulated to them or of the revocation of the delegation of powers by the Council ⁽⁴⁴⁾.

(ii) *Adoption by Council, consent from European Parliament*

100. Where a legislative act is adopted by the Council after obtaining the consent of the European Parliament **the European Parliament should be able to enjoy the same rights of control as the Council** – revocation and objection. Inasmuch as the European Parliament has the right to block the adoption of the legislative act, it should be entitled to block the entry into force of the acts designed to amend or supplement such legislative act. In addition it should have the power to call back the delegation it has initially approved.

101. Therefore, the rights of control of the European Parliament should be similar to the ones provided for in legislative acts adopted under the ordinary legislative procedure.

102. This solution has been followed, for example in Council Regulation (EU) No 2017/1939 ⁽⁴⁵⁾ (Article 115) and in Council Regulation (EU, Euratom) 2019/1197 ⁽⁴⁶⁾ (Articles 7 and 8).

⁴³ See recital 89 of Regulation 2019/1111 which only mentions the Council and Council experts to be involved – along with Member States' experts, in the preparation of delegated acts.

⁴⁴ See for instance Article 10 of Council Regulation (EU) No 973/2010 of 25 October 2010 temporarily suspending the autonomous Common Customs Tariff duties on imports of certain industrial products into the autonomous regions of the Azores and Madeira, OJ L 285, 30.10.2010, p. 4 and Article 93(7) of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, p. 1.

⁴⁵ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPP'), OJ L 283, 31.10.2017, p. 1.

2. THE PREPARATION, ADOPTION AND ENTRY INTO FORCE OF DELEGATED ACTS

103. Article 290 TFEU does not detail the procedure for adopting delegated acts. There are however obligations stemming from the Treaty or from the Common Understanding on Delegated Acts, as updated by the Interinstitutional Agreement on Better Law-Making of 13 April 2016 ⁽⁴⁷⁾ that need to be respected. In addition, when preparing delegated acts the relevant option in Legiswrite must be used and the drafting guidance in the Drafters' Assistance Package (DAP) must be followed.
104. In the preparation of delegated acts, due account must be taken of the better regulation principles and political oversight mechanisms of delegated and implementing acts referred to above under I.3.

2.1. Consultation of Member State experts

105. The question of consultations in the preparation of delegated acts has been one of the most sensitive issues of the implementation of Article 290 TFEU. Agreement between the institutions on this issue has been found in the Interinstitutional Agreement on Better Law-Making of 13 April 2016 updating the Common Understanding on Delegated Acts. **It is of utmost importance that the commitments made in this respect are met without exceptions.**
106. The Common Understanding provides that before the adoption of a delegated act, the Commission must consult experts designated by each Member States. **The Commission needs to harness the expertise of the relevant national authorities of all Member States**, given that those authorities will be responsible for implementing the delegated acts. This consultation is necessary to ensure that from a technical and legal point of view the delegated acts comply fully with the objectives laid down by the legislative act.
107. Section II of the Common Understanding contains detailed provisions on this consultation. The consultation of Member State experts in the preparation of delegated acts applies now without exceptions ⁽⁴⁸⁾: *'the Commission shall consult experts designated by each Member State in the preparation of draft delegated acts. The Member State' experts shall be consulted in a timely manner on **each** draft delegated act prepared by the Commission services'* (Point II.4 of the Common Understanding).

⁴⁶ Council Regulation (EU, Euratom) 2019/1197 of 9 July 2019 on measures concerning the implementation and financing of the general budget of the Union in 2019 in relation to the withdrawal of the United Kingdom from the Union, OJ L 189, 15.7.2019, p. 1.

⁴⁷ Prior to that, a Communication from the Commission to the European Parliament and to the Council of 9 December 2009 (COM (2009) 673), a responding Council declaration adopted on 14 December 2009 (Document n° 17477/09) and a European Parliament resolution of 5 May 2010 (P7_TA(2010)0127) addressed these issues.

⁴⁸ *'The specificities of the procedure for preparing regulatory technical standards (RTS) as described in the ESA Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 will be taken into account without prejudice to the consultation arrangements'* as laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016 (see the footnote to the Common Understanding).

- 108. The draft delegated act must be shared with the Member State experts.** *‘Those consultations shall take place via existing expert groups or via ad hoc meetings with experts from the Member States, for which the Commission services shall send invitations via the Permanent Representations of all Member States. **It is for the Member States to decide which experts are to participate.** Member States’ experts shall be provided with the draft delegated acts, the draft agenda and any other relevant documents in sufficient time to prepare’* (Point II.4 of the Common Understanding). This does not exclude earlier consultation, based on other documentation, of the Member States’ experts where their expertise is needed at an earlier stage. In exceptional cases a **written consultation** of Member States’ experts can be considered.
- 109.** The Commission rules on expert groups ⁽⁴⁹⁾ apply to expert groups preparing delegated acts, while taking into account the special requirements set out in the Interinstitutional Agreement on Better Law-Making of 13 April 2016 and the Common Understanding annexed to it.
- 110.** All expert group meetings on draft delegated acts must be properly documented in the Register of Expert Groups (‘Meetings’ tab). The date and place of the meeting need to be indicated and the relevant meeting documents (agenda, draft act, minutes, other meeting documents) need to be uploaded in the Register.
- 111. Under no circumstances may a comitology committee be consulted on a draft delegated act or asked to prepare it.** However, it is not excluded to consult in a Commission expert group Member States’ experts who are the same as the members of a given comitology committee. Thus, an expert group meeting could be held on the same day and with the same composition as a comitology committee meeting. In this case, the services must clearly distinguish between these two meetings: different agendas, different documents and different channels of information of the Council and the European Parliament (the comitology register for the comitology meeting, the functional mail boxes for the expert group meeting).
- 112.** Meetings of experts may include observers, where appropriate, e.g. where international organisations (such as the European Space Agency) or third countries (especially European Economic Area countries, or Switzerland) are directly interested in the acquis as a consequence of either a basic act or an international agreement, and in accordance with that basic act or international agreement.
- 113. The experts consulted by the Commission should not deliver any formal opinion.** *‘At the end of any meeting with Member States’ experts or in the follow-up to such meetings, the Commission services shall state the conclusions they have drawn from the discussions, including how they will take the experts’ views into consideration and how they intend to proceed. Those conclusions will be recorded in the minutes of the meeting’* (Point II.5 of the Common Understanding). Services must take care that the minutes provide a meaningful summary of the discussions and conclusions.

⁴⁹ Commission Decision of 30.05.2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016)3301final.

114. *'The preparation and drawing-up of delegated acts may also include consultations with stakeholders'* (Point II.6 of the Common Understanding). The Commission is free to seek stakeholder input in addition to Member State expert input and committed to do so where necessary. When the Commission consults Member State experts through an expert group which also includes other members, the Commission may organise meetings with Member State experts only to discuss draft delegated acts.
115. *'Where the material content of a draft delegated act is changed in any way, the Commission shall give Member States' experts the opportunity to react, where appropriate in writing, to the amended version of the draft delegated act'* (Point II.7 of the Common Understanding). **Services must provide Member State experts with the latest draft delegated act as it will be adopted.** A re-consultation is needed where the material content changes and thus not in case of purely editorial changes. In case of doubt whether the change can be considered material, services should always give Member State experts the opportunity to react. This can be done in writing and time limits can be shortened appropriately. Such a re-consultation might be needed, for example, if the Commission wants to modify the draft delegated act after the 4 week public feedback period.
116. *'A summary of the consultation process shall be included in the explanatory memorandum accompanying the delegated act'* (Point II.8 of the Common Understanding). Services must ensure that this section of the explanatory memorandum does not only contain factual information about the meeting date etc., but also an informative summary of the key issues raised during the consultation. Since this addition is made after the interservice consultation, services must ensure that they signal any significant changes to the draft act to the other services.
117. All delegated acts must be included in Decide Planning. The planned delegated acts for which the case 'to be published for feedback' is ticked are made publicly available on the Register of Delegated Acts. All planned delegated acts are made available to the European Parliament and the Council through the private interface of the Register of Delegated Acts.

2.2. Information to the legislator

118. *'When preparing and drawing up delegated acts, the Commission shall ensure a timely and simultaneous transmission of all documents, including the draft acts, to the European Parliament and the Council at the same time as to Member States' experts'* (Point II.10 of the Common Understanding).
119. As already explained (supra, 110), all expert group meetings dealing with delegated acts must be encoded in the Register of Expert Groups (tab 'Meetings') and the relevant meeting documents uploaded.
120. In addition, the e-mail by which **documents are sent simultaneously to the European Parliament and the Council** must explicitly contain a **clear reference in its title to the fact that the expert group meeting concerns the preparation of a delegated act.**

Functional mailboxes are available for that purpose:

- for the European Parliament:
Reunions-Comm-ExpNat@europarl.europa.eu
- for the Council:
service.courrier-actesdelegues@consilium.europa.eu

- 121.** The Register of Delegated Acts is supposed to serve as an official transmission channel between the three institutions. It will, therefore, replace the use of the functional mailboxes at a date to be decided by the three institutions. The information and meeting documents uploaded in the Register of Expert Groups are transmitted automatically to the Register of Delegated Acts.
- 122.** *'Where they consider this necessary, the European Parliament and the Council may each send experts to meetings of the Commission expert groups dealing with the preparation of delegated acts to which Member States' experts are invited'* (Point II.11 of the Common Understanding). It is appropriate for the **Parliament to be represented by officials** working for the Parliament's administration. In light of the composition of expert groups, where the political level is not represented, and of the technical nature of their discussions, the presence of Members of the European Parliament is not suitable. This interpretation is shared by the European Parliament itself: former European Parliament Presidents Buzek and Schulz have informed the Commission that *'no Member of the EP should take part, in any capacity, in working groups or advisory fora (regardless of their denomination) set up by the Commission, where these bodies deal with subject-matters in which Parliament is co-legislator'* ⁽⁵⁰⁾.
- 123.** *'To that end, the European Parliament and the Council shall receive the planning for the following months and invitations for all experts meetings'* (Point II.11 of the Common Understanding). Once the Register of Delegated Acts takes over the e-mail transmissions, such information will no longer need to be sent via e-mail (as it is already visible in the Register by encoding all future meetings in the 'Meetings' section of the Register of Expert Groups).
- 124.** To sum-up, the Interinstitutional Agreement on Better Law-Making of 13 April 2016 and the Common Understanding annexed to it introduced three key changes as compared to the commitments under point 15 of the Framework Agreement of 2010 between the European Parliament and the Commission and under the Annex I to this Framework Agreement ⁽⁵¹⁾.
- 125.** First, the possibility to participate in Commission expert groups dealing with the preparation of delegated acts now applies to both, European Parliament and Council experts.
- 126.** Second, different from the Framework Agreement which provides that the Commission 'may' invite Parliament's experts and thus has a certain margin of discretion, the

⁵⁰ Letter from M. Schulz to M. Barroso of 29 April 2013 and from M. Buzek to M. Barroso of 15 July 2011.

⁵¹ OJ L 304, 20.11.2010, p. 47. Guidelines have been provided on point 15 of the Framework Agreement between the European Parliament and the Commission in the following note: SEC(2010)1568 of 14 December 2010.

European Parliament and the Council have now the right to send experts to these meetings, and there is therefore no discretion on the Commission's side.

127. Third and as a consequence, services must now provide the European Parliament and the Council with the planning for the following months and the invitations for all experts meetings.
128. The full planning of delegated acts is available to the European Parliament and Council via the Register of Delegated Acts. While letters from the committee Chair are no longer required in order to allow European Parliament experts to attend, both the European Parliament and the Council agreed to inform the Commission services, in advance of the meeting, of who will attend from their side.
129. The Interinstitutional Agreement on Better Law-Making of 13 April 2016 (point 28) provides that *'the Commission may be invited to meetings in the European Parliament or the Council in order to have a further exchange of views on the preparation of delegated acts'*. This confirms the practice to invite the Commission, be it in a parliamentary Committee or in a Council Working Group, to present upcoming delegated acts. This exchange should take place in a cooperative spirit, respecting however the distinct institutional roles of each institution at that point of the process. Under Article 290 TFEU the Commission is autonomous in adopting delegated acts and is only subject to an ex-post control by the European Parliament and the Council. While the Commission should provide explanations and take note of suggestions made in such discussions, this should essentially remain an informative exchange. It also needs to be taken into consideration that in such discussions Members of the Parliament or Member State representatives can only voice their individual positions; these are not the positions of the respective institution at that time.

2.3. Bundling

130. In case a basic act contains several empowerments for delegated acts it may make sense to adopt a single delegated act based on several empowerments. This practice is referred to as 'bundling'.
131. The Interinstitutional Agreement on Better Law-Making of 13 April 2016 (point 31) provides that *'on condition that the Commission provides objective justifications based on the substantive link between two or more empowerments contained in a single legislative act, and unless the legislative act provides otherwise, empowerments may be bundled. Consultations in the preparation of delegated acts also serve to indicate which empowerments are considered to be substantively linked. In such cases, any objection by the European Parliament or the Council will indicate clearly to which empowerment it specifically relates'*. Given that the Interinstitutional Agreement refers to 'empowerments contained in a single legislative act', **delegated acts should not be based on empowerments from several basic acts.**
132. When preparing a bundled delegated act this should be made clear in the consultation process and in the draft shared with Member State experts to allow possible concerns to be voiced early on in the process. The explanatory memorandum and a recital should provide explanations on the substantive link between the empowerments.

- 133. Attention should also be paid in legislative negotiations to the introduction of 'anti-bundling clauses'**, i.e. provisions that foresee that the Commission shall adopt a separate delegated act for each empowerment. The legislator may also subdivide a single empowerment, in order for instance to oblige the Commission to adopt a separate delegated act for each annex of the same legislative act which the Commission is empowered to amend. The Commission should carefully consider whether the use of such clauses is acceptable and should oppose them when they risk leading to a piecemeal approach and thus undermining the very purpose of the use of delegations of powers. In addition, the multiplication of delegated acts supplementing a single basic legislative act would go against the accessibility and simplification of EU legislation. Any anti-bundling clause introduced during legislative negotiations should be signalled through GRI.

2.4. Adoption of delegated acts

- 134. A delegated act first has to be adopted by the College before it can be transmitted to the European Parliament and to the Council.** In addition to the information traditionally provided to the Greffe in order to launch the procedure for adoption, the service responsible has to specify:
- The article(s) of the legislative act on the basis of which the delegated act is adopted (empowering provision(s) of the basic act);
 - The time period during which the European Parliament and the Council may object to the delegated act (and its possible extension).
- 135.** The delegated act has to be accompanied by an **explanatory memorandum** setting out in a detailed manner the reasons for the act and providing information about the preparatory work undertaken by the Commission. *'A summary of the consultation process shall be included in the explanatory memorandum accompanying the delegated act'* (Point II.8 of the Common Understanding).
- 136.** The title of the delegated act must contain the adjective 'delegated' (TFEU, art. 291(3)).
- 137.** The **correctness of all language versions** of a delegated act must be carefully checked before its adoption by the College. Insofar as the right of objection of the European Parliament and the Council is exercised over an **adopted** delegated act, these two institutions cannot undertake any linguistic revision of the text which is notified to them.
- 138.** If the responsible service together with DGT, consider that it is necessary to verify the translation of a given delegated act, where appropriate with the help of the Member States' experts consulted beforehand, **such a control must in principle be carried out before adoption by the College.**
- 139.** In exceptional cases, **after the adoption by the College, and before the publication**, should the responsible service together with DGT consider that it is necessary to make **purely minor linguistic modifications on an adopted**

delegated act, following requests received during the period for objection, those modifications can be introduced by DGT via a sub-delegation procedure ⁽⁵²⁾, provided that the criteria of that decision are met. Such modifications do not trigger a new objection period. If after the adoption and before the publication, corrections of **substantive** errors are necessary, those would trigger a new objection period upon their notification to the European Parliament and the Council.

2.5. Transmission of delegated acts upon adoption

140. The Greffe prepares a transmission letter to the European Parliament and to the Council. This letter is transmitted as soon as possible upon adoption of the delegated act by the Commission.
141. The delegated act is transmitted **in all the official languages of the Union**. The Greffe will therefore need to await the availability of all language versions before transmitting the delegated act.
142. The sending of the transmission letter triggers the time-period for the right of objection: *'The period for expressing objections shall start when all official language versions of the delegated act have been received by the European Parliament and the Council'* (Point II.15 of the Common Understanding). In case of the use of the urgency procedure the letter will need to set out the reasons for the urgency.
143. The delegated act is not published in the *Official Journal of the European Union* before the end of the time-period for objection. This does not apply in cases under the urgency procedure and in cases where before the end of the time-period for objection both the European Parliament and the Council have informed the Commission of their intention not to express any objection: *'(...) the delegated act may be published in the Official Journal of the European Union, and may enter into force before the expiry of that period, if the European Parliament and the Council have both informed the Commission that they will not object'* (Point II.19 of the Common Understanding).

2.6. Publication in the Register of Delegated Acts

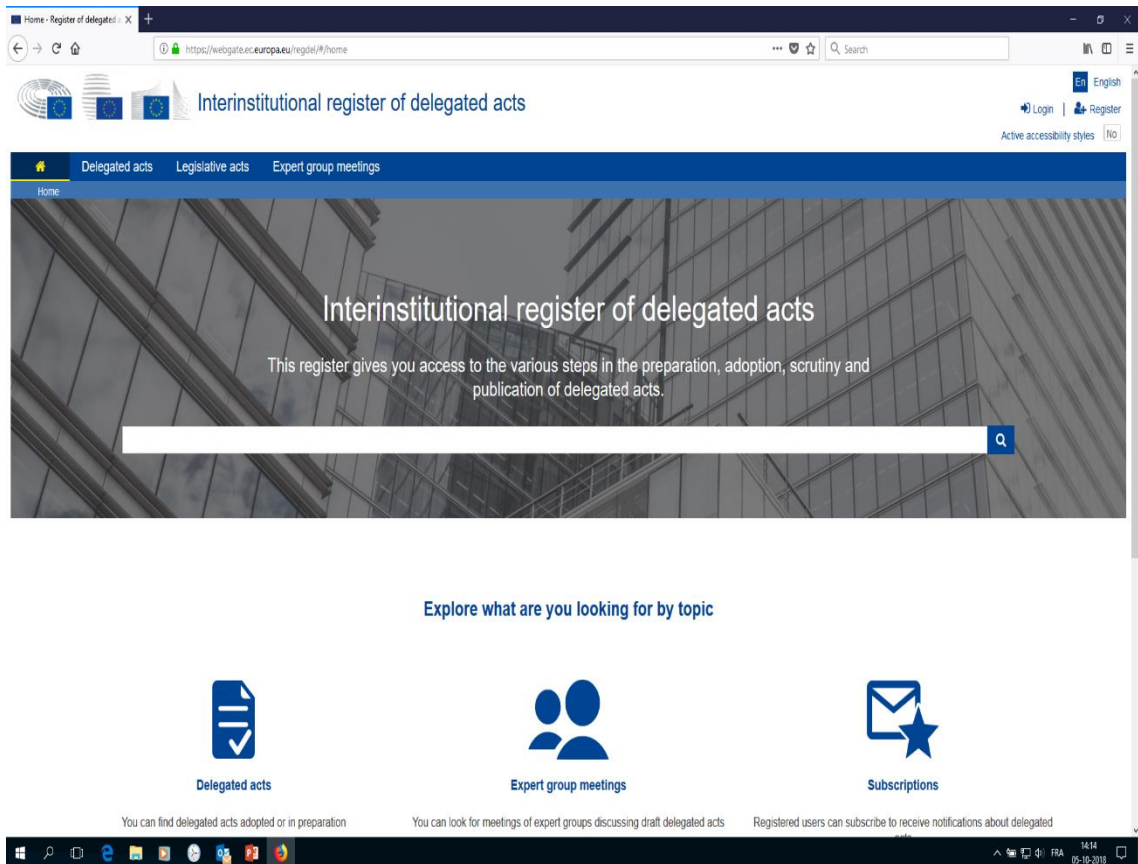
144. The Interinstitutional Agreement on Better Lawmaking of 2016 (point 29) provided for the creation of a joint Register of Delegated Acts. This Register was launched in December 2016 ⁽⁵³⁾ and offers an integrated view of the lifecycle of delegated acts, from planning to their publication in the Official Journal.
145. More precisely, the Register contains information on the acts planned, published for feedback, discussed in expert group meetings, and adopted. It then documents the procedural steps in the European Parliament and Council (objection, early non-objection, extension of deadline) and the act as published in the Official Journal.
146. The Register is automatically fed by IT applications of the Commission, European Parliament and Council. Services do not need to upload any documents in this Register,

⁵² (C(2010)3031), see also <https://webgate.ec.europa.eu/fpfis/wikis/display/REGISTRY/Correction+of+delegated+acts>

⁵³ <https://webgate.ec.europa.eu/regdel/#/home>

but rather to make sure that the right information and documents are available in Decide and the Register of Expert Groups.

147. Upon adoption, delegated acts are also made public in the Register of Documents of the Commission.



2.7. Transmission to the service responsible for publication

148. After its adoption by the College, a delegated act is transmitted to the Publications Office by the Greffe, with an 'embargo' on publication: the Publications Office will not publish it until an explicit green light is given to it (principle of 'no news, bad news') by the service. The Register of Delegated Acts automatically shows the end of scrutiny period for all delegated acts, so a link to the Register can be used by the lead service to ask SG PUBLICATIONS AU JO to inform the Publications Office that the act is now ready to be published.

2.8. Exercise of the rights of the Legislator

149. In order to exercise either of the powers of control granted to the two institutions, the European Parliament must act by a majority of its component members and the Council, as it is not acting on a proposal from the Commission, by the qualified majority defined in Article 238(2) TFEU ⁽⁵⁴⁾.

54 Article 290(2) TFEU.

a) Objections

(i) Time -period for expressing objections

- 150.** The **time-period for objection is triggered by the transmission letter to the European Parliament and the Council accompanied by all the language versions** of the delegated act adopted by the Commission: *'The period for expressing objections shall start when all official language versions of the delegated act have been received by the European Parliament and the Council'* (Point II.15 of the Common Understanding).

In practice, **in the European Parliament** the receipt of the delegated act is announced during the part-session following its reception, after which the act receives a reference and is referred to the committee responsible for the basic legislative act⁽⁵⁵⁾. Developments can then be followed via the European Parliament's Legislative Observatory⁽⁵⁶⁾. A resolution for an objection may be tabled either by the responsible committee or by a political group or a group of Members reaching the low threshold (one-twentieth of component members). If no resolution for an objection is tabled, the European Parliament will remain silent, i.e. there will be no explicit decision not to object.

- 151. On the Council side** the delegated act is dealt with in the respective preparatory body. In case there is no intention to raise an objection this is explicitly stated and can be followed on the list of 'A' items on the Council Agenda. The Council also informs the Commission via e-mail to the Secretariat-General.
- 152.** Once the scrutiny period has elapsed, and in the absence of any action from the European Parliament and the Council, the Register of Delegated Acts will automatically indicate that the scrutiny period is over for the act in question. If no objection was raised by either the European Parliament or the Council the delegated act can be published at the expiry of the two month-period.
- 153.** It is possible for the legislator to request an **extension** of the time-period for expressing objections. The extension – which is automatic upon request of one of the two branches of the legislative power⁽⁵⁷⁾ and which extends the objection period for both the Parliament and the Council – is mostly invoked where the legislator needs more time to assess whether it wishes to express objections. For example, the European Parliament needs more than two months if a *rapporteur* is appointed and if a draft resolution has to be prepared by a Parliamentary committee and submitted to the plenary. Extensions of deadline are automatically communicated by the European Parliament and the Council via the Register of Delegated Acts.
- 154.** *'In order to ensure that the European Parliament and the Council are able to exercise the rights provided for in Article 290 TFEU within the time limits laid down in each basic*

⁵⁵ The procedure is set out in Rule 111 of the Rules of Procedure of the European Parliament (of December 2019).

⁵⁶ <http://www.europarl.europa.eu/oeil/home/home.do>

⁵⁷ It has to be a request from the institutions themselves and not only from their secretariat.

act, the Commission shall **not transmit** any delegated acts during the following periods: **from 22 December to 6 January and from 15 July to 20 August**' (Point II.14 of the Common Understanding).

155. These 'recess' periods only apply when the period of objection lasts two months with a possible extension for an identical period. These periods do not apply for delegated acts adopted under the urgency procedure. Where a delegated act is adopted under the urgency procedure during one of these recess periods, the time limit for objection provided for in the basic legislative act starts to run only when this period is finished (Point II.14 of the Common Understanding).

(ii) *Grounds*

156. The **grounds for objection are not defined by the Treaty**. The right to express objection in principle falls under the discretionary power of the European Parliament and of the Council. **However, the institution objecting to a delegated act must explain its reasons in the decision or resolution formalising its objection** (any legal act of the Union must state the reasons on which it is based, in accordance with Article 296 TFEU).
157. This will ensure that the Commission will take such action as is necessary to remedy the course of action that prompted the European Parliament or the Council to express objection. If, for example, the institution that expressed objection explains that the Commission has exceeded the delegation of power, this would enable the Commission, if necessary, to opt for proposing a modification of the legislative act instead.
158. Decisions to object to a delegated act do not need to be published in the *Official Journal of the European Union* (except if they object to a delegated act adopted under the urgency procedure - Point II.25 of the Common Understanding). They are nevertheless visible in the Register of Delegated Acts.

(iii) *Consequences*

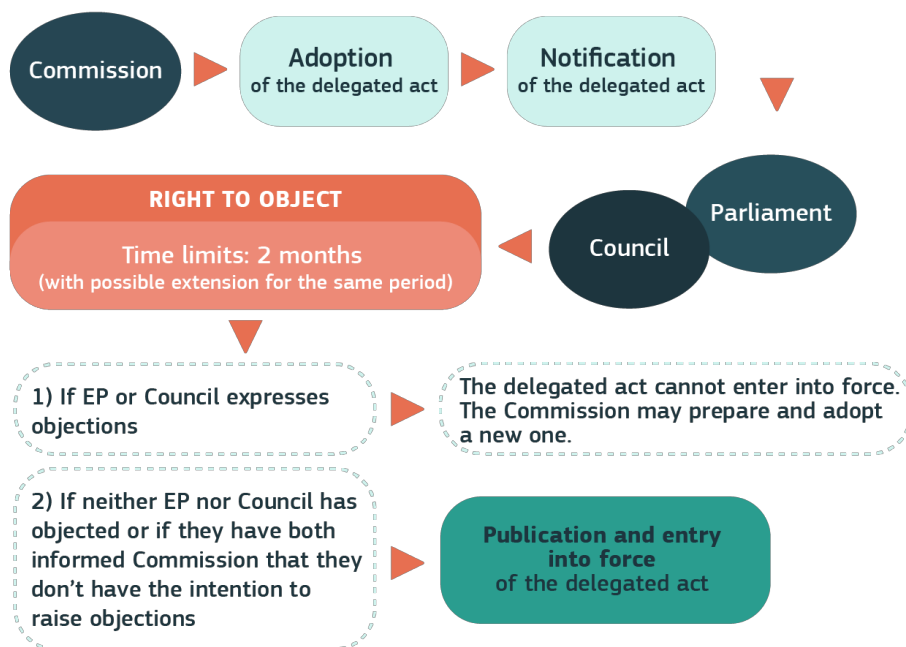
159. **An objection** – from either the European Parliament or the Council (one objection is sufficient) – **means that the delegated act** (not adopted under the urgency procedure) **cannot enter into force and thus will not be published**. The Commission may either prepare a new delegated act – and in this case must anew respect all the procedural steps described above – or decide to discontinue the process.

(iv) *'Early non objection'*

160. It is possible for the European Parliament and the Council to inform the Commission before the expiry of the objection period that they will not object. This allows an earlier publication of the delegated act. Services that consider that such an early non objection is required need to address a **letter** to the two institutions explaining the need for it. Such letters, directed to the Chairman of the responsible Committee on the Parliament side and the Chair of the respective Working Group on the Council side, should clearly set out the reasons why the non-objection is needed and explicitly request an early non-objection, if needed by a certain date. This possibility should be used only where absolutely needed. In order to go ahead and publish the delegated act an early non-objection from both the Parliament and the Council is needed.

- 161. The European Parliament** has provided for the possibility of an early non-objection in its Rules of Procedure ⁽⁵⁸⁾. The recommendation for an early non-objection originates in the committee responsible, which informs the Chair of the Conference of Committee Chairs by means of a letter setting out its reasons and tables a recommendation to that effect. If no objections are raised at the next meeting of the Conference of Committee Chairs, or, on grounds of urgency, by written procedure, the Chair of that body shall inform the President of Parliament, who shall in turn inform the plenary as soon as possible. If within 24 hours following the announcement in plenary, a political group or Members reaching the low threshold (one-twentieth of component members) object to the recommendation, it shall be put to the vote. If within the same period, no objections are raised, the proposed recommendation shall be deemed to have been approved.
- 162. In Council**, such a procedure will be completed by means of a formal decision of the Council – after a written consultation of the Member States.
- 163.** Early non-objections are automatically transmitted by the European Parliament and the Council via the Register of Delegated Acts.
- 164.** The following flow chart recapitulates the mechanism of the right to object.

OBJECTION TO DELEGATED ACTS



⁵⁸ Rule 111(6).

b) Urgency

165. A delegated act adopted under the urgency procedure is immediately published and is already in force when it is notified to the European Parliament and to the Council.
166. *'An urgency procedure should be reserved for exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises'* (Point II.20 of the Common Understanding). This list is not exhaustive; other policy areas may give rise to situations where urgent delegated acts have to be taken.
167. In its legislative proposal, the Commission should justify the choice of an urgency procedure. Indeed, all cases in which the urgency procedure may be used must be specified in the legislative act (Point II.20 of the Common Understanding) and the respective recitals as explicitly and clearly as possible.
168. The standard provision on the urgency procedure is to be inserted in any legislative act, which provides such a possibility for the Commission (see in the Annex model Article [B]).
169. When the Commission makes use of the power to adopt an act under the urgency procedure, the **notification to the European Parliament and the Council must state the reasons for the use of the urgency procedure** (Point II.23 of the Common Understanding). Those reasons must appear **in a recital** of the delegated act concerned.
170. *'A delegated act adopted under the urgency procedure shall enter into force without delay and shall apply as long as no objection is expressed within the period provided for in the basic act'* (Point II.22 of the Common Understanding). Usually, this period is similar to the one provided for in non-urgent cases: two months with possible extension of two months.
171. **'If an objection is expressed by the European Parliament or by the Council, the Commission shall repeal the act immediately following notification by the European Parliament or the Council of the decision to object'** (Point II.22 of the Common Understanding). It is the responsibility of the relevant DG to prepare the decision by which the Commission will repeal the delegated act concerned. The legal consequence of such repeal depends on the circumstances and needs to be considered on a case-by-case basis. The Secretariat-General and the Legal Service can assist in such cases.
172. When the Commission makes use of delegated powers under the urgency procedure, it must **keep the European Parliament and the Council fully informed about the intended use of such procedure**. *'As soon as the Commission services anticipate such a possibility, they shall informally forewarn the secretariats of the European Parliament and the Council to that effect via the functional mailboxes'* mentioned above (Point II.21 of the Common Understanding and see supra, section 2.2). Such warning should clearly specify which act is concerned, what the reason for the urgency is and in which timeframes the Commission intends to adopt the delegated act.

173. This '**early warning system**' is comparable to the mechanism established for the PRAC/RPS in the 2008 interinstitutional agreement between the European Parliament and the Commission ⁽⁵⁹⁾.

c) Revocation of an empowerment

174. A decision to revoke an empowerment may be taken by the European Parliament or the Council at any time after the entry into force of the legislative act providing for it.

175. The institution that initiates the revocation should explicitly state which delegated powers it is seeking to revoke. The revocation may not necessarily concern all of the powers delegated to the Commission. A '**partial revocation**' in which the European Parliament or the Council proposes to revoke only some of the powers delegated to the Commission is possible.

176. The Common Understanding contains rules on **mutual exchange of information**, in particular in the event of a revocation:

'27. When exercising their rights in applying the conditions laid down in the basic act, the European Parliament and the Council will inform each other and the Commission.'

'28. When either the European Parliament or the Council initiates a procedure which could lead to the revocation of a delegation, it will inform the other two institutions at the latest one month before taking the decision to revoke.'

177. As all legal acts, **a decision to revoke a delegation of power must state the reasons on which it is based**, in accordance with Article 296, second paragraph, TFEU.

178. **A decision to revoke a delegation of power will be published** in the L series of the *Official Journal of the European Union*. A decision to revoke enters into force the day following its publication (Point II.25 of the Common Understanding).

179. **Revocation does not affect the validity of any delegated acts already in force.**

180. Where a decision to revoke is taken by the legislator during the time-period for objection of a delegated act – adopted pursuant to the delegated powers subject to the revocation, but not yet entered into force – such a decision shall be deemed to have the same effects as a decision to object vis-à-vis that delegated act, meaning that it cannot enter into force and thus will not be published. Only delegated acts already in force are not retroactively affected by a decision to revoke.

⁵⁹ See OJ C 143, 10.6.2008, page 3, point 16.

2.9. Publication and entry into force

- 181.** After the expiry of the period for objection, or where both European Parliament and Council have signalled their 'early non-objection', a delegated act may be published and can enter into force (and be applied in accordance with its provisions) ⁽⁶⁰⁾.
- 182.** The embargo on publication is lifted by the Publications Office only when the service responsible gives its explicit green light to the Greffe (SG.B.2) via an e-mail to the functional mailbox SG PUBLICATIONS AU JO (supra, 2.7).

2.10. Reports on the exercise of the delegation

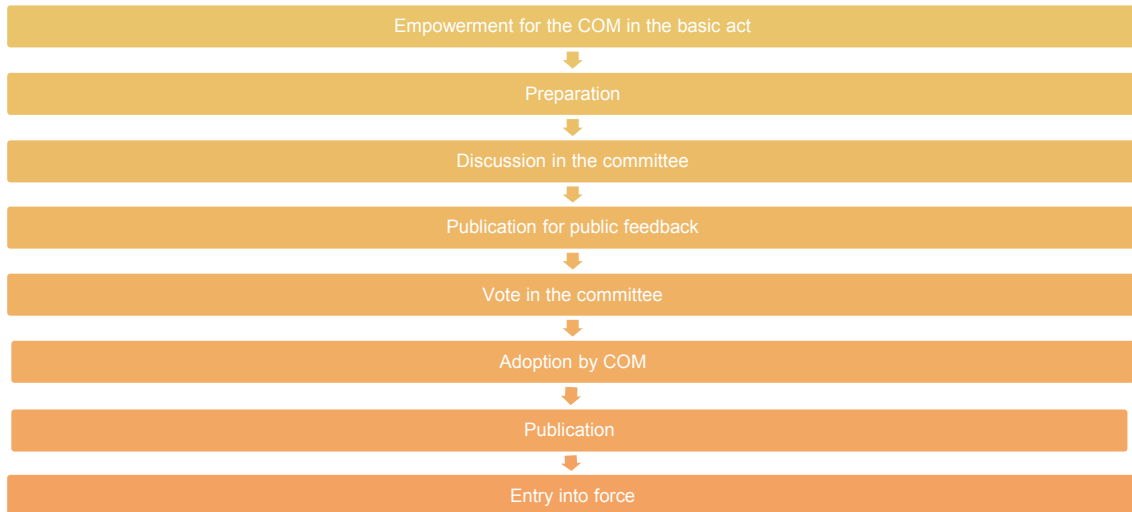
- 183.** Where the legislative act requires the Commission to report on the use of delegated powers, such report must be prepared within the timeframe provided for in the basic act before the expiry of the duration of the empowerment. These reports can be succinct. The title of the report should mention explicitly that it is a 'report on the exercise of the power to adopt delegated acts pursuant to ...' either with a reference to the specific article(s) if there are only few empowerments or to the basic act in general.
- 184.** The reports should contain the following elements:
- A short description of the legal framework and of the empowerments for delegated acts provided in the basic act;
 - Reference to the legal basis for the report, thus to the provision that requires the drafting of the report and the respective time limits;
 - A description of how the respective empowerments have been used: this includes an overview of the delegated acts adopted so far based on the respective empowerments along with a very succinct description of what they were about; information on when the delegated act was adopted by the Commission, that it was transmitted to the European Parliament and the Council and whether any of them extended the objection period or objected during the provided objection period (by making reference to the respective articles and time limits); when the delegated act was published and entered into force;
 - In case empowerments have not been used, the reports should explain why they have not yet been used and if there are any plans to use the empowerments, together with an indication on the possible time line;
 - The need for the tacit extension of the empowerment should be clearly spelled out;
 - A clear statement at the end that with this report the Commission complies with the reporting requirement in the basic act and that the Commission invites the Council and the European Parliament to take note of this report.

⁶⁰ In very exceptional cases, notably when after the adoption of the delegated act by the Commission and during the objection period and therefore while the delegated act was not yet published and into force, factual circumstances changed, the Commission has withdrawn a delegated act by Commission Decision (see for example C(2016) 7793). In such cases appropriate information of the European Parliament and the Council must be ensured.

Wording such as *'The Commission has over the past ... years exercised/not exercised the delegated powers conferred to it under Directive/Regulation... The Commission sees the need to extend the empowerment because With this report the Commission complies with the reporting requirement under Article ...of the Directive/Regulation and invites the European Parliament and the Council to take note of this report'* should be used ⁽⁶¹⁾. Services should make sure that they keep track of these reporting obligations and comply with them timely.

⁶¹ For examples see Report from the Commission to the European Parliament and the Council on the exercise of the delegation conferred on the Commission pursuant to Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) COM(2016) 60 final and Report from the Commission to the European Parliament and the Council on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Directive 2013/30/EU on safety of offshore oil and gas operations Directive 2013/30/EU COM(2017) 655 final.

III. GUIDANCE IN RELATION TO IMPLEMENTING ACTS



- 185.** As already explained, under Article 291 TFEU, Member States are primarily responsible for the implementation of Union law, but where uniform conditions for implementing legally binding Union acts are needed, those acts must confer implementing powers on the Commission (or on the Council in exceptional cases). The reference to 'legally binding Union acts' in Article 291 means that any legally binding Union act (not only a legislative act, as is the case for delegated acts) may confer implementing powers. This means that also a delegated act can in principle confer implementing powers on the Commission (see *supra*, section I.2.1). Acts adopted by the Commission under Article 291 are referred to in the TFEU as '**implementing acts**' and the word 'implementing' must be inserted in their title (Article 291(4)). Only legally binding acts may be adopted by means of implementing acts⁽⁶²⁾. These acts take the form of regulations, directives or decisions, in conformity with Article 288 TFEU. By contrast, acts that are not legally binding but only offer guidance should be adopted by the Commission under its own autonomous right under the TFEU. In cases where, in spite of opposition from the Commission, the Parliament and the Council include an empowerment for guidelines or recommendations to be adopted as implementing acts, the binding nature of the implementing act in question would have to be assessed on a case-by-case basis.
- 186.** The rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers are laid down in the **Comitology Regulation adopted by the European Parliament and Council on 28 February 2011 ('the Comitology Regulation')**⁽⁶³⁾.

⁶² See above under I, 2.4.

⁶³ Regulation (EU) No 182/2011 of the European Parliament and of the Council 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.

- 187. The Comitology Regulation repealed Council Decision 1999/468/EC** ('the Comitology Decision')⁶⁴ **as from 1 March 2011** and replaced the procedures set out in that decision by two new procedures. However, the Comitology Regulation provisionally maintains the effects of Article 5a of the Comitology Decision for existing basic acts that refer to the regulatory procedure with scrutiny (RPS/PRAC). Since empowerments to adopt measures under RPS/PRAC are not implementing in nature as those measures can amend or supplement non-essential elements of a legislative act, the measures adopted under RPS/PRAC are not referred to as 'implementing acts'.
- 188.** Under the automatic alignment provided for in Article 13(1), points (b) and (c), of the Comitology Regulation, the former management and regulatory procedures became examination procedures as from 1 March 2011. That alignment has certain consequences as regards the appeal committee. In the case of the former **management** procedure, where there is 'no opinion' in a committee, the Commission may adopt the implementing act and the appeal committee procedure does not apply (automatic exclusion of Article 5(4), second and third subparagraphs). In the case of the former **regulatory** procedure, where there is 'no opinion' in a committee, the Commission cannot adopt the implementing act (automatic application of Article 5(4), second subparagraph, point b)). It can either submit an amended draft to the same committee or refer the same draft to the appeal committee. These rules apply automatically, without it being necessary that the conditions of Article 5(4) are fulfilled.
- 189.** In contrast, **certain basic acts confer implementing powers on the Commission without providing for control by Member States**, i.e. without referring to any procedure under the Comitology Regulation, and the Comitology Regulation does not apply to the acts adopted under those empowerments. Even though such acts are not subject to comitology, they should be referred to as 'implementing acts' under Article 291(4) TFEU.
- 190. Article 15 of the Comitology Regulation required the Commission to report by March 2016 on the implementation of the Regulation and make any appropriate legislative proposals.** The Commission reported on 26 February 2016⁽⁶⁵⁾ to the European Parliament and the Council on the implementation of Regulation (EU) 182/2011 and concluded that the existing framework overall allowed for an efficient and constructive cooperation between the Commission and the Member States. To address the issue of 'no opinion' cases at appeal committee level the Commission adopted on 14 February 2017 a legislative proposal to amend the Comitology Regulation putting forward four targeted amendments to increase transparency and accountability at the level of the appeal committee. This legislative proposal has not yet been adopted by the legislator.

⁶⁴ Council decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23.

⁶⁵ Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 182/2011, COM(2016)92.

1. INCLUDING EMPOWERMENTS FOR IMPLEMENTING ACTS IN LEGISLATION

191. If the Commission, in its proposal, and the legislator, during the negotiations, have identified a need for uniform conditions for implementation, several decisions have to be taken in order to organise the conferral of the implementing powers on the Commission.

The present guidelines do not cover situations where implementing powers are conferred on the Council in accordance with Article 291(2) TFEU. Those situations have to be examined on a case-by-case basis. Normally, the Commission does not include implementing powers for the Council in its proposals. A specific justification, reflected in a recital, is needed in such cases ⁽⁶⁶⁾.

192. When existing basic acts are reviewed by the services, it is necessary to check carefully if cases where certain powers were reserved for the Council in the past (whereby the Council may act on its own initiative or on a Commission proposal) comply with the requirements of Article 291(2) TFEU and can therefore still be conferred to the Council. Indeed, the Council may retain the implementing powers only in duly justified cases in the sense of Article 291(2) TFEU. Otherwise, the basic act should be amended so that the Commission is entrusted with implementing powers.

1.1. Necessity for control

193. The first decision to be taken concerns the **necessity for control by the Member States**.
194. It is legally possible for the legislator to confer implementing powers on the Commission without requiring any control by the Member States. This interpretation is reflected in Article 1 of the Comitology Regulation, which limits its scope of application to any legally binding Union act which *'requires that the adoption of implementing acts by the Commission be subject to the control of Member States'* and equally in recital 6, which reserves the application of the comitology procedures to *'those basic acts which require the control of the Member States for the adoption by the Commission of implementing acts'*.
195. It is therefore possible for a basic act not to require control by the Member States. However, since this might be politically sensitive, there should be good arguments relating to the nature of the implementing act in question which can be put forward during inter-institutional negotiations. This would be the case, for example, where the Commission is asked to take repetitive technical measures, or individual decisions addressed to Member States without precedent value and/or without impact on other Member States. This is for example the case for many financing decisions or entries of names in the register of protected designations of origin. It is not necessary to justify in the basic act why no control is required.

⁶⁶ See for example Regulation 1053/2013, Recital 11 and Regulation 1051/2013, Recital 9. See also case C-440/14 P National Iranian Oil Company v. Council, §§ 47 to 59.

1.2. Nature of control

196. If a control mechanism is necessary, a choice has to be made between the two comitology procedures set out in the Comitology Regulation.
197. These are the advisory and examination procedures (Article 2).

Since 1 March 2011, the former advisory procedure has become the new advisory procedure, the former management and regulatory procedures have become the examination procedure and the former safeguard procedure has become the urgency procedure.

a) Prohibition of ad hoc procedures and other deviations

198. The control mechanisms are exhaustively set out in the Comitology Regulation, so it is **legally not possible to create any ad hoc procedure** for the Member States to control the Commission's exercise of implementing powers. Furthermore, a basic act cannot modify the operation of the procedures established by the Comitology Regulation, except where the Regulation explicitly authorises this. Voting rules, deadlines, prerogatives of the Commission, the consequences of committees' opinions and all other procedural matters have been fixed in advance by the Comitology Regulation.
199. Some basic acts provide for a kind of 'pre-comitology' phase, requiring the Commission to consult certain bodies before submitting draft implementing acts to a committee. This cannot constitute an additional step in the procedures established by the Comitology Regulation. Thus, pre-consultations cannot be part of the conferral of implementing powers. Hence, when the Commission needs to seek the technical and scientific advice of agencies or scientific committees in the preparation of implementing acts, the consultation of those bodies may be explicitly provided for in the basic act, as long as it does not form part of the comitology procedure itself⁽⁶⁷⁾. This means that the Commission must not be bound by the opinions of those bodies and this consultation intervenes before and separately from the comitology procedure.
200. It is acceptable under Article 291 TFEU to establish a 'trigger mechanism' for the initiation of a comitology procedure. The legislator could indeed limit the intervention of the Commission to situations where a particular event occurs or where a request is submitted, notably by one or several Member States. This is for example the case where the Commission decides by means of implementing acts whether or not national measures in relation to specific products are justified or where the Commission grants an authorisation by implementing act based on an authorisation request and a positive scientific assessment by an agency.

⁶⁷ For example the following wording would be acceptable, by preference in a recital rather than in the enacting terms: 'In the application of the Directive/Regulation the Commission should consult A, B, or C ...'

- 201.** In the Interinstitutional Agreement on Better Law-Making the three institutions agreed 'to refrain from adding, in Union legislation, procedural requirements which would alter the mechanisms for control' established by the Comitology Regulation. 'Committees carrying out their tasks under the procedure set up under that Regulation should not, in that capacity, be called to exercise other functions' ⁽⁶⁸⁾. In particular, Comitology committees should not act as groups of experts.
- 202.** Services should pay particular attention to such deviating mechanisms and consult Secretariat General and Legal Service if any such mechanism is proposed by either the Parliament or the Council in legislative negotiations. If the proposal of the Parliament or Council is incompatible with Regulation 182/2011, this needs to be signalled through GRI.

b) Choice between the advisory and examination procedures

- 203.** The criteria for choosing the advisory or examination procedure are set out in Article 2 of the Comitology Regulation.
- 204.** The choice must be guided by the nature and impact of the implementing act required (Article 2, paragraph 1). Thus, for example, tighter control in the form of the examination procedure may be warranted because of the sensitivity of the implementing act. Conversely, where the implementing act is not sensitive, the lighter advisory procedure would be warranted.
- 205.** Article 2 of the Comitology Regulation also establishes rebuttable presumptions. It follows from its paragraph 2 that the examination procedure should in principle apply to the following implementing acts:
- all implementing acts of general scope, of a general nature (regardless of the policy domain concerned) and
 - other implementing acts (thus, for example individual decisions) relating to the areas listed in sub-points i) to v), some of which are policy areas: programmes with substantial implications; the common agricultural and common fisheries policies; the environment, security and safety, or protection of the health or safety, of humans, animals or plants; the common commercial policy; taxation. These are self-explanatory, except for the first: 'programmes with substantial implications'. This relates to financial programmes. The notion of 'substantial implications' is clarified in recital 12: it covers programmes 'with substantial budgetary implications or directed to third countries'. These two categories are not meant to be cumulative. Thus, in all cases — even where from a budgetary point of view the programme is not substantial — programmes covering third countries fall under the examination procedure.
- 206.** Under paragraph 3 of Article 2, the advisory procedure applies in principle to all cases not covered by the examination procedure. However, to the extent that paragraphs 2 and 3 make rebuttable presumptions, it is possible to apply 'in duly justified cases' the advisory procedure in situations for which paragraph 2 of Article 2 foresees the examination procedure, and vice-versa. In such cases, there should be a recital justifying the choice of procedure.

⁶⁸ Point 30 of the Interinstitutional Agreement on Better Law-Making.

c) Possible choices as to procedural matters

- 207.** Essentially, once the procedure has been chosen, all of the rules applicable to that procedure are set out in the Comitology Regulation. Therefore, all the basic act needs to do is to refer to the relevant procedure. However, there are two cases where the Comitology Regulation allows the legislator to make a choice as to procedural matters.
- 208. The first case where a choice is possible concerns the rules applicable to written procedures.** Article 3(5) of the Comitology Regulation sets these out in some detail and the legislator cannot depart from them — it cannot, for example, prohibit the use by a committee of written procedures. However, it can introduce a different mechanism for terminating a written procedure without result (second subparagraph of paragraph 5). In principle, a written procedure is terminated without result at the initiative of the committee's chair or as soon as a single Member State so requests. However, the legislator can in the basic act provide for different rules. It may, for example, decide that a majority vote — simple or qualified — is necessary to trigger termination. Such an option has to appear explicitly in the provision establishing the comitology procedure (see the relevant template).
- 209. The second case where a choice is possible concerns the case of 'no opinion' in the examination procedure.** In principle, if the committee delivers 'no opinion' (where there is no qualified majority for or against a draft implementing act), the Commission is authorised to adopt the draft implementing act. It is not required to do so, but can choose whether to adopt, amend or withdraw the draft.
- 210.** In three situations, however, the Commission is not authorised to adopt the draft implementing act after a 'no opinion' from the committee. Two of these situations are clearly set out in detail in Article 5(4) of the Comitology Regulation:
- 1) if the draft implementing act concerns the policy areas exhaustively listed in point a) of Article 5(4), second subparagraph (taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures), or
 - 2) if there is a simple majority against the draft (point c) of Article 5(4), second subparagraph), regardless of the policy matter concerned.
- 211.** Though not further explained in detail, the Comitology Regulation also gives a third option to the legislator: point b) of Article 5(4), second subparagraph, allows the legislator to state in the basic act that in the event of 'no opinion' the Commission cannot adopt the draft implementing act (so-called 'no opinion clause'). This would prevent the adoption of the implementing act also in policy areas not listed in point a) and even where there is no simple majority against (indeed, in the latter case, point c) applies).
- 212.** Point (b) of the second subparagraph of Article 5(4), derogates from the rule of principle — under which the Commission may adopt the draft implementing act after a 'no opinion'. In line with a general interpretative principle of Union law ⁽⁶⁹⁾, this exception has to be interpreted restrictively. Therefore, the use of that provision should remain limited to specific cases and has to be justified in a recital. Where this provision is proposed in legislative negotiations, services should request an explanation as to the

⁶⁹ See by analogy case C-378/00 Commission v Parliament and Council, § 62.

need thereof and request the legislator to justify the use of this provision in a recital. These cases need to be brought to the attention of the GRI. As a rule, if a 'no opinion' clause is included without an appropriate justification in a recital, the Commission would make the following statement: 'The Commission underlines that it is contrary to the letter and to the spirit of Regulation 182/2011 (OJ L 55 of 28.2.2011, p. 13) to invoke Article 5(4), subparagraph 2, point b), in a systematic manner. Recourse to this provision must respond to a specific need to depart from the rule of principle, which is that the Commission may adopt a draft implementing act when no opinion is delivered. Given that it is an exception to the general rule established by Article 5(4), recourse to subparagraph 2, point b), cannot be simply seen as a discretionary power of the Legislator, but must be interpreted in a restrictive manner and thus must be justified.'

d) Urgency procedure for immediately applicable implementing acts

- 213.** As further detailed below (under section 2.8), the urgency procedure is set out in Article 8 of the Comitology Regulation ('*Immediately applicable implementing acts*') and allows adopting immediately applicable implementing acts without prior submission to a committee. It is not a separate procedure but rather a variant of the examination or advisory procedure. The urgency procedure does not apply directly under the Comitology Regulation. The basic act must explicitly provide for its use by referring to Article 8 in conjunction with the relevant Article on the comitology procedure concerned.
- 214.** Further, the basic act must lay down explicitly the '*duly justified imperative grounds of urgency*' (Article 8(1)). In addition to this appearance in the enacting terms, the need for using the urgency procedure has to be explained in a recital.
- 215.** The urgency procedure allows for the adoption of provisional measures only. They can remain in force for not more than 6 months. The legislative basic act can however also provide for shorter or longer durations (Article 8(2)).

2. THE PREPARATION AND ADOPTION OF IMPLEMENTING ACTS

- 216.** When preparing implementing acts services must use the relevant options in Legiswrite and follow the drafting guidance set out in the Drafters' Assistance package (DAP).
- 217.** In the preparation of implementing acts due account must be taken of the better regulation principles and political oversight mechanisms of delegated and implementing acts described above under section I, 3.1.
- 218.** One act cannot be based on empowerments which provide for different procedures for the adoption of the act, i.e. empowerments providing for the use of the advisory procedure, examination procedure and RPS/PRAC and empowerments which do not provide for control by the Member States cannot be used as legal basis for one and the same act. Different empowerments providing for either the advisory procedure, examination procedure or RPS/PRAC can be used as legal basis for one act if all the empowerments provide for consultation of the same committee.

2.1. Comitology committee

- 219.** A comitology committee is composed of representatives of **all the Member States** and is chaired by a representative of the Commission (Article 3(2) of the Comitology Regulation). The role of comitology committees is to assist the Commission in the exercise of the implementing powers conferred upon it by basic acts by giving opinions on draft implementing acts prepared by the Commission. Comitology committees are always created by the legislator in a basic act.
- 220.** In some cases, the legislator has established different sections within a single committee to deal with different areas. Each of the sections operates as a separate committee. This practice is not illegal but should not be encouraged. In all cases whether the basic act provides for sections in the committee, in conformity with a well-established practice, the Commission will invite the Member States to the committee meetings via their Permanent Representations. Whatever the name of the configuration is, the Member States remain free to choose their representatives. The Commission does not have the power to select the right representatives for the right configuration, and neither can the legislator provide for that in the basic act.
- 221.** For the examination procedure, the control mechanism established by the Comitology Regulation includes the possibility of referral to an **appeal committee**. The appeal committee is also a comitology committee, i.e. it is made up of Member State representatives, chaired by the Commission and follows the same voting rules. As opposed to the other comitology committees, however, it is not a permanent body; rather, it is a procedural tool, giving Member States the opportunity to have a second discussion at a higher level of representation.
- 222.** It is important to draw a **distinction between comitology committees and other consultative entities, in particular 'expert groups'**, usually created by the Commission itself. Comitology committees are always created by the legislator, and through them, the Member States control how the Commission exercises implementing powers. By comparison, the expert groups provide expertise to the Commission in preparing and implementing policy. Their input is not binding on the Commission, which remains fully independent in the way it calls upon and takes into account the expertise and views gathered ⁽⁷⁰⁾. The Commission may discuss in an expert group the early preparation of an implementing act, where it needs to gather the views of stakeholders different from the Member States or where the draft implementing act is not mature enough to be submitted for discussion and vote in a committee. This process has to remain distinct from the discussions in the committee.
- 223.** In the cases where the Commission is empowered to adopt implementing acts without Member State control and the Commission wants to consult the Member States on the draft act, it can do so in an expert group, it cannot use committees for such consultation.

⁷⁰ See for more information Commission Decision C(2016)3301 of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, and Communication to the Commission C(2016)3300 final, Framework for Commission expert groups: horizontal rules and public register. <http://ec.europa.eu/transparency/regexpert/faq.cfm?aide=2>.

224. The committee may decide to establish a working group composed of several Member States only to examine particular points related to the draft implementing act under discussion. The working group reports back to the committee, composed of all the Member States.

2.2. Comitology register

225. Like the Comitology Decision of 1999, the Comitology Regulation provides for the **transparency of committee proceedings**. Article 10 contains obligations for the Commission: (1) to maintain a register of committee proceedings containing different types of documents and information accessible to the European Parliament and the Council and (2) to make references to these documents and information available to the general public ⁽⁷¹⁾.
226. The **Comitology Register**, first set up in 2003, consists of a two-part document register: an 'internal' part for inter-institutional cooperation and an 'external' part publicly accessible on EUROPA ⁽⁷²⁾. The Register is also used to transmit documents relating to committee proceedings to the European Parliament and Council. In 2008, the Register was revamped in line with an inter-institutional agreement between the Commission and the European Parliament ⁽⁷³⁾. A new, modernised Register was launched in October 2020.

The Comitology Register contains the following 8 elements:

1. a list of all comitology committees (including the appeal committee),
 2. agendas of committee meetings,
 3. summary records of the meetings and the lists of authorities representing the Member States,
 4. draft implementing acts submitted to committees,
 5. the results of voting,
 6. the final draft implementing acts following delivery of the opinion of the committees,
 7. information concerning the adoption of the final draft implementing acts by the Commission,
 8. statistical data on the work of the committees.
227. All documents must be made available in the Register at the same time as they are sent to the committee members, thus allowing them to be immediately disclosed to the European Parliament and the Council. **These documents have to be made available in all cases where comitology control is foreseen regardless of the nature of**

⁷¹ Public access to information on committee proceedings is ensured in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43). Rules for the protection of classified documents applicable to the Commission also apply to the use of the Register.

⁷² <http://ec.europa.eu/transparency/regcomitology/index.cfm>.

⁷³ Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC (OJ C 143, 10.6.2008, p.1).

the basic act, that is even if the basic act has not been adopted under the ordinary legislative procedure. If the documents are classified, they cannot be uploaded in the Register, but have to be transmitted to the Member States, European Parliament and Council by other means.

228. By default, the draft implementing act will not be disclosed to the general public before the vote in the committee and will be disclosed after the vote. These setting can be changed if it is considered that disclosure of the act prior to the vote of the committee would not hinder the discussions in the committee or where it is necessary to preserve the confidentiality of the text of the draft implementing act until its adoption by the College.

2.3. Common rules of procedure for committees

229. The Comitology Regulation provides for **common procedural rules** applicable to all committees and independent of whether they act under the advisory or the examination procedure. Moreover, the Comitology Regulation provides for the Commission to draw up standard procedural rules (Article 9). The Commission thus adopted on 8 July 2011 the **Standard Rules of Procedure for comitology committees** (StRoP) ⁽⁷⁴⁾. Based on these, all committees adopt their individual rules of procedure, adapting where necessary the standard rules to their specific needs. In case the individual rules of procedure deviate substantially from the standard rules of procedure the Secretariat-General should be consulted. A committee adopts its rules of procedure by a simple majority of its component members on the proposal of the chair. The committees that operate under both the Comitology Regulation and Article 5a of the Comitology Decision (i.e. those that still use the RPS/PRAC procedure) need to establish two separate rules of procedure.
230. The StRoP do not apply to the appeal committee. The appeal committee has its own rules of procedure, which were adopted in line with Article 3(7) of the Comitology Regulation on 29 March 2011 ⁽⁷⁵⁾. The latter rules of procedure included a review clause stipulating that the Commission should evaluate, by April 2014, how the rules operate in practice. The review has shown that the rules of procedure work well and its results have been communicated in the Report from the Commission on the Working of Committees during 2013 ⁽⁷⁶⁾.
231. The role of the Commission (the chair) includes the **organisation of committee meetings, the preparation of documents and the practical running of committee meetings**. The chair prepares and submits a draft implementing act to the committee (Article 3(3) of the Comitology Regulation). This preparation includes in all cases a formal interservice consultation, which must take place before the draft is submitted to the committee for a vote. In cases where the draft implementing act raises serious and sensitive issues, a political endorsement should be sought at the appropriate level in accordance with the applicable internal rules for political oversight.

⁷⁴ OJ C 206, 12.7.2011, p. 11.

⁷⁵ OJ C 183, 24.6.2011, p. 13.

⁷⁶ COM(2014) 572 final.

This concerns only very exceptional cases. In the few cases in which this was deemed necessary this has been done by way of an information note to the College.

- 232.** When planning the adoption of an implementing act, the services must also need to set aside time for the 4-week feedback provided for draft implementing acts (see I, 3.2 above) and for the notification to the WTO, in particular under the Agreement on technical barriers to trade and the Agreement on the application of sanitary and phytosanitary measures, when the act falls within the scope of these Agreements (see I, 4 above).
- 233.** The chair has to submit the draft agenda and the draft implementing act to the committee **not less than 14 calendar days before the meeting**. The time limit for submission can be shortened in exceptional cases, to be *'duly justified'*. The chair can also set a time limit for the committee to deliver its opinion on the draft. The time limits have to take into account the urgency/complexity of the matter and afford the committee members early and effective opportunities to examine the draft and express their views (Article 3(3) of the Comitology Regulation). The Court of Justice pays particular attention to the respect of those time limits. For instance, a practice consisting in the submission of the draft of an implementing act to the Committee only in the course of a meeting convened in order to examine it is incompatible with both the wording and the objectives pursued by Article 3(3) of the Comitology Regulation⁽⁷⁷⁾; it constitutes an infringement of an essential procedural requirement and, in such cases, the implementing act may be annulled by the Court of Justice of the European Union.
- 234.** As regards the language regime for committees, Regulation N° 1/1958 applies to the work of comitology committees. However, an explicit reference to the language regime was deliberately not introduced in the provisions of the Standard Rules of Procedure in order to allow the committees to find pragmatic solutions ⁽⁷⁸⁾.
- 235.** There are two basic **principles guiding the work with committees**. On the one hand, the examination procedure is based on the **'reverse majority'** principle, which **allows the Commission in general to adopt the implementing act unless there is a qualified majority against the draft implementing act** — thus a negative opinion of the committee (cf. Article 5(1) to (4) and recital 11 of the Comitology Regulation). On the other hand, the chair must nevertheless **strive for 'solutions which command the widest possible support within the committee'**, taking into account the suggestions and amendments supported in the committee (Article 3(4) of the Comitology Regulation). The chair therefore has a margin for negotiation in a committee before submitting the draft implementing act to the vote. *'Until the committee delivers an opinion, any committee member may suggest amendments and the chair may present amended versions of the draft'* (Article 3(4) of the Comitology Regulation). Should the amended text, however, depart from important aspects of the draft agreed in the interservice consultation, a new interservice consultation (if necessary, simplified/accelerated) has to take place before the committee is asked to vote and deliver its opinion.

⁷⁷ Case C-183/16 Tilly-Sabco SAS, §§ 86 to 118.

⁷⁸ See SEC(2003)795.

- 236.** The **written procedure** is regulated in some detail in Article 3(5) of the Comitology Regulation. However, the principle is to have a meeting and the written procedure is an exception, so its use needs to be justified (*'in duly justified cases'*). The Commission has to describe the need for written procedure in the letter to the Member States launching the procedure. The Standard Rules of Procedure for comitology committees (StRoP) ⁽⁷⁹⁾ state that *'In particular, the chair may use the written procedure to obtain the committee's opinion in cases where the draft implementing act has already been discussed during a committee meeting'*. Another examples given in the StRoP are the following: *'In particular areas where rapid action is required on a regular basis, or where the basic act includes specific obligatory time frames for action, the rules of procedure of the committee concerned may provide that, as a rule, the committee's opinion is obtained by written procedure'*.
- 237.** The written procedure permits a vote in written form. The steps in a written procedure are as follows:
- the chair decides to use the written procedure;
 - the chair sends the draft implementing act to the committee members, explains the need for using the written procedure and sets a time limit for it (there is no fixed time limit under the Comitology Regulation, which instead stipulates that the time limit should be set *'according to the urgency of the matter'*);
 - the outcome of a vote under the written procedure is established as follows and this procedure should be recalled when the written procedure is launched: a Member State may (1) explicitly give its agreement, or (2) explicitly oppose, or (3) explicitly abstain, or (4) not respond in the sense of (1), (2) or (3) within the time limit set by the chair, in which case it is considered to agree tacitly to the draft implementing act;
 - unless otherwise provided in the basic act, a written procedure is terminated without result where, within the time limit set, the chair so decides or a committee member so requests. Should a written procedure be terminated in such a way, the chair has to convene a meeting within a reasonable time.

2.4. Attendance of European Economic Area (EEA) countries and/or Switzerland in committees

- 238.** The Comitology Regulation itself only refers to representatives of Member States. The Standard Rules of Procedure for comitology committees (StRoP) ⁽⁸⁰⁾ do however foresee the possibility for third parties and experts to attend committee meetings (Article 5(1), last sentence and Article 7). This is of particular relevance in relation to the EEA countries, but also in specific cases to Switzerland. Article 7 provides that *'The representatives of [specify the third country or organisation in question] shall be invited to attend the meetings of the committee, in accordance with [specify the legal act, such as an agreement made by the Union, an Association Council decision or other basic act that provides for the presence of these observers]'*. In line with these provisions, third countries must and can be invited to attend only if there is a legal act that provides for the presence of these countries in this specific case. The rules of procedure of the

⁷⁹ OJ C 206, 12.7.2011, p. 11.

⁸⁰ OJ C 206, 12.7.2011, p. 11.

specific committee must explicitly make reference to the legal act in question (so for example specific provisions of the EEA Agreement). Third country representatives cannot be present and cannot participate in the voting.

2.5. Advisory procedure

- 239.** Under the advisory procedure (Article 4 of the Comitology Regulation), the committee delivers its opinion on a draft implementing act, **if necessary** by taking a vote by a **simple majority** of its component members.
- 240.** The opinion of the committee under the advisory procedure is not legally binding. The Commission has discretion to decide on the draft implementing act. However, the Commission is obliged to strive for *'solutions which command the widest possible support within the committee'* (Article 3(4)) and to take *'the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered'* (Article 4(2)).
- 241.** There is no possibility of referral to the appeal committee under the advisory procedure.
- 242.** If new circumstances arise after the committee delivered an opinion and before adoption by the Commission and they require that the draft implementing act is amended, the Commission should submit the amended draft act to the committee for a new opinion. Depending on the amendments compared to the version previously submitted to the committee, this can be done by written procedure. There is no requirement to inform the GRI of the planned non-adoption of the voted act beforehand.

2.6. Examination procedure

- Voting rules

- 243.** The voting rules for the examination procedure reflect the voting rules required for the Council: the committee therefore delivers its opinion on a draft implementing act by **qualified majority laid down in the TEU and TFEU for acts to be adopted on a proposal of the Commission** (Article 5(1) of the Comitology Regulation)⁸¹. Accordingly a qualified majority⁽⁸²⁾ is attained if:
- 1) at least **55% of the Member States** vote in favour. This means that a qualified majority has to comprise **at least 15 Member States in EU27**.
 - 2) the Member States voting in favour represent **at least 65% of the population** of the Union.

Services should use the voting sheet prepared by SG to record and calculate voting results.

⁸¹ In accordance with Articles 16(4) TEU and Article 238(3) TFEU the 'double majority' has replaced the earlier system of weighted votes since 1 November 2014.

⁸² A smart voting sheet is available on the Comitology website.

244. Unless a member of the committee objects, the chair can, without proceeding to a formal vote, establish that the committee has delivered a positive opinion, by consensus, on the draft implementing act (Article 4(3) StRoP). Consensus means that the Chair established consensus and that no member objected. It does not require that all members are present.
245. Indeed, there is no quorum requirement for committees, which in practice allows the chair (who may set a time limit for the delivery of an opinion in accordance with Article 3(3) of the Comitology Regulation) to establish that there is no opinion in cases where there are not enough Member States at the meeting to obtain a qualified majority for or against the draft submitted by the Commission.

- Effects of a positive opinion

246. Where there is a qualified majority in favour of the draft implementing act (**positive opinion**), the Commission is required to adopt it (Article 5(2) of the Comitology Regulation).
247. In some cases new circumstances arise after the positive vote in the committee and before adoption by the Commission, and in very exceptional cases they require that the voted act is not adopted at all or that it must be amended. The following scenarios are possible:
- The Commission may take into consideration new circumstances that have arisen after the vote and decide not to adopt a draft implementing act, after having duly informed the committee and the legislator⁽⁸³⁾. Such a decision requires a political endorsement (e.g. via a special meeting of the Heads of Cabinet (RSCC) or the inter-institutional relations group (GRI)).
 - If the new circumstances require that an act different from the one on which the committee delivered a positive opinion is adopted, the Legal Service and the Secretariat General should be consulted to determine the right course of action.

- Effects of a negative opinion

248. Where there is a qualified majority against the draft implementing act (**negative opinion**), the Commission cannot adopt it (Article 5(3) of the Comitology Regulation). In such cases, the Commission can:
- (1) drop the draft implementing act altogether, if it is not deemed necessary;
 - (2) if it is deemed necessary, amend the draft implementing act and submit the revised version to the (same) committee within 2 months of the delivery of the negative opinion; or,
 - (3) if it is deemed necessary, refer the same draft to the appeal committee within 1 month of the delivery of the negative opinion.

⁸³ Statement by the European Parliament, the Council and the Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 19.

- Effects of a 'no opinion'

249. Where there is no qualified majority for or against the draft implementing act ('**no opinion**', Article 5(4), first subparagraph of the Comitology Regulation) the Commission can — in principle:
- (1) adopt the draft implementing act, or
 - (2) drop the draft implementing act, or
 - (3) amend it and go back to the (same) committee.
250. A difference compared with the previous comitology system is that there is no obligation for the Commission to adopt draft implementing acts in cases of 'no opinion'. The underlying consideration was the need for greater flexibility so that the Commission could reconsider the draft, taking account, among others, of positions expressed within the committee.
251. In certain cases, however, a 'no opinion' is equivalent to a negative opinion (see supra, section III. 1.2.c). In accordance with Article 5(4), second subparagraph, of the Comitology Regulation, the Commission cannot adopt the draft implementing act where:
- (1) it concerns any of the sensitive areas exhaustively listed in the Regulation (taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures); or,
 - (2) the basic legal act provides that the draft implementing act may not be adopted where no opinion is delivered ('no opinion clause'); or,
 - (3) a simple majority of the component members of the committee oppose it.
252. In those three cases, the Commission has the same options as for a 'negative opinion' (Article 5(4), third subparagraph, of the Comitology Regulation), i.e. it can:
- (1) drop the draft implementing act altogether, if it is not deemed necessary;
 - (2) if it is deemed necessary, amend the draft implementing act and submit the revised version to the (same) committee within 2 months of the delivery of the 'no opinion'; or,
 - (3) if it is deemed necessary, refer the same draft implementing act to the appeal committee within 1 month of the delivery of the 'no opinion'.

- Article 7

253. In very exceptional circumstances, the Commission can **adopt a draft implementing act despite a negative opinion** or a 'no opinion' with a blocking effect. Article 7 of the Comitology Regulation provides for such a possibility where an implementing act '*needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU*'.
254. This refers to situations where it is not possible to wait until the committee votes again on the same or another draft implementing act, because in the meantime the market

could be significantly disrupted e.g. due to the speculative behaviour of operators ⁽⁸⁴⁾. In such cases, the Commission must immediately refer the adopted implementing act to the appeal committee. The implementing act remains in force if the appeal committee does not deliver a negative opinion. If it does deliver a negative opinion, however, the act must be immediately repealed. Article 7 applies without the need to provide for this possibility in the basic act. However, as regards basic acts adopted before 1 March 2011, Article 7 applies only where the basic act refers to the former management procedure (Article 13(3) of the Comitology Regulation).

- Next steps in the case of a negative opinion / 'no opinion' with a blocking effect

255. There is a margin of discretion for the Commission as regards the decision to be taken following a negative opinion or 'no opinion' with a blocking effect.
256. It has to be underlined that the flexibility offered by the Comitology Regulation is only of a procedural nature and does not change the nature of the obligations of the Commission stemming from the implementing powers which have been conferred on it. The absence of a qualified majority in favour or against a draft implementing act opens rooms for negotiation, while in the past such situations led automatically the Commission to either adopt the measures at stake (in the management procedure) or submit a proposal to the Council (in the regulatory procedure). In the current system, the Commission may reflect, continue negotiations at the level of the committee, or decide to raise the level of the procedure by submitting the draft implementing act to the appeal committee.
257. This flexibility, however, cannot be interpreted as a possibility to avoid exercising the powers conferred on the Commission. The Comitology Regulation explicitly states that **the Commission has to assess whether the draft implementing act at stake 'is deemed to be necessary'** (Article 5(3) and (4) of the Comitology Regulation). In other terms, in all cases where no opinion has been delivered and this no opinion has a blocking effect, and even where a negative opinion has been issued by the committee, the Commission must determine whether the measures contained in the draft implementing act have to be taken or not.
258. It is therefore indispensable to make use of the flexible provisions of the Comitology Regulation taking into account the nature of the obligations imposed on the Commission by the legally binding Union act which has conferred powers on the Commission. For example, where the Commission is empowered to decide whether or not to authorise a substance or a product, a 'no opinion' situation in the relevant comitology committee cannot justify dropping the draft implementing act. Insofar as the Commission has to respond to a request for authorisation, it has to make use of all the possibilities offered by the Comitology Regulation to achieve that goal, including the recourse to the appeal committee.
259. A possible way to address this issue at an early stage could be for the service concerned to indicate already in the interservice consultation that the implementing act is deemed necessary and thus, in the case of a negative opinion or 'no opinion' with

⁸⁴ See statement by the Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 20.

blocking effect, the procedure will continue to be pursued under Article 5(3) and (4) of the Comitology Regulation.

260. A decision to continue the procedure by submitting an amended draft to the same committee or the same draft to the appeal committee is taken in principle by the service responsible for the committee concerned (the chair).

2.7. The Appeal Committee

261. Under the Comitology Regulation recourse to the appeal committee is not a regular step in the procedure but is rather an exception. There is no obligation to go to the appeal committee ⁽⁸⁵⁾. Hence, wherever possible, the Commission should give preference to going back to the committee with an amended draft rather than going to the appeal committee. Recourse to the appeal committee is based on the presumption that **all possibilities of discussion within the committee have been exhausted** and no amended draft can be envisaged.
262. In addition, the service concerned should consider whether in sensitive cases (e.g. in the case of a negative opinion or strong resistance within the committee to the draft) political endorsement (e.g. via the GRI) is needed before going to the appeal committee. This has to be decided on a case-by-case basis.
263. Where the chair of a committee decides to refer a case to the appeal committee, the chair must immediately inform the Member States, through their Permanent Representations, of that decision. The date of that communication is considered as the date of **referral** (Article 1(1) RoP Appeal Committee).
264. The referral to the appeal committee initiates a new phase in the procedure, which has its own time frame (Article 3(7) of the Comitology Regulation):
- (1) where the appeal committee is called upon, it has to meet no sooner than 14 days, except in duly justified cases, and no later than 6 weeks after the date of referral;
 - (2) the appeal committee has to deliver its opinion within 2 months of the date of referral, unless the chair, in accordance with Article 3(3) of the Comitology Regulation, has set a shorter time limit.
265. In order to ensure that the appeal committee meets at '**an appropriate level of representation**', the Commission has to conduct specific consultations with the Member States (Article 3(7), fifth subparagraph, of the Comitology Regulation). To this end, the Commission consults Member States on various options for the date of the meeting, usually in the letter of referral, and takes the utmost account of Member States' suggestions. Member States also indicate the level of representation that they consider appropriate, which should be '*of a sufficiently high and horizontal nature, including at Ministerial level*' (Article 1(5) RoP Appeal Committee) and '*as homogenous as possible*' (Article 5(1) RoP Appeal Committee). Experience so far has shown that Ministerial level representation is not the norm; usually it is at the level of the permanent representative.

⁸⁵ Except in two cases: Article 5(5) and Article 7 of the Comitology Regulation.

266. In the appeal committee, as in other committees, the chair has a margin for negotiation. The chair has to strive for *'solutions which command the widest possible support within the appeal committee'*, taking into account the suggestions and amendments supported in the appeal committee (Article 6(2) of the Comitology Regulation). In addition, when considering the adoption of draft implementing acts concerning particularly sensitive sectors (taxation, consumer health, food safety, and protection of the environment), the chair, in order to find a balanced solution, should, as far as possible, *'act in such a way as to avoid going against any predominant position which might emerge within the appeal committee against the appropriateness of an implementing act'* (Comitology Regulation, recital 14). Until the appeal committee delivers an opinion, any member of the appeal committee may suggest amendments and the chair may present amended versions of the draft (Article 6(2) of the Comitology Regulation). Should the amended text, however, depart in fundamental aspects from the draft agreed in the inter-service consultation, a new inter-service consultation (if necessary, simplified / accelerated) has to take place.
267. The appeal committee delivers an opinion by **qualified majority**. As with other committees, unless a member of the appeal committee objects, the chair may, without proceeding to a formal vote, establish that the appeal committee has delivered a positive opinion, by consensus, on the draft implementing act (Article 4(4) RoP for the Appeal Committee). The Rules of Procedure for the appeal committee provide for a **quorum** (*'the presence of a majority of the Member States is required to enable the appeal committee to vote. This rule also applies when the appeal committee delivers an opinion by consensus'*, Article 5(4) RoP for the Appeal Committee). However, when the time limit for the appeal committee to deliver an opinion has expired (whether the time limit set by the chair under Article 3(3) or the two months set by Article 3(7) of the Comitology Regulation), the appeal committee is considered not to have delivered an opinion (Article 5(4) RoP for the Appeal Committee).
268. Under Article 6(3) of the Comitology Regulation, the consequences of voting in the appeal committee are as follows:
(1) in the case of a positive opinion, the Commission is required to adopt the implementing act;
(2) in the case of no opinion, the Commission 'may' adopt it ⁽⁸⁶⁾;
(3) in the case of a negative opinion, the Commission cannot adopt the draft implementing act.
269. Given that referrals to the appeal committee are under the responsibility of the service concerned, it has been considered useful to **standardise the necessary correspondence** ⁽⁸⁷⁾.
270. There are specific rules for **certain trade issues** during the appeal committee phase. The Comitology Regulation requires **draft definitive anti-dumping or countervailing measures** to be referred to the appeal committee where no opinion was delivered by a committee and a simple majority of its component members opposed the draft (Article 5(5) of the Comitology Regulation). In such cases, there is no

⁸⁶ With one exception (see point 266 below).

⁸⁷ .Templates can be found on the Comitology website, see https://myintracomm.ec.europa.eu/sg/comitology/implementing_powers/Pages/tools.aspx.

possibility to go back to the (same) committee with an amended draft. Immediately after the vote, the Commission has to start consultations with the Member States. No sooner than 14 calendar days and no later than one month after the committee meeting, the chair informs the Member States (members of the committee and Permanent Representations) of the results of those consultations and, on that basis, submits to the appeal committee either the version of the draft implementing act on which the committee voted or an amended version (Article 2 RoP for the Appeal Committee). The time limit for the appeal committee to meet is shorter than the limit under Article 3(7) of the Comitology Regulation: no sooner than 14 calendar days and no later than one month after submission (instead of 6 weeks). However, the time limits for submission and the meeting, as set out in Article 5(5) of the Comitology Regulation, are without prejudice to the need to respect the deadlines set in the relevant basic acts. The time limit for the appeal committee to deliver its opinion on draft definitive anti-dumping or countervailing measures is in principle 2 months after the date of referral (Article 3(7) of the Comitology Regulation).

271. The Commission can adopt definitive multilateral safeguard measures only if the appeal committee issues a positive opinion (Article 6(4) of the Comitology Regulation).

2.8. Urgency procedure for immediately applicable implementing acts

272. As explained supra, under section 1.2.d), the urgency procedure provided for in Article 8 of the Comitology Regulation (*'Immediately applicable implementing acts'*) allows the Commission to adopt, without prior consultation of a committee, an implementing act that applies immediately, when there are *'duly justified imperative grounds of urgency'*. The missing **consultation** must, however, **be held after adoption**: no later than 14 days after adoption, the Commission must submit the act to the relevant committee in order to obtain its opinion in accordance with the relevant comitology procedure (advisory or examination procedure).
273. There are **specific rules for certain trade defence measures** (Article 8(5) of the Comitology Regulation). The urgency procedure under Article 8 automatically applies to provisional anti-dumping and countervailing measures. Article 8(5) provides for a specific procedure prior to adoption. Where the Commission intends to adopt provisional anti-dumping or countervailing measures, it must first consult or, in cases of extreme urgency, simply inform the Member States. In the former case, the consultation is not to be understood as the formal submission of a draft measure to the relevant committee, as this would not be compatible with Article 8(2) — it is therefore rather an informal consultation with the Member States individually, i.e. outside the committee. In cases of extreme urgency, where the Commission only informs the Member States before adoption, consultations must take place no later than 10 days after notification to the Member States of the measures adopted by the Commission (Article 8(5)). No later than 14 days after adoption, the Commission must submit the adopted provisional anti-dumping or countervailing measures to the relevant committee in order to obtain its formal opinion.

- 274. Where the advisory procedure applies**, the Commission must take the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered, and then decide if the act remains in force or is to be repealed ⁽⁸⁸⁾.
- 275. Where the examination procedure applies** and the committee delivers a negative opinion, the Commission must immediately repeal the implementing act (Article 8(4) of the Comitology Regulation). If the committee issues a positive opinion or fails to deliver an opinion, the act remains in force in principle for a maximum of 6 months (unless the basic act provides otherwise). Should there be a need for a definitive act, i.e. an implementing act to apply for an indefinite period, the following practice is recommended. After the adoption of the provisional measure, the examination procedure should be launched as soon as possible in order to obtain a committee opinion on the final measure, which would allow the Commission to adopt it. Once adopted, the definitive measure would then replace the provisional measure.
- 276.** Article 13(1), point (d), of the Comitology Regulation stipulates that where a basic act refers to the former safeguard procedure (Article 6 of the Comitology Decision of 1999), the urgency procedure (Article 8 of the Comitology Regulation) applies. It has therefore to be understood that in case of the former safeguard procedure, Article 8(4) applies, i.e. a variation of the examination procedure.

2.9. Role of the Parliament and the Council

- 277.** The Parliament or the Council are not involved **in the preparation of implementing acts** and do not participate in committee meetings. They cannot block the adoption of a draft implementing act (no right of veto) and cannot call back the implementing powers.
- 278.** However, both legislators must be properly and continuously informed of committee proceedings through the Comitology Register. Article 10 of the Comitology Regulation specifies the documents to be sent to the Parliament and Council at the same time as they are sent to the committee members.
- 279.** The co-legislators have a **right of scrutiny** (not in the sense of right of control, but more in the sense of the French expression: 'droit de regard') over draft implementing acts based on acts adopted under the ordinary legislative procedure. This means that, at any stage of the procedure until the adoption of the implementing acts, they can indicate to the Commission that the draft exceeds the implementing powers provided for in the basic act. In such cases, the Commission has to review the draft, taking account of the position expressed, and inform the Parliament and the Council whether it intends to maintain, amend or withdraw it (Article 11 of the Comitology Regulation).
- 280.** The right of scrutiny does not entail the automatic suspension of the Commission's internal procedures for adopting the implementing act. On the European Parliament's side this right is applied through motions for resolution and there are a number of occasions on which the European Parliament made use of its scrutiny right. In such cases a GRI fiche ⁽⁸⁹⁾ is usually prepared and a follow-up fiche ⁽⁹⁰⁾.

⁸⁸ Cf. Article 4(2) of the Comitology Regulation.

⁸⁹ See for example SP(2018)768, SP(2016) 247, SP(2016) 76 and SP(2015) 722/2.

2.10. RPS/PRAC

- 281.** The RPS/PRAC procedure was not affected by the comitology reform of 2011 (Article 12 of the Comitology Regulation). It can no longer be used in new legislation, but still appears in existing basic acts and will continue to apply (in line with Article 5a of the Comitology Decision of 1999) in those acts until they are formally amended and adapted to the Lisbon Treaty. Separate Guidelines ⁽⁹¹⁾ are in place explaining the procedure.
- 282.** The Commission made at the time of adoption of the Comitology Regulation a commitment to review the provisions attached to this procedure, in order to adapt them in due course according to the criteria laid down in the Treaty on the Functioning of the European Union (a statement in this sense was published in the Official Journal together with the Comitology Regulation ⁽⁹²⁾).
- 283.** In line with this commitment the Commission made three horizontal alignment legislative proposals in 2013 ⁽⁹³⁾. Due to the stagnation of the interinstitutional negotiations on these files, the Commission, as announced in its 2015 Work Programme ⁽⁹⁴⁾, withdrew them ⁽⁹⁵⁾. In the Interinstitutional Agreement on Better Law-Making the Commission committed to submit by the end of 2016 a new proposal for the alignment of legislative acts which still contain references to the regulatory procedure with scrutiny. The respective alignment proposals were adopted by the Commission on 14 December 2016 ⁽⁹⁶⁾ and are currently being negotiated with the European Parliament and Council in the framework of the ordinary legislative procedure.
- 284.** Agreement was found on the alignment of 64 acts included in the Commission proposal COM(2016)799 and Regulation (EU) No 2019/1243 ⁽⁹⁷⁾ was adopted on 20 June 2019. A circular explains the effects of the alignment of the RPS/ PRAC to either delegated or implementing acts ⁽⁹⁸⁾.
- 285.** When preparing the said proposals, the starting position of the Commission was that the definition of delegated acts in Article 290(1) is very similar to that of PRAC/RPS measures covered by Article 2(2) of the 1999 Comitology Decision, as amended in 2006 to introduce PRAC/RPS. At the same time, the similarity of the criteria does not mean that they must be applied in exactly the same way, insofar as PRAC/RPS was shaped within the institutional structure of the former Treaty establishing the European

⁹⁰ See for example SP(2016)190.

⁹¹ SEC(2006)1249.

⁹² OJ L 55 of 28.2.2011, p. 19.

⁹³ COM(2013) 451 final, COM(2013) 452 final and COM(2013) 751 final.

⁹⁴ COM(2014) 910 final.

⁹⁵ (2015/C 80/08), OJ C 80 of 7.02.2015, p. 17

⁹⁶ COM(2016)798 and COM(2016)799

⁹⁷ Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, OJ L 198, 25.7.2019, p. 241.

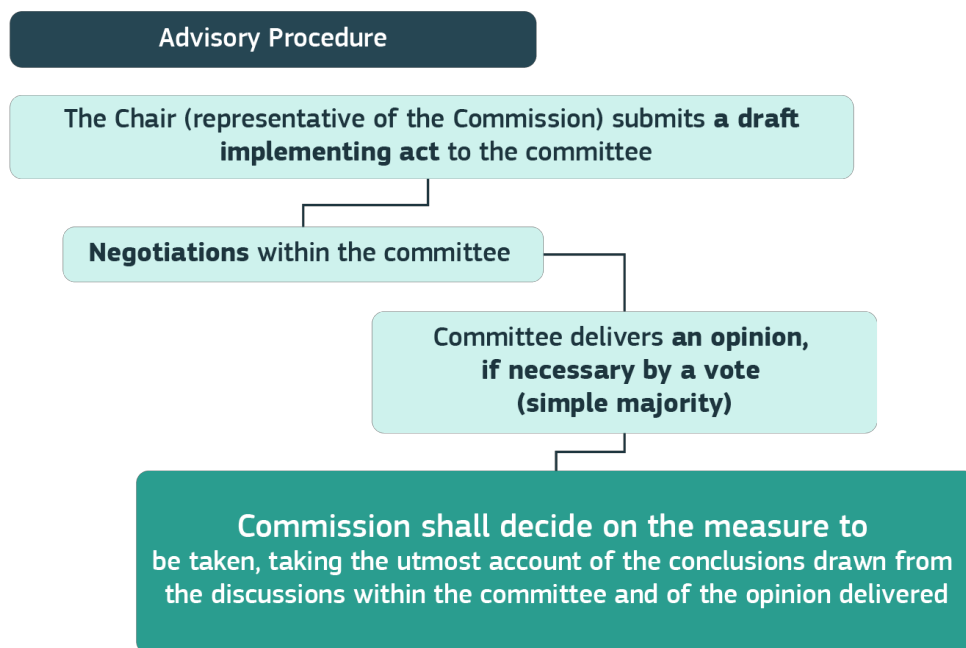
⁹⁸ Ares(2019)2343100 - 02/04/2019.

Community, under a system where only 'implementing measures' were provided for by the treaties, while the *summa divisio* between delegated and implementing acts is one of the main novelties introduced by the Treaty of Lisbon. As a result, the Commission proposed to align to delegated acts many of the PRAC/RPS empowerments, whereas for others it proposed alignment to implementing acts.

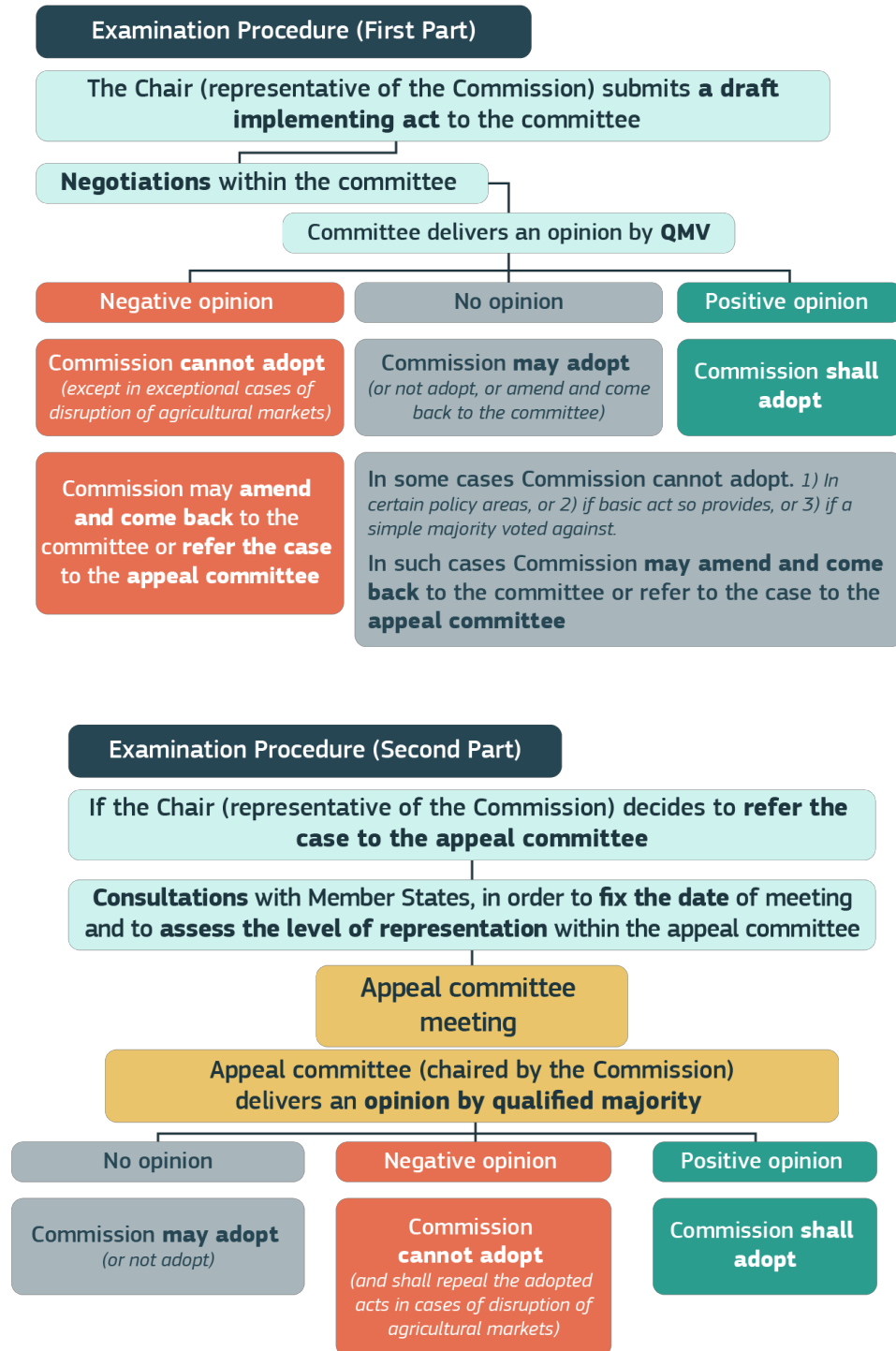
- 286.** Measures adopted under RPS/PRAC are not 'implementing acts' in the sense of Article 291(4) TFEU.

2.11. Recapitulation of procedures

1. Advisory Procedure



2. Examination Procedure



Links:

- 1) Interinstitutional Agreement on Better Law-Making and annexed Common Understanding on delegated acts (2016):
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_123_R_0001
- 2) Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union (2019):
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.223.01.0001.01.ENG&toc=OJ:C:2019:223:TOC
- 3) Comitology Regulation (2011):
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF> and
the attached statements:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0019:0019:EN:PDF>
- 4) Comitology Decision (1999):
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:255:0004:0008:EN:PDF>
- 5) Standard rules of procedure for committees (2011):
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:206:0011:0013:EN:PDF>
- 6) Rules of procedure for the Appeal Committee (2011):
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:183:0013:0016:EN:PDF>
- 7) Comitology Website
<https://myintracomm.ec.europa.eu/sg/comitology/Pages/index.aspx>

Standard clauses delegated act

(for standard clauses for implementing acts please see: https://myintracomm.ec.europa.eu/sq/comitology/implementing_powers/Documents/templates_regulation_en.zip)

Recital:

In order to ... [*objective*], the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of ... [*content and scope*]. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

Article(s) delegating power

The Commission [shall adopt/is empowered to adopt] delegated acts in accordance with Article [A] concerning ... [*content and scope*].

The following supplementary paragraph is to be added where the urgency procedure applies:

Where, in the case of ... [*content and scope*], imperative grounds of urgency so require, the procedure provided for in Article [B] shall apply to delegated acts adopted pursuant to this Article.

Article [A]

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

[duration]

Option 1:

2. The power to adopt delegated acts referred to in Article(s) ... shall be conferred on the Commission for an indeterminate period of time from ... [*date of entry into force of the basic legislative act or any other date set by the co-legislators*].

Option 2:

2. The power to adopt delegated acts referred to in Article(s) ... shall be conferred on the Commission for a period of ... years from ... [*date of entry into force of the basic legislative*

act or any other date set by the co-legislators]. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the ...-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

Option 3:

- 2.The power to adopt delegated acts referred to in Article[s] ... shall be conferred on the Commission for a period of ... years from the ... [*date of entry into force of the basic legislative act or any other date set by the co-legislators*].
- 3.The delegation of power referred to in Article(s) ... may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
- 4.Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.
- 5.As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
- 6.A delegated act adopted pursuant to Article(s) ... shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council.

The following supplementary article is to be added where the urgency procedure applies:

Article [B]

Urgency procedure

- 1.Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
- 2.Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article [A](6). In such a case, the Commission shall repeal the act immediately following the notification of the decision to object by the European Parliament or by the Council.