BRIEFING

European Parliament

The European Parliament's right to challenge Commission delegated acts

SUMMARY

The distinction between delegated and implementing acts was introduced in Articles 290 and 291 of the Treaty on the Functioning of the European Union by the Treaty of Lisbon. Before its entry into force, the distinction was not formally known, although the idea of delegated legislation in the EU legal order was already present. In particular, acts adopted under the regulatory procedure with scrutiny (RPS) as part of the comitology procedure are often regarded as direct predecessors of today's delegated acts.

Under the current legal framework, the European Parliament can, with regard to delegated acts adopted by the Commission, 1) object to the delegated act (i.e. exercise its right of veto regarding the act, preventing its entry into force); 2) bring an action for annulment of the delegated act to the Court of Justice of the European Union (CJEU); and, for the future, 3) revoke the delegation (which does not affect delegated acts that have already been adopted). Parliament can object to a delegated act only once: from the moment the proposed delegated act is submitted to Parliament, up until the deadline for making objections, set in the basic legislative act.

Since the introduction of the distinction between implementing and delegated acts, Parliament has used its power only once to challenge a delegated act, by lodging an action for annulment to the CJEU – Case C-286/14, where Parliament successfully challenged a Commission delegated regulation concerning the Connecting Europe Facility. As mentioned above, acts adopted under the RPS as part of the comitology procedure are often seen as predecessors of today's delegated acts, and therefore the earlier Case C-355/10 in which Parliament challenged the legality of the Schengen Borders Code (a Council decision adopted under the RPS procedure, hence a predecessor of a delegated act), is also relevant for the present analysis. Thus far, Parliament has not brought any other relevant cases for annulment of delegated acts.

IN THIS BRIEFING

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Author: Rafał Mańko
Members' Research Service

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Background

The distinction between delegated and implementing acts was introduced in Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) by the Treaty of Lisbon. Before its entry into force, the distinction was not formally known, although the idea of delegated legislation in the EU legal order was already present.[1] In particular, acts adopted according to the **regulatory procedure with scrutiny** (RPS) – one of the sub-types of the comitology procedure – are considered direct predecessors of today's delegated acts.[2] The RPS was created in 2006 by virtue of Decision 2006/512/EC, giving the European Parliament the right to object to (veto) an executive act proposed by the Commission. Today, as EU law expert M. Chamon explains, acts adopted under the RPS 'effectively fulfil the same functions as delegated acts, but they are adopted following a comitology procedure, even if they are not implementing acts under Article 291 TFEU'.[3] The RPS, although now superseded by delegated acts (in new legislation), still exists whenever the pre-Lisbon basic (legislative) act envisages it. Moreover, new acts under the RPS can continue to be adopted until all the basic acts have been amended to provide for delegated acts (or implementing acts) under the Lisbon system. The alignment of the RPS with the post-Lisbon distinction between delegated and implementing acts is still ongoing.[4]

With regard to delegated acts adopted by the Commission, Parliament can:

object to (veto) the delegated act;
bring an action for annulment of the delegated act to the Court of Justice;
revoke the delegation (meaning that the Commission may not use that delegation to adopt new delegated acts in the future, although any delegated acts adopted until the moment of revocation do remain in force).

Entry into force of the Taxonomy Delegated Regulation – No objection by Parliament

In the case of the Taxonomy Delegated Regulation (procedural reference: 2022/2594(DEA)), Article 23(3) of the basic Taxonomy Regulation provides that delegated acts, adopted by the Commission, enter into force **within 4 months** of their notification to Parliament and Council if neither of them objects, or earlier if both inform the Commission that they will not object. The second sentence of that provision allows the period to be prolonged by 2 months, i.e. for a total of 6 months. In the concrete case of the Taxonomy Delegated Regulation, the period for Parliament and Council to object ran from 10 March 2022. On 6 July 2022, Parliament did not secure a majority to adopt resolution B9-0338/2022, which proposed to object to the delegated regulation, and the proposal for a resolution was thus rejected in plenary. As a result, the Taxonomy Delegated Regulation was published in the Official Journal of the EU on 15 July 2022 and entered into force 20 days later.

Parliament's objection to a Commission delegated act

Parliament can object to (veto) a delegated act proposed by the Commission only once: from the moment the proposed delegated act is submitted to Parliament, up until the deadline for making objections, set in the basic legislative act. EU law experts Paul Craig and Grainne de Búrca draw attention to the fact that the Parliament's right to object to a delegated act is not coupled with a right to amend the delegated act in any way.[5] Furthermore, the basic legislative act usually sets a relatively short timeframe for making an objection (2-3 months), which – as the two academics point out – does not facilitate the exercise of this right.[6] Parliament has exercised its right to object to a delegated act a number of times.[7]

Revocation of delegation by Parliament

Academics point out that the Council's and Parliament's right to revoke a legislative delegation (i.e. a delegation granted to the Commission in a basic act, allowing it to adopt delegated acts) should not be viewed as a sanction against the Commission for exceeding its powers, but rather, as a response to a change in the political situation where one of the two co-legislators believes that the matter at hand would be best resolved directly through a legislative act rather than an executive

one.[8] The only condition for exercising the right of revocation is attainment of the majority prescribed by the Treaty (i.e. majority of component members for Parliament, and qualified majority in the Council).[9] According to academics, the revocation operates only *pro futuro* and has no retroactive effect for delegated acts already adopted; these would need to be repealed by a separate act (i.e. by new legislation), not by a mere act of revocation.[10] This is also formulated explicitly in basic acts (see e.g. box on the page below). At the time of writing of this briefing, **Parliament had never exercised its right to revoke a legislative delegation**.[11]

Whereas Article 290(2)(a) TFEU provides the legal basis for the exercise of the right to **revoke a legislative delegation (i.e. a delegation of powers** to enact delegated acts), the procedure to be followed by the Parliament is laid out in Rule 111(7) of its Rules of Procedure (RoP). The rule provides, in the first paragraph, that the 'committee responsible may, in accordance with the provisions of the basic legislative act, submit to Parliament a motion for a resolution revoking, in full or in part, that delegation of powers or opposing the tacit extension of that delegation of powers'. The provisions clearly refers to the basic legislative act for details on how the procedure should take place.

The second subparagraph of Rule 111(7) RoP stipulates – mirroring the second subparagraph of Article 290(2) TFEU – that the decision to revoke delegation requires a **majority of Parliament's component Members** (i.e. currently 353 Members must vote in favour of the decision to revoke). This higher threshold has prompted comments from some EU law scholars, such as Joana Mendes, that Parliament cannot effectively control the adoption of delegated acts by the Commission.[12] The fact that thus far the Parliament has not used its right to revoke delegated legislation seems to corroborate Mendes's claim.

With regard to the exercise of *ex post* control rights by the Council, Article 290(2) TFEU requires a 'qualified majority'. This rule must be read in the light of Article 238(2) TFEU which provides for a **reinforced QMV**, requiring at least 72 % of the members of the Council (in contrast to the usual 55 % provided for in Article 16(4) TEU), whenever the Council does not 'act on a proposal' from the Commission'. The concept of the Council 'acting on a proposal' from the Commission is understood as encompassing situations when the Council receives a proposal for an act and votes to adopt or amend it; expressing an objection to a delegated act or revoking a legislative delegation as such are considered as being outside the notion of 'acting on a proposal'. This is considered so given that the delegated act is not seen as a proposal for the Council to act, but an act **already adopted** by the Commission, whose entry into force is pending during the

Article 23 of the Taxonomy Regulation and the lack of retroactive effects of a possible revocation of delegation

Article 23 of the Taxonomy Regulation (the basic act for the Taxonomy Delegated Regulation), provides for the procedural rules to which Rule 111(7) RoP refers to. Specifically, the first sentence in Article 23(3) of the Taxonomy Regulation clearly indicates that the 'delegations of powers referred to in Articles 8(4), 10(3), 11(3), 12(2), 13(2), 14(2) and 15(2) **may be revoked at any time** by the European Parliament or by the Council'. Therefore, there is no time limit set within which Parliament may revoke its delegation. However, the fourth sentence of Article 23(3) importantly specifies that the revocation of delegation '**shall not affect the validity of any delegated acts already in force**'. Therefore, even if Parliament revokes any of the 7 delegations contained in the Taxonomy Regulation, the Taxonomy Implementing Regulation (2022/1214) **will remain in force** because it was published in the OJEU on 15 July 2022[1] and *entered into force* on 4 August 2022 (i.e. on the 20th day after publication, as provided for by its Article 3). The fact that the Taxonomy Implementing Regulation will *apply* only from 1 January 2023 (as provided for in its Article 3) is irrelevant here, as Article 23(3) of the Taxonomy Regulation clearly states that the validity of delegated acts is a function of them being **'already in force',** not 'already applicable'. Therefore, had Parliament revoked the delegation up to 3 August 2022 (the last day ***before* it entered into force**), it would have affected the validity of the Taxonomy Implementing Regulation; however, as from 4 August 2022, this is no longer the case (because it **entered into force** on that day, even if it will become **applicable *only on 1 January 2023)***.

scrutiny period for the Parliament and Council. Therefore, it is considered that the reinforced QMV is applicable for Council decisions in both cases: objections to delegated acts *and* revocations of delegations.[13] As a result, **it is easier for the co-legislators to grant the Commission the power to adopt delegated acts** (simple majority in Parliament, ordinary QMV in Council) **than to revoke that right or oppose a specific delegated act** (absolute majority, reinforced QMV).

Action for annulment of a delegated act brought by Parliament

Introduction

Since the introduction of the distinction between implementing and delegated acts, the Parliament has used its powers to challenge a delegated act only once, by lodging an action for annulment to the Court of Justice – Case C-286/14, where Parliament successfully challenged a Commission delegated regulation on the Connecting Europe Facility. However, as mentioned earlier, acts adopted under the RPS as part of the comitology procedure are perceived as predecessors of today's delegated acts, and therefore the earlier Case C-355/10 in which Parliament challenged the legality of the Schengen Borders Code (a Council decision adopted under the RPS procedure), is also relevant for the present analysis.[14] No other relevant cases for annulment of delegated acts have been brought by Parliament thus far.[15]

The *Schengen Borders Code* case (C-355/10)

In its judgment of 5 September 2012,[16] the CJEU (sitting as Grand Chamber) annulled Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). The decision in question was adopted on the basis of Article 12(5) of the Schengen Borders Code under the RPS provided for under the comitology system.

Within Parliament, the Commission proposal was considered by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) (procedural reference: 2009/2755(RPS)). The LIBE committee Members, in their meeting of 17 March 2010, argued that the proposed measures **exceeded the scope of Article 12 of the Schengen Borders Code** and that they should instead be the subject of a legislative proposal under the ordinary legislative procedure. LIBE adopted a resolution formally opposing the draft Council decision. The motion for a resolution was tabled for inclusion on the plenary agenda of the session of 24 and 25 March 2010. Parliament voted by **336 to 253, with 30 abstentions, in favour of the motion** tabled on behalf of the LIBE committee by Juan Fernando López Aguilar (S&D, Spain). However, under the rules for this procedure, an absolute majority of all Members – **369** – would have been needed to ensure that the motion was carried and the draft decision be rejected by Parliament. As the necessary majority was not obtained, the motion fell and the draft decision was therefore adopted by the Council. Soon after, on 10 May 2010 the **LIBE committee unanimously requested the JURI committee to advise the Parliament's president to lodge an action for annulment before the CJEU**.[17]

Defending the legality of the challenged decision, the Council argued before the CJEU that Parliament's action was inadmissible precisely because Parliament had not exercised its right to oppose the proposed decision. The lawyers for the Council argued that if the Parliament had had doubts as to the legality of the contested decision, it should have opposed it (paragraph 33 of the judgment). The Parliament's Legal Service, in turn, argued that the non-objection to a proposed measure under the RPS does not limit Parliament's right to request judicial review later on. They added that Parliament was not obliged to act on its doubts about the legality of the proposed act by exercising its right of veto (objection) (paragraph 36 of the judgment).

The Court agreed with the arguments of Parliament's lawyers, finding that the action was admissible even if Parliament had not objected to the proposed measure (paragraphs 37-41 of the judgment). Specifically, the Court found that:

the right to bring an action for annulment by the Member States, Parliament, Council and Commission '**is not conditional on proof of an interest in bringing proceedings**' (paragraph 37 of the judgment);
the exercise of the right to bring an action for annulment 'is not conditional on the position taken, at the time when the measure in question was adopted, by the institution or Member State bringing the action' (paragraph 38 of the judgment);
the fact that Parliament did not exercise its right to object to (veto) the measure 'is not capable of excluding that institution's right to bring proceedings' (paragraph 39 of the judgment);
parliamentary scrutiny of a measure before it is adopted '**cannot be a substitute for review by the Court**' (paragraph 40 of the judgment).

In essence, therefore, the Court distinguished between the (political) process of scrutinising an executive law-making measure, on the one hand, and the (legal) process of judicial review of the measure in question by the Court itself, on the other hand.[18] In other words, Parliament's right to trigger a judicial review of an executive law-making measure is not subject to Parliament proving that it has any legal interest in doing so, nor is it conditional on Parliament's stance in the process leading up to the adoption of the said measure.

However, according to den Heijer and Tauschinsky, the fact that Parliament did not use its power of veto (objection) could have a practical impact on the burden of proof incumbent on Parliament before the CJEU.[19] They draw attention to the essential difference between the exercise of parliamentary veto powers, on one hand, and the triggering of judicial review by Parliament, to be performed by the CJEU, on the other hand. Indeed, the two procedures differ both as regards their triggering (majority of component Members versus a decision of the Parliament's Committee on Legal Affairs (JURI), see below) and their motives (a veto is predominantly political, an action for annulment is predominantly legal). Nonetheless, den Heijer and Tauschinsky admit that there seems to be 'some overlap' between the two procedures. However, despite the fact that considerations of a legal nature enter into play in both Parliament's ex ante political check (the veto procedure) and the Court's ex post legality check, this fact, in their view, should not limit Parliament's capacity to exercise its right of action. They speculate, however, that it could potentially influence the CJEU's decision on the Parliament's action for annulment on the merits, in particular with regard to the extent of the burden of proof incumbent on the Parliament and the 'intensity' of the judicial review that the CJEU would be prepared to enter into, although this is a theoretical point, as they admit that the CJEU has never adopted such an approach. Den Heijer and Tauschinsky actually draw attention to the fact that in the *Schengen Borders Code* case the CJEU did not, in any explicit way, address the issue of the relationship between Parliament's non-exercise of its veto rights, on the one hand, and its subsequent legal action before the Court, on the other.

Furthermore, den Heijer and Tauschinsky draw attention to a second issue: Parliament's responsibility for not objecting to an illegal act, which they compare to the Commission's forbearance in bringing an action against a Member State for failure to fulfil its obligations under EU law.[20] The two scholars acknowledge, however, that Parliament actually attempted to block the entry into force of the illegal delegated act, but failed to do so owing to the high threshold of votes required to effectively launch a veto.

The interplay between the failed veto procedure and the subsequent action for annulment was explicitly addressed in point 22 of the Advocate General Mengozzi's opinion on the case. The Advocate General highlighted that under Parliament's RoP, an action for annulment is to be brought on the recommendation of the committee responsible without any vote in plenary. This is in obvious contrast to the veto procedure, which requires a vote in plenary garnering a qualified majority. In

Mengozzi's view: 'To deny the Parliament the right to bring an action for annulment of an act adopted in the regulatory procedure with scrutiny, notwithstanding the position expressed in the course of that procedure, would therefore mean, inter alia, **depriving the parliamentary minority of an instrument of protection**.'[21]

The Advocate General thus drew attention to the fact that the exercise of the right to bring an action for annulment against a measure that was not vetoed by Parliament owing to the lack of a sufficient majority to back the veto should be treated as an **instrument of protection of the parliamentary minority**. Indeed, in the case at hand, a majority of 336 Members voted for the objection, but this number fell short of the requirement for an absolute majority of 369 Members.

The Advocate General also drew attention to **the legal versus the political distinction** between the political procedure of veto and the legal procedure of the action for annulment, and the way in which this distinction is woven into the mandatory versus the non-mandatory nature of Parliament's course of action.[22] Specifically, AG Mengozzi pointed out that the exercise of Parliament's right of objection is optional ('Parliament is not obliged'), even if Parliament considers that 'there are grounds relating to illegality that allow it to exercise its right of veto'. This is because, as the Advocate General highlighted, the exercise of the right of veto depends 'also on considerations of a political nature'. Thus, the veto procedure is a political one, and as such it is not guided exclusively by purely legalistic considerations, but also by a broader array of factors that influence Parliament's political decision-making process. This lead the Advocate General to the crucial conclusion about the non-interchangeability of the two procedures (political veto versus legal action before the ECJ: a 'review of the lawfulness of an act by exercising a veto in the course of its adoption procedure may **not be regarded as an alternative to judicial review**, precisely because that procedure can be made subject to considerations of a political nature'.[23] Addressing specifically the *Schengen Border Code* case, the Advocate General noted that many Members of the European Parliament 'who voted in favour of the contested decision considered that it exceeded the implementing powers conferred by the SBC but that it was none the less preferable for the European Union to create a legal instrument, however imperfect it might be, to address the increase in migration by sea expected in the summer of 2010'.[24]

Regarding the substance of the judicial review in Case C-355/10, Parliament argued that the Council decision defined '**essential elements**' of the legal issue in question, something that ought to have been regulated in the basic legislative act (see paragraphs 43-44 of the judgment). The Court agreed with the arguments put forward by Parliament's lawyers and found that the contested decision 'contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision' (paragraph 84 of the judgment). In consequence, the Court annulled the decision in its entirety.

The *Connecting Europe Facility* case (C-286/14)

The only CJEU case so far in which Parliament sought the annulment of a delegated act strictly within the meaning of Article 290 TFEU was decided by the CJEU's judgment of 17 March 2016.[25] In this case, Parliament sought the annulment of Commission Delegated Regulation (EU) No 275/2014 of 7 January 2014 (the delegated act) amending Annex I to Regulation (EU) No 1316/2013 of the Parliament and Council establishing the Connecting Europe Facility (the basic act). Article 21 of the basic act provided for a delegation for the Commission to adopt delegated acts in order to modify annexes to the basic act. As per Article 26(5) of the basic act, Parliament and Council were given **two months** to object to the delegated act. The delegated act added a new part to Annex I of the basic act, thereby amending the basic act. Parliament argued that the delegated act ought to be annulled precisely because through it the Commission had added a new part to an annex attached to the basic act, instead of adopting a new annex in the form of a delegated act (paragraph 14 of the judgment). In other words, Parliament took issue with the fact that the delegated act amended an annex of the basic act, rather than adding a new annex of its own. The argument essentially revolved

around the **legal form of the annex**: should it be an annex *at the level of a legislative act* (amended by the delegated act) or should it be an annex *at the level of a delegated act*.

The Commission considered the Parliament's action for annulment inadmissible, since it questioned the Commission's law-making technique for exercising its delegated power rather than the substance of the actual act (paragraph 15 of the judgment). In other words, the Commission took the view that the Parliament's action focuses on form (what legal form for the annex), rather than on content (what should be in the annex). The CJEU found the action admissible, pointing out that it deals with the **limits of the scope of delegation**, a question which is an issue of substance (paragraph 18 of the judgment).

The substance of the dispute turned on **the distinction drawn between 'amending' and 'supplementing'** the basic act. The Court explained the difference as follows:

> *41. The delegation of a power to **'supplement'** a legislative act is meant only to authorise the Commission to **flesh out** that act. Where the Commission exercises that power, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified.*
>
> *42. By contrast, the delegation of a power to **'amend'** a legislative act aims to authorise the Commission to **modify or repeal** non-essential elements laid down by the legislature in that act. In cases where the Commission exercises that power, it is not required to act in compliance with the elements that the authority conferred on it aims precisely to 'amend'.* [Emphasis added]

In the case at hand, the CJEU found that **the delegation in question was one to 'supplement' and not to 'amend'**. This required that instead of modifying the basic act (its annex) by way of a delegated act, the Commission should adopt a separate delegated act **supplementing** the basic act (paragraphs 57-58 of the judgment). In other words, the CJEU agreed with the Parliament that the annex should have been contained in the delegated act (i.e. have the legal form of a delegated act). The Commission's delegation, by contrast, did not extend to amending the basic act (and the annex contained therein). As a result, the Court annulled the delegated act, although it let it remain in force (paragraph 71). In the operative part of the judgment, the Court ordered 'that the effects of Delegated Regulation No 275/2014 be maintained until the entry into force, with a reasonable period, which may not exceed six months from the date of delivery of the present judgment, of a new act intended to replace it', although – as it appears from the EUR-Lex database at the time of writing – no new delegated act was adopted.

Commenting on the judgment, EU law scholar A.P. van der Mei praised the judgment for drawing 'a clearer distinction' between the notions of amending and supplementing.[26] The scholar noted that the Court's approach is based on a 'concrete and simple criterion', namely that of textual amendment. In other words, if a delegated act modifies *the text* of a legislative act (including the text of an annex that is part of that act), this belongs to the category of **amending** the basic act. In contrast, if the wording (the text) of the basic act is not affected, we speak of **supplementing** the basic act. Van der Mei praises the approach adopted by the Court, stating that the criterion adopted by the CJEU is 'simple and workable' and that it 'may indeed contribute to a clearer and more transparent legislative process'. M. Chamon, in turn, commented that the ECJ 'did not conclude … that it should be up to the Commission to choose between supplementing and amending. It **clarified the institutional balance** (in Article 290 TFEU**) in favour of the legislature**, since it read a hierarchy (into Article 290 TFEU) between amending and supplementing even if there is no immediate basis for this in the Treaty'.[27] It should be noted that in Case C-286/14, the question of **admissibility** owing to Parliament's lack of objection (veto) to the delegated act was not raised at all. According to the legislative observatory (procedure reference: 2014/2509(DEA)) there was no proposal for a resolution to object to the delegated regulation, and it seems it was not the object of any discussions in committee. In other words, Parliament headed straight for the action for annulment (a legal tool) without attempting to block the delegated act by way of its veto (a political tool).

Procedural arrangements to bring an action for annulment of a delegated act

The procedural arrangements for Parliament's right to bring an action for annulment are governed by the following legal texts:

Article 263 TFEU, which enshrines the action for annulment of an EU act;
Article 51 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union (which is also an act at Treaty level, as it is a protocol annexed to the Treaties – and therefore an act of primary EU law);
Rule 149 of Parliament's Rules of Procedure;
the JURI committee's Guidelines for the application of Rule 149 of the Rules of Procedure as last amended on 26 May 2021.

Article 263 TFEU

Article 263 TFEU grants Parliament the right to bring an action for annulment without requiring the Parliament to demonstrate any interest in doing so (Parliament has been among the 'privileged applicants' since the Treaty of Nice[28]). Privileged applicants are allowed to bring an action for annulment **without proving any interest** on their side (they can do so simply in the interest of legality) (Case 45/86 *Commission* v *Council*, paragraph 3; Case T-369/07 *Latvia* v *Commission*, paragraph 33). Importantly, their right to bring an action for annulment **does not depend on their stance during the legislative proceedings** (or other proceedings leading to the act's adoption) – they can support the act and later change their mind about its compatibility with the Treaties.[29] Thus, a Member State could for instance vote in favour of an act in the Council, but later question its legality before the CJEU (Case 166/78 *Italy* v *Council*, paragraphs 5 and 6).

The sixth paragraph of Article 263 TFEU lays down the **time limits** for bringing an action for annulment: **two months** running from the publication or notification of the act. For the deadline to be met, the action must be **lodged at the Registry of the CJEU** within the prescribed period (Articles 21 and 52 of the CJEU Rules of Procedure).

The list of grounds for annulment (i.e. **pleas** that the applicant may raise) is set out in Article 263 TFEU; these grounds include:

lack of competence;
infringement of an essential procedural requirement;
infringement of the Treaties;
infringement of any rule of law relating to the application of the Treaties; and
misuse of powers.

Article 51 of the CJEU Statute

The CJEU as an institution of the EU includes two courts: the **Court of Justice** (CJ), the higher instance court, and the **General Court** (GC), the lower instance court (Article 19(1) TEU). The division of work between the two CJEU courts is determined by the CJEU Statute. Although normally actions for annulment of Union acts brought by Member States are heard by the CJ, in the case of delegated acts they are brought to the GC, as provided for by Article 51(a) of the CJEU Statute. By contrast, actions for annulment of implementing acts, brought by Member States, are heard by the CJ and not the GC (Article 51(a)(i) of the CJEU Statute). Given that judgments of the GC are subject to appeal to the CJ, judgments on the validity of delegated acts are given by the GC in first instance and, if appealed, are decided upon in a definite manner by the CJ (on appeal, in second instance). In contrast, actions for annulment of legislative or implementing acts, brought by the Member States, are decided upon in the first and only instance by the CJ (without the possibility of appeal to any other court).

Rule 149 of Parliament's Rules of Procedure

Rule 149(1) provides that Parliament 'shall ... examine Union legislation and its implementation in order to ensure that the Treaties have been fully complied with, in particular where Parliament's rights are concerned.' Rule 149(2) provides for the competence of the JURI committee: if 'it suspects a breach of Union law .... [it should] report to Parliament, orally if necessary.' Sentence 2 of this paragraph stipulates that the JURI committee 'may hear the views of the committee responsible for the subject matter', i.e. in the case of the Taxonomy Implementing Regulation – Committee on Economic and Monetary Affairs (ECON) and Committee on the Environment, Public Health and Food Safety (ENVI) which were competent to carry out the examination of the delegated act in question (procedure 2022/2594(DEA)).

Rule 149(3) provides that the 'President ***shall*** **bring an action** on behalf of Parliament in accordance with the recommendation of the committee responsible for legal affairs.' The same rule in its second sub-paragraph provides that the president *may* ask the plenary to decide, during the next part-session, whether the action should be maintained. If the plenary votes against the action by a majority of the votes cast, the president must withdraw the action. The third sub-paragraph of Rule 149(3) deals with situations in which the president brings an action contrary to the recommendation of the JURI committee. In such an event, the president *must* ask the plenary, during the next session, whether the action should be maintained.

JURI committee guidelines on the application of Rule 149

Rule 149(6) RoP provides that the JURI committee lays down principles it will use when applying Rule 149. Accordingly, the Guidelines for the application of Rule 149 of the Rules of Procedure as last amended on 26 May 2021 (PE549.409r03-00), lay out in points 8-10 a set of detailed principles for actions for annulment. Most relevant in the context of delegated acts is point 10, which states that 'Parliament should bring such an action against Commission decisions that do not comply with the *relevant delegation of legislative power* or power to adopt an implementing act'.

Action for annulment of delegated acts brought by individual Members of the European Parliament: Pending case before the General Court

On 10 October 2022, René Repasi MEP (S&D, Germany) brought an individual action for annulment of the Taxonomy Delegated Regulation before the General Court (Case T-628/22 *Repasi v Commission*). Whereas the Court has not yet published his application, the applicant himself explained his legal argumentation in a blog post on *EU Law Live*, pointing out that the main legal issue at stake is the **standing of an individual Member of Parliament to challenge a Commission delegated act**. The applicant contends that owing to its content (it classifies nuclear energy and gas as forms of 'green' energy), the Taxonomy Delegated Regulation should have been adopted as a **legislative act**, given that there is a fundamental political choice involved that ought to have been made by the EU co-legislators. The applicant argues that by choosing to enact the above regulation as a delegated act and not as a proposal for a legislative act, the Commission infringed not only the procedural rights of the Parliament (which are obviously much broader in the ordinary legislative procedure than in the ex-ante screening of delegated acts), but also his **individual rights as a Member**. The applicant contends that in a Union based on representative democracy (Article 10(1) TEU), EU citizens are directly represented at EU level in the Parliament (Article 10(2) TEU), and that this democratic representation – according to the applicant – 'is not with the European Parliament as an institution but *with the Members* of the European Parliament' (emphasis added). The right to vote and the right to table amendments are, the applicant argues, individual rights **vested in each individual Member** of the European Parliament and not in the Parliament as a whole. It is this very right, he argues, that the Commission infringed by enacting the above normative act in the form of a delegated act rather than a legislative act proposed to Parliament and Council under the ordinary

legislative procedure. Indeed, in the case of delegated acts Parliament can either (tacitly) accept them or exercise its right of veto (as already mentioned, requiring a higher majority – of its component Members), but cannot propose any amendments.

Analysing the arguments put forward by the applicant in *Repasi v Commission*, Christoph Krenn (Max Planck Institute for Comparative Public Law)[30] compared the case to the *Chernobyl* case from 1990,[31] in which the CJEU provided a dynamic interpretation of Article 173 of the Treaty of Rome (now 263 TFEU), **granting the Parliament the right to bring an action for annulment of a Council regulation**, even though, at the time, Parliament was not legally considered a 'privileged applicant' as regards the actions for annulment procedure (as far as the wording of the Treaties was concerned). Krenn points out that 'it is an established principle of EU procedural law that the participation in the adoption of an act may lead to a right to challenge it. If a person has been equipped with procedural rights in the adoption of an act, he or she might – under certain conditions – be able to challenge it', drawing attention to the *WWF-UK* v *Council* case,[32] where the CJEU differentiated between the right to question the legality of the substance of an act from the right to question the procedural aspects of its adoption.[33]

It remains for the General Court, and possibly, on appeal, to the Court of Justice, to decide whether the action brought by an individual MEP challenging the legality of a delegated act will be considered **admissible** in light of the constitutional position of individual Members of the European Parliament in the Treaties.

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