

Implementation of the Treaty of Lisbon

# Delegated Acts

(Article 290, Treaty on the Functioning of the European Union)

# Guidelines for the services of the Commission

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## I. — Introduction

1. The Treaty of Lisbon has substantially modified the structure as regards the powers that can be conferred on the Commission by the legislator(s). It provides a clear distinction between acts of a quasi-legislative nature, on the one hand, and, on the other hand, acts which merely implement the provisions of a basic act. It also provides an entirely different legal framework for each type of act.
2. The two provisions in question are Articles 290 and 291 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), as laid down in the Treaty of Lisbon signed on 13 December 2007<sup>(1)</sup>. They entail substantial modifications of the procedures known so far as the “comitology procedures”
3. Article 290 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. Legal acts adopted by the Commission in this way are referred to in the terminology used by TFEU as “delegated acts” (Article 290(3)). Article 290 does not require the adoption of any binding instrument of secondary legislation to ensure its implementation; it is sufficient in itself and contains all the elements required by the legislator for defining, case by case, the scope, content and practical arrangements for delegating power.
4. Under Article 291, Member States are primarily responsible for the implementation of Union Law but where uniform conditions for implementing legally binding acts are needed, those acts must confer implementing powers on the Commission (or on the Council in very exceptional cases). 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 secondary legislation, i.e. a new “Comitology Regulation” adopted by EP and Council<sup>(2)</sup>, which has replaced as from 1<sup>st</sup> March the Council Decision 1999/468/EC (hereinafter, “the Comitology Decision”) amended in 2006 to introduce the new regulatory procedure with scrutiny (hereinafter “PRAC/RPS”).

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<sup>1</sup> OJ C 306, 17.12.2007

<sup>2</sup> Regulation (EU) 182/2011, OJ L 55, 28.2.2011, page 13.

5. Legal acts adopted by the Commission under the procedures set up by the new regulation are referred to in the terminology used by TFEU as “implementing acts” (Article 291(4)).
6. The present guidelines address delegated acts. They add to the communication from the Commission to the European Parliament and to the Council of 9 December 2009<sup>(3)</sup> on Article 290, TFEU (hereinafter: “the communication”).
7. The communication sets out the Commission’s views on the scope of the delegated acts — in particular the comparison with the regulatory procedure with scrutiny <sup>(4)</sup> (hereinafter, “PRAC/RPS”) and with implementing acts — the framework for delegations of power, the working methods the Commission intends to use for preparing the adoption of delegated acts and, finally, the conditions under which the legislator might exercise control over the way the powers conferred on the Commission are implemented.
8. Council reacted to this communication by a declaration adopted on 14 December 2009<sup>(5)</sup>. The European Parliament adopted a resolution on 5 May 2010<sup>(6)</sup>.
9. The three institutions subsequently agreed on a “Common Understanding on delegated acts” (hereinafter “CU” – copy annexed to the present guidelines). The CU has been endorsed by the three institutions, after an exchange of letters between Mr Buzek, Mr Barroso and Mr Martonyi (Hungarian Presidency) <sup>(7)</sup>.
10. The CU builds further on the Commission communication and streamlines the practices established thereafter by the European Parliament and the Council. It sets out the practical arrangements, agreed clarifications and preferences applicable to delegations of legislative power under Article 290 of TFEU. It contains new models for Articles and recitals.

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3 COM (2009) 673.

4 Articles 2 (2) and 5a of the Comitology Decision

5 Document of the Council n° 17477/09

6 P7\_TA(2010)0127

7 Letter from Mr Barroso to Mr Buzek of 25 May 2011.

11. The following guidelines serve to develop further the practical operation of the preparatory and adoption phases of delegated acts. They are not of a definitive nature; they are necessarily a ‘work in progress’ which may need to be updated regularly. Moreover, the Commission remains free to adapt its institutional stances and internal procedures.
12. These guidelines do not repeal the communication but update and build up the contents of it. However, they replace the instructions given to the services by the following notes: SEC (2009) 1578 and 1730, SEC (2010) 583.
13. It is also very useful to refer to existing basic legislative acts adopted as from 1<sup>st</sup> December 2009 and containing delegations of powers under Article 290. A table of these acts may be consulted at the following address:  
[http://www.cc.cec/home/dgserv/sg/i/comitology/delegated\\_alignment\\_en.htm](http://www.cc.cec/home/dgserv/sg/i/comitology/delegated_alignment_en.htm)

## II. — Delineation

### Scope of delegated acts

#### How to differentiate delegated and implementing powers

##### II.A. — Basic Rules as to the Scope

14. Firstly, a delegation of power in the sense of Article 290 is possible only in a legislative act <sup>(8)</sup>, i.e. basic acts adopted by ordinary or special legislative procedure. Acts which are not adopted by such procedures – such as Council decisions concluding international agreements pursuant to Article 218 TFEU or Council regulations based on its Article 31 fixing autonomous Common Customs Tariff duties – cannot delegate powers to the Commission under Article 290.
15. Secondly, a delegation of power under Article 290 only covers acts of general application. Individual measures cannot be subject to such delegation. On the other hand, implementing acts can be individual or general.

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<sup>8</sup> See the definition of legislative acts in Article 289 (3) of TFEU.

16. Thirdly, as it is clearly stated by Article 290 (1), second subparagraph, last sentence, a delegation of power cannot embrace essential elements of an area. A power delegated to the Commission under this provision of TFEU must be limited to “non-essential elements”.
17. This concept - “non-essential elements” – is not entirely 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.
18. 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”<sup>9</sup>.
19. Fourthly, 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 of TFEU.
20. Finally, it has to be underlined that 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. 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.

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<sup>9</sup> Case C- 240/90 Germany vs. Commission, §§ 36 and 37.

## II.B. — Guidelines on other aspects of the Scope

21. Article 290 only applies to non-legislative acts which are designed to “supplement or amend certain non-essential elements of the legislative act”. These two verbs – supplement and amend – must be compared with the verb implement, which characterizes Article 291.
22. It is rather complicated and probably fruitless to draw up abstract instructions on this issue. It is not a matter of a scientific or magic formula the application of which would mechanically designate the nature of a power conferred on the Commission and allocate acts between Article 290 and Article 291. As it was the case for PRAC/RPS, a case-by-case approach is necessary.
23. Vested with the right of initiative, the Commission has a primary role to play in this regard. Indeed, when it submits its proposal to the legislator, the Commission should know in an unequivocal way the nature of the power it needs. Does the Commission simply need to adopt acts to give effect to the rules determined by the legislator? Or does the Commission consider it necessary to be invested with the power to amend or supplement the rules contained in the future legislation? The global architecture of any new legislative proposal has now in an explicit manner to take into consideration the demarcation line between Article 290 and Article 291.
24. A misuse of the criteria set out in Articles 290 and 291 might not only affect the legality of the basic legislative act but it could also impinge on the validity of subsequent acts adopted by the Commission. If for example the legislator confers implementing powers on the Commission, in a situation where delegated powers should have been conferred, the Commission would not be legally authorised to make use of those powers to amend or supplement the provisions laid down in the basic act. To highlight this point, it is to be noted that the Commission made the following declaration in the context of the adoption of Directive 2011/24/EU of 9 March 2011 on the application of patients’ rights in cross-border healthcare: “The Commission has certain doubts that some of the future acts, which the Commission has been given the power to adopt by the legislative act, would be implementing acts. When exercising its implementation powers, the Commission will not adopt, on the basis of the powers granted, acts that it considers as being delegated acts within the meaning of Article 290.”



a) Basic rules to differentiate delegated and implementing acts

25. Firstly, there is no overlapping between the two articles: if an act qualifies as a delegated act it cannot qualify at the same time as an implementing act. However, a basic legislative act might need both delegated acts and implementing acts to be properly put into operation.
26. In this respect, it is 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, in practice, and given various examples which have been attempted, it has proved difficult to demonstrate that the implementing powers given by the Commission to itself are not in fact a means of “bypassing” the delegation. Thus, it is recommended that services do not use a delegation of power under Article 290 to “create” implementing powers under Article 291. Rather, the services should seek to identify clearly in the basic legislative act where delegated and implementing powers may be needed in tandem.
27. Secondly, Article 290 actually defines delegated acts but Article 291 does not operate in the same way as regards implementing acts. There is no actual 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.
28. Further “uniform conditions” of general application which would serve to supplement or amend a legislative act would be delegated acts in accordance with Article 290 – and it would not be possible in accordance with the Treaty to use implementing acts in such cases. The two categories are mutually exclusive, as it is stated in the communication.

29. Uniform conditions 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 acts to defined situations (for example to grant authorisations for products). Such acts by the Commission can be either of a general nature or be individual decisions. It is the fact that the implementation is taken at Union level, in a centralised manner, which in itself, amounts to “uniform conditions”.
30. Thirdly, the possible nuances between the scope of delegated acts and the scope of the PRAC/RPS introduced in 2006 should not be overstated. The wording of the communication really grasped the difficulty: the definition of delegated acts in Article 290(1) is very similar to that of acts covered by Article 2 (2) of the Comitology Decision, as amended in 2006 to introduce PRAC/RPS.
31. However, the similarity of the criteria does not mean that they must be applied in exactly the same way. Thus, if some services consider that in the past PRAC/RPS was applied in cases where it was not justified then it is entirely possible to rethink the nature of the powers and to apply Article 291 instead of Article 290, if it is clear that the criteria set out in Article 290 are not met.
32. In any case, it is for the legislator formally to amend existing provisions providing for PRAC/RPS and to establish on a case-by-case basis, in the light of the provisions concerned, whether the acts in question actually fall within the scope of Article 290.
33. Finally, there is no link between the political importance of a decision 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.

b) Amendments

34. The verb 'amend' has a precise meaning. It means to make formal changes to a text by deleting, replacing or adding non-essential elements. The procedure provided for under Article 290 thus applies where the legislator envisages the basic act being amended by the addition of new non-essential elements or by the replacement or deletion of non-essential elements in the basic act itself, whether in an article of the basic act or in an annex. On the contrary a delegated act 'supplementing' the basic act will remain a separate act and will not formally change the basic act.
35. 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<sup>10</sup>. Thus, a formal amendment of a legislative act might relate not only to the text of one or more articles in the enacting terms but also to the text of an annex. The fact that the annex contains purely technical measures does not change its nature as being part of the legislative act.
36. Sometimes the updating of an annex does not imply any input from the Commission. For example, the Commission may in certain cases be under the obligation to act as a scribe and only duplicate in an annex 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 has no influence in the process; it does not exercise any "power" but merely, for example, transmits information to the Official Journal of the European Union.
37. In such circumstances the use of annexes should be avoided and the Commission should simply be asked to "make public" the relevant information. Where the use of an annex for such information is unavoidable, the basic act could clearly state that the annex is published for information purposes only and that the Commission is to update it on the basis of information provided by the Member States. Using this procedure could avoid the use of delegated acts.

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<sup>10</sup> The insertion of 'empty annexes' should be avoided. If the legislator considers that annexes are needed, it should be in a position to establish them and to delegate powers to the Commission only to modify them.

38. However, if the legislator insists on making use of a delegation of power under Article 290 to modify such annex, the delegated acts adopted by the Commission which simply reproduce some factual information should not be subject to the right of objection of the legislator, given that the Commission has in practice no margin of manoeuvre.

c) Supplement vs. Implement

39. 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) and the verb 'implement' (Article 291).
40. As already acknowledged by the communication the word "supplement" is not readily or easily defined. Basically, a delegated act which supplements a legislative act takes the form of a separate act imposing new non essential rules, new norms. The premise of a delegation is that the 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. A delegated act will always deal with the content, the substance of the legislation.
41. In contrast the verb 'implement' envisages the situations in which there is no need to establish any new rules or norms; the legislative act is complete and the sole purpose of any subsequent 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.
42. For example, where the Commission is empowered to authorise the use of a chemical product on the basis of criteria established by the legislative act, that decision implies implementation by the Commission. The Commission makes use of the legislative rules and simply applies them to a concrete situation. Conversely, 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 can be done only by means of a delegated act.

43. A good tool to help in distinguishing “supplementing” and “implementing” 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 basic 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 legislation; such decision would normally remain within the ambit of Article 291.
44. 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) will be a delegated act. 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 obligation placed on the Member States but merely permits them to give effect to those obligations in a harmonised manner.

### III. — Delegations of powers

#### How to prepare a legislative act containing a delegation of power

45. Above all, services must bear in mind that legislative acts must contain provisions consistent with the standard clauses attached to the CU. Only very exceptional circumstances could justify the insertion of recitals or provisions departing from the agreed models. It is no longer possible to make use of the models attached to the communication or to the note SEC (2010) 583.

### III.A. — Alignment of the acquis

46. There are two categories of new basic acts:
- Some basic acts are completely new; they contain new substantial rules possibly associated with powers conferred on the Commission;
  - Others modify existing basic instruments, possibly amending in whole or in part their comitology provisions.

The first category does not raise any major difficulty: all rules concerning powers conferred on the Commission must be in line with Article 290 and/or Article 291, depending on the nature of the powers conferred – delegated or implementing powers.

The second category raises the issue of “alignment” to TFEU, either as regards PRAC/RPS<sup>(11)</sup> or as regards acts that had never been aligned to PRAC/RPS because they were not adopted under co decision.

47. Concerning the alignment, the Commission made the following statements in the context of the new Comitology Regulation:

Concerning basic acts not aligned to PRAC/RPS:

“The Commission will proceed to an examination of all legislative acts in force which were not adapted to the regulatory procedure with scrutiny before the entry into force of the Lisbon Treaty, in order to assess if those instruments need to be adapted to the regime of delegated acts introduced by Article 290 of the Treaty on the Functioning of the European Union. The Commission will make the appropriate proposals as soon as possible and no later than at the dates mentioned in the indicative calendar annexed to this declaration<sup>(12)</sup>.”

While this alignment exercise is underway, the Commission will keep the European Parliament regularly informed on draft implementing measures related to these instruments which should become in the future delegated acts.”

Concerning basic acts already aligned to PRAC/RPS:

“As regards legislative acts in force which currently contain references to the regulatory procedure with scrutiny, the Commission will review the provisions attached to this procedure in each instrument it intends to modify, in order to adapt them in due course according to the criteria laid down in the Treaty. In addition, the European Parliament and the Council will be entitled to signal basic acts they consider important to adapt as a matter of priority.”

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<sup>11</sup> See COM (2009) 673, page 3, point 2.1.

<sup>12</sup> VP Šef•ovi• already sent a list to the European Parliament in July 2010. The list and the indicative calendar have been updated in the declaration made in the context of the new Comitology Regulation.

The Commission will assess the results of this process by the end of 2012 in order to estimate how many legislative acts containing references to the regulatory procedure with scrutiny remain in force. The Commission will then prepare the appropriate legislative initiatives to complete the adaptation. The overall objective of the Commission is that, by the end of the 7th term of the Parliament, all provisions referring to the regulatory procedure with scrutiny would have been removed from all legislative instruments.”

48. Therefore:
  - as regards legislative acts not aligned to PRAC/RPS, services must prepare the appropriate legislative proposals designed to adapt the basic legislative acts mentioned in the list annexed to the declaration, in accordance with the calendar contained in that list; and
  - as regards legislative acts already aligned to PRAC/RPS, services must examine carefully all the legislative acts they intend to modify in the period up until the end of 2012, in order to include the ‘alignment issue’ in these potential legislative proposals.
49. As a matter of principle, it is highly recommended to advance the alignment and settle as soon as possible the PRAC/RPS issue in the whole acquis. There is no advantage in delaying this exercise; if, at the end of 2012, too many legislative acts still contain references to PRAC/RPS, the Commission will have to prepare a heavy and complex alignment exercise, either by means of omnibus proposals or through a great number of individual proposals tabled at the same time.
50. It should also be noted that the measures adopted by the Commission under the former comitology procedures remain valid until they are modified or repealed or they cease to have effect. The alignment of a legislative act to TFEU provisions does not render illegal the measures adopted before.

### III.B. — Objectives, content and scope of the delegation

51. The new configurations of powers conferred on the Commission imply that our legislative proposals should be conceived differently than before. The conferral of power on the Commission of whatever nature should now be made clear and explicit. Where the Commission is given the power to amend formally the act or to add to it a set of new rules (“to supplement”), this must be said clearly and explicitly.

52. 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” – 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.
53. As 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?

### III.C. — Duration of the delegation

54. The communication explained the numerous disadvantages of the practice of strict ‘sunset clauses’ whereby there is an automatic time limit on the powers conferred on the Commission, thus essentially compelling it to present a new legislative proposal to renew the delegation on the expiration of that time limit.
55. Thus, the stated preference of the Commission is to have delegations of power of indeterminate duration.
56. If some services consider 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 inter service consultation.
57. It is appropriate to foresee a right of revocation<sup>(13)</sup> where the length of the delegation of power is of an indeterminate duration.

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<sup>13</sup> See below, section IV.



58. If it appears – during the preparation of the proposal of a legislative instrument, or during its negotiation – that a specific expiry date for the delegation of power has to be foreseen, the following options are recommended:
- A fixed duration – for example of 5 years – with automatic renewal: in such a case, the condition sine qua non of an automatic renewal is that the Commission presents a report before the expiry of the delegation.
  - If a real and strict “sunset clause” is inevitable, then the Commission should make clear that it is necessary to allocate sufficient time to give full effect to the powers delegated to it – for example, seven or ten years.
59. The three options contained in the relevant standard clause annexed to the CU (Article a (2)) capture these possibilities. In cases where the legislator decides not to accept an indeterminate duration, the “compromise option” (fixed duration + tacit renewal) is clearly seen as the preferred option. Point 9 of the CU reflects this inclination:
- “9. Where a determined period of time is provided, the basic act should in principle provide for the delegation of power to be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes the extension not later than three months before the end of each period. The Commission shall draw up a report in respect of the delegated power not later than nine months before the end of each period. This paragraph does not affect the European Parliament or the Council’s right of revocation.”
60. It has to be underlined that:
- If the Commission does not fulfil its obligation to present a report in due time, the delegation will not be renewed;
  - The decision of the European Parliament or of the Council to oppose the extension is to be understood as a ‘specific revocation’ which does not affect the ‘general right of revocation’ (see below). This ‘specific revocation’ nevertheless has to follow the same rule as regards the majority required (QMV in Council and majority of component members in EP);
  - The decision not to extend will be published in the Official Journal of the European Union (point 17 of the CU), at the initiative of the institution responsible for the revocation.

### III.D. — Rights of the Legislator

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

61. 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.
62. The legislator is not obliged to impose these two conditions cumulatively; they are independent of one another. For instance, the right of objection might sometimes prove difficult to use, particularly when the legislator wishes to confer on the Commission the power to adopt delegated acts with a particularly short deadline or strict timetable.
63. However, in principle a delegation of power would be subject to the two means of control established by Article 290. The basic legislative act must explicitly provide for them; they do not follow automatically from the Treaty.

#### (i) Right of objection

64. Regarding the right of objection, the basic act must fix the deadlines thereof. The European Parliament or the Council may object to a notified delegated act within the time-period laid down in the basic legislative act. Usually, this time period is of two months (extendable by two months at the initiative of the European Parliament or the Council (see the model Article annexed to the CU).
65. The period for objection is defined on a case-by-case basis 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. But such exceptions should be duly justified in the basic act – for instance in a recital.
66. There is the possibility for what is called, especially in the European Parliament, an “early approval”; this implies that the legislator may explicitly decide “not to express objections”. This is reflected in the model Article a, paragraph 5 (in bold and underlined characters):

“5. 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 [2 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 [2 months] at the initiative of the European Parliament or the Council.”

67. An urgency procedure allows the Commission to adopt, publish and apply immediately a delegated act which nevertheless remains subject to the right of objection.
68. According to the CU, urgency procedures should be reserved for exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises. This list is not exhaustive; other policy areas may give rise to situations where urgent delegated acts have to be taken.
69. In its legislative proposal, the Commission should justify the choice of an urgency procedure. All cases in which the urgency procedure may be used should be specified in the basic legislative act as explicitly and clearly as possible.
70. The standard provision on the urgency procedure is to be inserted in any basic legislative act which foresees such a possibility for the Commission (see the model Article b annexed to the CU). This model does not need any further comment.

#### (ii) Right of revocation

71. 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.
72. Whereas objection is a specific veto directed at a clearly defined delegated act, revocation is a general and absolute withdrawal of the delegated powers from 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.

73. As it has been stated before, there is no legal obligation for the Commission to propose systematically that the legislator should be vested with a right of revocation; however, insofar as, in principle, the Commission's proposals will contain delegations of indeterminate duration, it is appropriate to foresee a right of revocation, which could be seen as "compensation".
  74. The standard provision on the right of revocation is to be inserted in any basic legislative act which foresees such a possibility for the legislator (see the model Article a, paragraph 3 annexed to the CU). This part of the model does not need any further comment.
- b) Legislative acts adopted in accordance with a special legislative procedure
75. 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
  76. 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 decision-making process, it seems logical to exclude the possibility for it to interfere in the adoption and entry into force of the acts designed to amend or supplement the legislation.
  77. This solution has been endorsed in Council Regulation (EU) No 973/2010 of 25 October 2010 (autonomous Common Customs Tariff duties for Azores and Madeira). It has also to be noted that in such a case the European Parliament is 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 (see Article 10 of Regulation 973/2010).

(ii) Adoption by Council, consent from European Parliament

78. There is, as yet, no such precedent for situations where a legislative act is adopted by the Council after obtaining the consent of the European Parliament.
79. It is the view of the Commission that in such cases the European Parliament should be able to enjoy the same rights of control than the Council – revocation and objection. Inasmuch as the European Parliament has the right to block the adoption of the legislative act, it should accordingly 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.
80. Therefore, the rights of control of the legislator should be similar to the ones provided for in legislative acts adopted under the ordinary legislative procedure.

III.E. — Other standard texts to be inserted in the basic legislative act

81. The consultation of experts and the information of the legislator<sup>(14)</sup> must be reflected in the recitals of basic legislative acts. The agreed formulations are the following:

“It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.”

82. The Commission cannot accept a formulation which would go beyond this recital. It is excluded, in particular, to impose on the Commission specific means of consultation or new formulas such as “the Commission shall take the almost account of the experts views”; it is also not acceptable to identify in the basic act the experts the Commission would have to consult.

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<sup>14</sup> See below, section IV.A points a) and b)

83. In addition, the elements of the recitals are not to be mirrored in the operative part of the legislative act concerned. They are self standing political statements designed to ensure the appropriateness of the preparatory phase of the delegated acts. Under no circumstances should a legislative act contain these elements in any of its articles.
84. Finally, the Commission should not be asked to make any “declaration” concerning the preparatory phase of delegated acts – this issue has already been settled and there is no need to reopen it in each legislative file. The communication and the CU clearly suffice to ensure both Council and European Parliament that the Commission will conduct appropriate consultations before the adoption of any delegated act.

## IV. — Delegated acts

### How to prepare, adopt and make enforceable a delegated act

#### IV.A. — Preparation of delegated acts

85. The question of the consultation phase in the preparation of delegated acts has certainly been one of the most sensitive issues of the implementation TFEU. Article 290 contains no provision referring directly or indirectly to the procedure for adopting delegated acts. Using the powers conferred on it by the legislator the Commission adopts the acts necessary to attain the objectives laid down by the basic instrument.
86. The Commission enjoys a large measure of autonomy in this matter. In particular, the legislator cannot impose a mandatory consultation of representatives of the Member States. “Comitology procedures” or any other similar systems are clearly excluded from the scope of Article 290.
87. The Commission needs to harness the expertise of the relevant national authorities of all the 27 Member States, given that it is those authorities which will be responsible for implementing the delegated acts once they have been adopted. 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 basic legislative act.

88. The Commission attaches the highest importance to this work, which makes it possible to establish an effective partnership at the technical level with experts in the national authorities. However, that being said, it should be clear that these experts have no institutional role in the decision-making process.

89. The communication and the CU contain important elements in this regard. Paragraph 4 of the CU deserves to be entirely quoted:

“The Commission, when preparing and drawing up delegated acts, will ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council and carry out appropriate and transparent consultations well in advance, including at expert level. The European Parliament and the Council shall indicate to the Commission their respective functional mailboxes to be used for the transmission of documents relating to these consultations.”

90. This paragraph entails a series of duties for the Commission services.

a) Consultations of experts

91. Except in cases where the preparatory work does not require any new expertise or where delegated acts are to be adopted under the urgency procedure, the Commission services should systematically consult experts.

92. Consultations must involve experts from all the 27 Member States. In practice, invitations to meetings to prepare delegated acts should, in principle, be sent to the 27 Permanent Representations, as Member States are responsible for the designation of the experts who will represent their interests in this regard.

93. Consultations have to be carried out in a timely manner to give the experts an opportunity to make a useful and effective contribution to the Commission. To do so, the services should use existing expert groups (which might be restructured according with the needs) or create new ones if it appears to be absolutely necessary – bearing in mind the need to avoid “inflation” of new expert groups exclusively devoted to the preparation of delegated acts. Services could also organise ad hoc meetings of experts, without formally registering a group. These meetings of experts (expert groups meetings or ad hoc meetings) are always chaired by the Commission.

94. Under no circumstances may a comitology committee be asked to prepare a future delegated act. It is not excluded to consult experts who often participate in a given comitology committee. An "expert meeting" could be held on the same day and with the same composition as a comitology committee meeting. However 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.
95. Meetings of experts may include observers, where appropriate. It is particularly relevant where international organisations (such as the European Space Agency) or third countries (especially EEA countries, or Switzerland) are directly interested in the *acquis* as a consequence of either a basic act or an international agreement.
96. The preparation of delegated acts may also include consultations with stakeholders, which should however not take priority over the conclusions drawn up by the Commission after the meetings with the experts designated by the Member States.
97. If so requested by the European Parliament, the Commission may also invite Parliament's experts to attend those meetings (point 15 of the Framework Agreement between the EP and the Commission)<sup>(15)</sup>.
98. A request from the European Parliament to be invited must come from the Chair of the relevant parliamentary committee and must be addressed to the Director-General of the DG responsible<sup>(16)</sup>. This DG is not legally obliged to comply with the request but the political consequences of a refusal must be fully taken into account. Parliament's experts may be any persons appointed by the EP.
99. It is essential that experts know sufficiently in advance that they are invited to a meeting during which the preparation of a delegated act will be examined. Reference to this should be explicitly included in the agenda of the meeting.

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<sup>15</sup> OJ L 304, 20.11.2010. Guidelines have already been provided on this issue in the following note: SEC(2010)1568 of 14 December 2010.

<sup>16</sup> See SEC(2010)1568.



100. No vote takes place and there is no formal opinion. However, the Commission services have to inform the experts of the conclusions they believe should be drawn from the discussions, their preliminary reactions and how they intend to proceed. This information could be made orally or in writing (in the latter case some short minutes of the meeting could be sent to the experts).
101. It is up to each service to determine the nature and contents of the documentation made available to the members of the expert groups. The working document on which the experts are consulted should contain adequate information to allow the experts to know the substantive obligations/rights which are to be dealt with in the delegated act.
102. There is no obligation to provide expert groups with a final draft of the delegated act concerned but it is indispensable to obtain a technical reaction from experts on the substance of the text the Commission intends to adopt, and also a first political feedback in order to avoid a potential veto by the Council or the European Parliament after the adoption of the delegated act.
103. Formal inter service consultations and all the other steps of the decision-making process within the Commission are in principle conducted after the completion of the consultation phase. If some significant new elements are introduced during this internal process, there might be a need for a re-consultation of the experts who were previously involved, if necessary in writing.

b) Information of the legislator

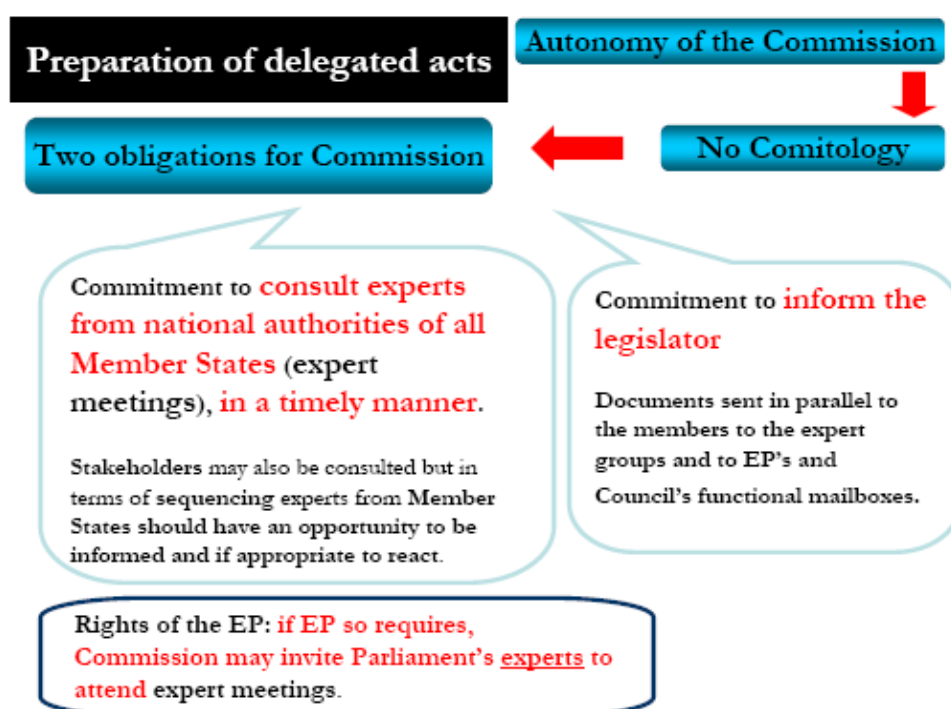
104. The European Parliament and the Council are to receive all relevant documents during the preparation of delegated acts, in a simultaneous, timely and appropriate manner.
105. Each time an expert group meeting is convened in order to prepare a delegated act, the service responsible must send to the EP and to the Council all the documents sent to the members of the expert group, and at the same time. The e-mail by which documents are sent to EP and Council must explicitly contain a mention in its title which makes a clear reference to the fact that the meeting concerns the preparation of a delegated act.

106. Functional mailboxes are available for that purpose:

For the European Parliament: [Reunions-Comm-ExpNat@europarl.europa.eu](mailto:Reunions-Comm-ExpNat@europarl.europa.eu)

For the Council: not yet available – relevant Council SG staff shall receive the documents in the meantime.

107. Consultation of the experts and information of the legislator may be summarized as follows:



c) Other issues related to the preparation of delegated acts

(i) Impact assessments

108. It is the primary responsibility of each service to determine the scale of expertise required to prepare a delegated act. All services should bear in mind the necessity, in certain circumstances, to have recourse to impact assessments.

109. All Commission initiatives with significant impacts or which define future policy should now have an impact assessment, and this will include certain key delegated acts<sup>(17)</sup>.

(ii) TBT notifications – SPS notifications

110. 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.

111. This agreement contains transparency provisions and in particular the obligation to notify technical regulations and conformity assessment procedures at a draft stage (link to the agreement under [http://ec.europa.eu/enterprise/tbt/tbt\\_repository/Libdoc\\_1\\_EN.pdf](http://ec.europa.eu/enterprise/tbt/tbt_repository/Libdoc_1_EN.pdf)).

112. 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.

113. 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.

114. The objective of the notification procedure is to inform other WTO Members of upcoming changes of legislation on products and give them the opportunity to comment on the planned changes. The EU, as a WTO Member, is bound by this international obligation.

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<sup>17</sup> For more information on impact assessments:  
[http://ec.europa.eu/governance/impact/commission\\_guidelines/commission\\_guidelines\\_en.htm](http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm)

115. It is therefore important that services, when planning the adoption of delegated acts containing technical regulations or conformity assessment procedure, foresee the necessary time for the TBT notification.
116. It means that the notification of such a draft delegated act has to take place before its adoption by the Commission. Thus, sufficient time should be ensured so as to allow for a comment period of 60 to 90 days for the third countries and to allow for any comments to be analysed and to be replied to before the act is adopted by the Commission.
117. The draft thus needs to be notified to the WTO before it is at the stage of an imminent adoption by the Commission.
118. 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.
119. The notification should therefore be made at an early stage. The draft should not be at a stage where it has been discussed to such an extent that no changes can be introduced anymore, given that the purpose of the procedure is to inform third countries on the draft at a time when it can still be modified. Changes that appear during the adoption procedure can still be communicated after the original notification to the other WTO Members and only if they are very substantial a new comment period should be given.
120. Of course, the other consideration in the time line is that it is necessary that a comprehensive text of a proposed technical regulation or conformity assessment procedure exist so that it can be notified and thus the draft should already be at a stage to be communicated outside the Commission.
121. In this regard it is recommended to notify the working document on the basis of which the experts are consulted (see above).
122. The notification obligation under the WTO Agreement on the application of Sanitary and Phytosanitary measures (the SPS Agreement) is very similar and delegated acts containing sanitary and phytosanitary measures should be notified to the WTO along the same lines than under the TBT Agreement explained above.

#### IV.B. — Adoption of delegated acts

123. A delegated act is adopted by the college prior to its notification 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 EP and the Council may object to the delegated act (and its possible extension).
124. Further, in accordance with the communication, 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.
125. The title of the delegated act must contain the adjective "delegated".
126. 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 control 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.
127. If the responsible DG together with DGT, consider that it is necessary to verify the translation of a given delegated act, where appropriate with the help of the experts consulted beforehand, such a control must in principle be carried out before adoption by the college.
128. In exceptional cases, after the adoption by the college, and before the publication, should the responsible DG together with the DGT consider that it is necessary to make purely minor linguistic modifications on an adopted delegated acts, following requests received during the period for objection (see below, section IV.F), those modifications can be introduced by DGT via a sub-delegation procedure (C(2010)3031), provided that the criteria of that decision are met.

#### IV.C. — Notification of delegated acts upon adoption

129. The Greffe prepares a notification letter to the European Parliament and to the Council. This letter is transmitted as soon as possible upon adoption of the delegated act.
130. The notification is made in all the official languages of the institutions of the Union. The Greffe will therefore need to await the availability of all language versions before adopting the delegated act.
131. The transmission of the notification letter triggers the time-period for the right of objection.
132. The delegated act is not to be published in the Official Journal of the European Union until the end of the time-period for objections, unless before that date both the European Parliament and the Council have informed the Commission of their intention not to express any objection (see point 11 of the CU and the explanations below in section V.F).

#### IV.D. — Publication in the register of documents of the Commission

133. A delegated act adopted by the Commission and notified to the European Parliament and to the Council will be made public in the register of documents of the Commission.
134. A visible disclaimer must accompany this publication: “This delegated (Regulation/Directive/ Decision) has not yet entered into force. It is subject to the right of the European Parliament and of the Council to express objections, in accordance with Article 290 (2) of the Treaty on the Functioning of the European Union.”

#### IV.E. — Transmission to the service responsible for publication

135. After its adoption by the college, a delegated act is transmitted to OPOCE by the Greffe, with an ‘embargo’ on publication. OPOCE will not be authorized to publish it until an explicit green light is given to it (principle of “no news, bad news” – see point 164 for the “green light” procedure).

#### IV.F. — Exercise of the rights of the Legislator

136. In order to exercise either of the powers of control granted to it the European Parliament must act by a majority of its component members and the Council by qualified majority, as provided for in the second subparagraph of Article 290(2).

##### a) Objections

##### (i) Timelines for expressing objections

137. The time-period for objection is triggered by the notification letter accompanied by all the language versions of the delegated act adopted by the Commission.

138. In practice, where the deadline is of 2 months, with a possible extension of 2 additional months, it is to be expected that the European Parliament and the Council will in most cases remain silent and the delegated act will be published at the expiry of the two month-period.

139. The extension – which is automatic upon request of one of the two branches of the legislative power<sup>18</sup>– will most probably be 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.

140. In order to ensure that the European Parliament and the Council are able to exercise their rights within the time limits laid down in each basic act, the Commission is not to transmit any delegated acts from 22 December until 6 January and from 15 July until 20 August.

141. These periods only apply when the period of objection is based on two months with a possible extension for an identical period.

142. These periods do not apply for delegated acts adopted under the urgency procedure. Where a delegated act is adopted under the urgency procedure during these periods, the time limit for objection provided for in the basic legislative act starts to run only when this period is finished.

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<sup>18</sup> It has to be a request from the institutions themselves and not only from their secretariats.

143. The three institutions are to agree by 1 October 2013 on an arrangement for the notification of delegated acts during the European Elections in 2014.

(ii) Grounds

144. Unlike the PRAC/RPS, the grounds for objection are not defined. The right to express objections in principle fall 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 objections (any legal act of the Union must state the reasons on which it is based, in accordance with Article 296, second paragraph, of TFEU).

145. 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 objections. If, for example, the institution that expressed objections shows clearly that the Commission has exceeded the framework of the delegation of power, this would enable the Commission, if necessary, to opt for proposing a modification of the legislative act instead.

146. On the basis that a decision to object to a delegated act will specify to whom it is addressed – the Commission – it will not need to be published in the Official Journal of the European Union in accordance with Article 297 (2), last subparagraph of TFEU.

(iii) Consequences

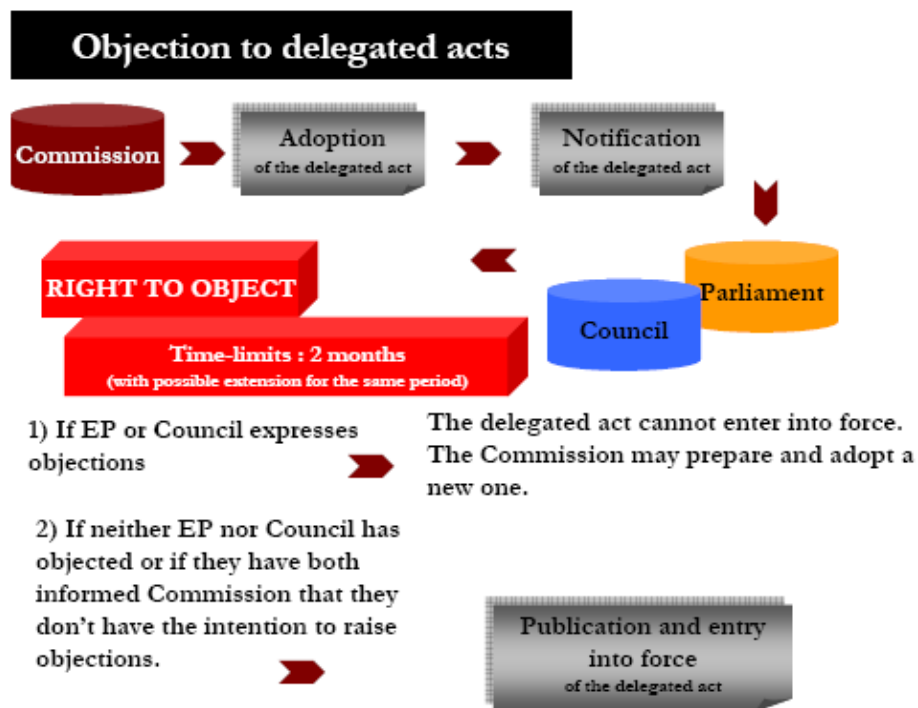
147. An objection – from either the European Parliament or the Council (one is objection sufficient) – means that the delegated act cannot be published and thus cannot enter into force. The Commission may either prepare a new delegated act – and in this case must respect all the procedural steps described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

(iv) 'Early approval'

148. There is no specific operational requirement for an 'early approval' by which the legislator may explicitly decide 'not to express objections' before the end of the period (see section III.D, point 61).



149. 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. In the European Parliament, this would probably be done in the same way as it is done currently for the ‘early approval’ to draft measures under PRAC/RPS, by means of a consultation of the Conference of Committee Chairs (CCC), at the initiative of the Chair of the relevant Parliamentary Committee. If the CCC endorses the ‘early approval’, a draft letter stating that the EP had no intention to object is submitted to the President of the European Parliament. When signed, this letter is addressed to the President of the Commission.
150. The following flow chart recapitulates the mechanism of the right to object.



b) Urgency

151. A delegated act adopted under the urgency procedure is immediately published and is already in force where it is notified to the European Parliament and to the Council. The notification must state the reasons for the use of the urgency procedure. Those reasons must appear in a recital of the delegated act concerned.

152. The delegated act adopted under the urgency procedure is applicable as long as no objection is expressed within the period provided for in the basic act. Usually, this period is similar to the one provided for in non-urgent cases: two months with possible extension of two months.
153. If objections are expressed the Commission must repeal the act without delay following the notification by the European Parliament or the Council of the decision to object. It is the responsibility of the relevant DG to prepare the decision by which the Commission will repeal the delegated act concerned.
154. 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 foresee such a possibility, they should informally forewarn the secretariats of the European Parliament and the Council via the functional mailboxes mentioned above.
155. This “early warning system” is comparable to the mechanism established for the PRAC/RPS in the interinstitutional agreement between the European Parliament and the Commission<sup>(19)</sup>.

c) Revocation

156. A decision to revoke may be taken at any time after the entry into force of the basic legislative act providing for it.
157. 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.
158. The CU contains rules on mutual exchange of information, in particular in the event of a revocation:

“19. 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.

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<sup>19</sup> See OJ C 143, 10.6.2008, page 3, point 16.

“20. 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.”

159. 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.
160. 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.
161. It does not affect the validity of any delegated acts already in force.
162. 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 be published and enter into force. Only delegated acts already in force are not retroactively affected by a decision to revoke.

#### IV.G. Publication and entry into force

163. After the expiry of the period for objection, or where both EP and Council have signalled their ‘early approval’, a delegated act may be published and can enter into force (and be applied in accordance with its provisions).
164. The embargo mentioned in point 135 is lifted by OPOCE only when the service responsible gives its explicit green light to the Greffe (SG.A.3) via an e-mail to the functional mailbox SG PUBLICATIONS AU JO.

## V — Conclusions

### Recapitulation of key recommendations

#### DEMARCATIION LINE BETWEEN ART. 290 AND ART. 291

- Comply only with the legal criteria established by the Treaty – and disregard some other biased criteria: the ‘political sensitivity’ or the ‘technicality’ of the measures to be taken is not relevant.
- Assess the objectives of the power to be conferred on the Commission. What do we want to achieve? Why do we need such powers?
- Ask whether the power conferred on the Commission is to determine “WHAT” the Member States – or other persons or entities concerned by the legislation – must do (delegated powers) or to determine “HOW” they are to act in carrying out their obligations under the basic act (implementing powers).
- Examine whether the Commission is empowered to take action as if it were substituting for the legislator to impose new normative rules (delegated powers), or merely to give effect to existing rules and thus ensure a centralised and uniform implementation (implementing powers).

## ALIGNMENT

- 150 basic acts with no reference to PRAC but falling under ordinary legislative procedure since the TFEU must be aligned with Article 290.
- As regards existing basic legislative acts referring to PRAC (more than 300), services are asked, from now to the end of 2012, to review the provisions attached to this procedure in each legislative act they intend to modify, in order to adapt them in due course according to the criteria laid down in the Treaty.

## CONTENTS OF A LEGISLATIVE ACT WITH DELEGATIONS OF POWERS

- Services must use the standard clauses attached to the Common Understanding.
- Any delegation of power must be explicitly and precisely defined.

## DURATION OF A DELEGATION OF POWER

- Services should propose a delegation of power conferred for an indeterminate period of time.
- ‘Sunset clauses’ should be rejected.
- A fixed duration is acceptable only if it is accompanied by a mechanism of tacit extension accompanied by a reporting obligation for the Commission.

## PREPARATION OF DELEGATED ACTS

- Commission is autonomous. There is no committee procedure (comitology) to be followed and the legislator cannot impose comparable mandatory mechanisms by which the Member States would be allowed to deliver formal opinions in the course of the preparation of delegated acts.
- Services must carry out appropriate and transparent consultations well in advance. Those consultations take the form of expert meetings where all the Member States are invited. Agendas of such meetings must contain an explicit mention of the preparation of delegated acts. Working documents on which consultations take place should contain all adequate information to allow the experts to know the substantive obligations/rights which are to be dealt with in the delegated act.
- Comitology committees cannot be used to consult Member States. Expert group meetings or ad hoc meetings should be used for that purpose.
- European Parliament may request to be invited to such expert meetings, in accordance with the Framework Agreement.
- A simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council is ensured by the services (use of functional mailboxes).
- Third States, in particular EEA countries, or Switzerland, are invited to expert meetings where they are directly interested in the *acquis* as a consequence of either a basic act or an international agreement.
- International obligations, such as TBT or SPS notifications, must be taken into account in the preparatory phase of delegated acts.
- Any checks aiming to ensure the correctness of the different language versions, including through the experts consulted beforehand, should take place in principle before the adoption of the delegated act by the College.
- The preparatory phase must be summarized in an explanatory memorandum accompanying the delegated act and setting out in a more detailed manner the grounds for the act and providing information about the preparatory work undertaken by the Commission.

## **RIGHTS OF CONTROL OF THE LEGISLATOR**

- The legislator only, not the Member States, may control delegated acts.
- The right to express objections may be exercised only over an adopted delegated act which has been notified to the legislator in all languages.
- There are some recess periods during which no notification can take place.
- In principle the period for objection is of two months extendable by two months.
- Services should follow closely each delegated act notified to the legislator, in order to be able to launch the publication and make possible the entry into force of a delegated act where the period for objection has elapsed.
- There are possibilities to adopt and publish immediately delegated acts, prior to their notification, but such urgent procedures must be explicitly foreseen in the legislative act, in duly justified cases.

### Annexes:

- 1) Communication from the Commission to the European Parliament and to the Council on the implementation of Article 290 of the TFEU
- 2) Common Understanding on delegated acts