

## E-ALERT | Government Affairs

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### REFORM OF THE EU 'COMITOLGY' PROCEDURE

On 1 March 2011, the Regulation on the [Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers pursuant to Article 291 TFEU](#) (Implementing Powers Regulation) will take effect. The Regulation replaces three of the four procedures set out in the old comitology decision and marks the latest step in the reform of the EU legislative process brought about by the Lisbon Treaty. It complements the rules on delegated acts in Article 290 of the Treaty on the Functioning of the European Union (TFEU), which replaces the fourth procedure of the old comitology decision.

**Knowledge of the new rules on delegated and implementing acts, and in particular the complex political interplay among the European Commission (Commission), the European Parliament (EP), and the Member States, is essential for any company interested in affecting the outcome of the EU legislative process, as these rules will touch virtually every area of EU legislative activity.** Indeed, it is estimated that every year the EU adopts some 2,000 measures pursuant to these procedures. Moreover, while these measures were once used in only a relatively few technical areas, their use today is standard practice.

#### BACKGROUND

The TFEU, which was adopted as part of the Lisbon Treaty, brought about a fundamental overhaul of the EU legislative process. First, it established the distinction between legislative and non-legislative acts, and second, it introduced two types of non-legislative acts that can be adopted pursuant to legislative acts: delegated acts ([Article 290 TFEU](#)) and implementing acts ([Article 291 TFEU](#)).

Legislative acts are usually adopted following the EU's ordinary legislative procedure, known as "co-decision." It starts with a proposal by the Commission, and then proceeds in a series of steps to consideration by the full EP and the Council. The outcome of this process, usually in the form of directives or regulations often provides that certain details of the legislation should be further elaborated at a later time in the form of delegated acts or implementing acts.

"Delegated acts" are measures that "supplement or amend non essential elements of earlier legislative acts". "Implementing acts" are measures that give effect to legislative acts without amending or supplementing them. The distinction between delegated acts and implementing acts is for practical reasons very important and yet at the same time also very obscure.

The distinction is of practical importance because the procedures for adopting delegated acts and implementing acts are significantly different. In particular, while the adoption of delegated acts involves the EP and the Council on an equal footing, the EP's role in the adoption of implementing acts is much less significant. In both procedures, the Commission plays a leading role in formulating proposals.

The distinction between delegated and implementing acts is, however, very obscure. The criterion in Article 290 of "supplementing" the non-essential parts of a legislative act suggests a very broad notion of delegated acts; arguably, other than individual decisions, most measures adopted pursuant to legislative acts "supplement" them in one way or another. Moreover, while

the distinction depends on the content of the act finally adopted, it needs to be made at the beginning of the process, as different procedures apply.

The EU legislator often tries to overcome this difficulty by stipulating in the legislative act which of the two procedures is to be used in particular instances. However, the legislator cannot overrule the Treaty. In other words, they cannot provide that delegated acts should be used in instances where the Treaty provides for the use of implementing acts and vice versa. This is important for companies because an act that has been wrongly classified, and thus adopted pursuant to the wrong procedure, is void and can be challenged before the EU courts.

## IMPLEMENTING ACTS

The Implementing Powers Regulation applies to implementing acts pursuant to Article 291 TFEU. It was agreed last December after several months of complex negotiations among the Parliament, the Council, and the Commission. It leaves intact the basic system of committees chaired by a Commission representative, but changes the procedures by which those committees act as well as the controls placed on the Commission.

The main novelty is the introduction of a new “examination” procedure which will apply to a wide range of measures. Examples include implementing measures of general scope; programmes with “substantial implications” (i.e. budgetary implications); measures related to Common Agricultural Policy (CAP) and fisheries, the environment, security and safety, protection of health, and safety of humans, animals and plants, taxation, and Common Commercial Policy (CCP). The Council and the Parliament, following certain guidelines, decide what measures are subject to “examination” in the first place.

The examination procedure specifies two stages during which Commission proposals are reviewed by Member States: First, in the Member State committee, and second in the Appeal Committee. Member States representatives can only block a Commission proposal by a qualified majority vote (QMV) pursuant to [Article 16\(4\) and \(5\)](#) of the Treaty on European Union and, where applicable, to [Article 238\(3\) TFEU](#).

**Member State Committee:** The Commission submits its draft measure to the Member State representatives on the Committee for their consideration. If the Committee votes by QMV in favor of the Commission’s proposal, the Commission can adopt the proposal. If the Committee votes by QMV against the Commission’s proposal, the Commission cannot adopt it but may only submit a new proposal to the Committee, or refer its original proposal to the Appeal Committee.

If the Committee cannot reach a QMV decision in favor or against the proposal (no opinion), the Commission is, in general, free to adopt it. This rule is, however, subject to a variety of exceptions as defined in the Regulation.

**Appeal Committee:** The Appeal Committee is another innovation of the Implementing Powers Regulation. It is also a committee of Member State representatives chaired by the Commission that replaces the Council in its former role as the appeal body under prior comitology procedures. Any Member State can suggest amendments to the Commission’s proposal and the Commission may (but is not required to) include them. The result is likely to be bargaining between the Commission and (individual) Member States. In practice, it is likely that Ministers will often attend the meetings of the Appeal Committee as it must meet at “an appropriate level of representation.”

At the appeal stage, Member States may only block the Commission’s proposal by a QMV vote. This also applies to measures in the area of Common Commercial Policy, with the exception of definitive multilateral safeguard measures, which will require a vote by QMV in favor before the Commission can adopt them. There is also a transitional derogation for the adoption of definitive anti-dumping and countervailing measures. For a period of 18 months, the Appeal Committee

may block the adoption of definitive anti-dumping and countervailing measures by a simple majority (instead of QMV).

Importantly, the Parliament and the Council, as an institution, have a limited role in the examination procedure. They may indicate at any time to the Commission that they consider a proposed measure to not qualify as an implementing measure as defined by Article 291 TFEU, or to exceed the powers granted by the legislation that it seeks to elaborate. In that case, the Commission must review its draft and explain to the Parliament and Council what it intends to do. However, the Commission can still proceed to adopt its proposal if it considers that it qualifies as an implementing act. Thus, the Council and Parliament do not have veto power, but they can, of course, challenge the adoption of the act before the Court of Justice of the EU.

**Date of application:** As from 1 March 2011, the Regulation will replace the former system and will automatically apply to existing legislation, without the need to amend the basic legislative acts in the form of an omnibus act. An important exception concerns the adoption of definitive anti-dumping and countervailing duty measures because the existing basic acts provide that these measures are adopted by the Council and not the Commission. Therefore, the corresponding basic acts must first be amended, and it is expected that this will take place later this year.

## DELEGATED ACTS

The procedures for adopting delegated acts are set out in Article 290 TFEU itself. In addition, the procedures are being elaborated in a ‘Common Understanding’ which describes in further detail how and when the institutions should interact. This ‘Common Understanding’ has been adopted by the Council, but not yet by the Parliament and the Commission.

The procedures for adopting delegated acts present three striking features.

- First, the EP and Council are free to define the scope and procedural details that will apply to delegated acts in each and every basic legislative act, provided, of course, that the act qualifies as a delegated act as defined in Article 290 TFEU.
- Second, the notion of “non-essential part of a legislative act” allows broad use of delegated acts. Hence, in principle, it may be that many acts (for example, the banning of a particular substance) that previously qualified as legislative acts and were adopted through the ordinary (co-decision) legislative procedure, can now be adopted as delegated acts pursuant to Article 290 TFEU.
- Third, perhaps to offset the Commission’s potentially enhanced role, the EP and the Council have been given broad powers to object to any delegated acts and even to revoke the Commission’s delegated powers.

The new procedures envisioned in Article 290 TFEU on delegated acts will progressively take effect, once the legislators have amended the relevant basic legislative acts. A full alignment is anticipated by 2014. The EP and Council are required to specify the powers delegated to the Commission and the procedures that the EP and Council will follow to revoke such powers or to object to any delegated acts adopted by the Commission. One of the major changes is that there is no longer a single, uniform framework for the delegation of powers to the Commission. Rather, the Parliament and Council now have the right to define the objectives, scope, and duration of delegated acts for every individual legislative act, on a case-by-case basis.

Under the system introduced by Article 290 TFEU, the Commission is no longer required to obtain an opinion from Member State Committees. Instead, it must submit its proposed delegated acts for scrutiny directly and simultaneously to the European Parliament and the Council. In practice, however, it is unlikely that committees will disappear, as in particular the Member States, as members of the Council, will need to turn to experts to vet the Commission’s proposal. Thus, in

order to avoid opposition, it is likely that the Commission will consult with expert groups composed of Member State representatives and national ministries and agencies, as well as Members of Parliament and/or EP Committees before submitting proposed delegated acts.

Once the Commission submits its proposed delegated act, the EP - by simple majority—and the Council—by QMV—have the right to object to the delegation and to revoke it. In this connection, both the EP and Council have the right to oppose a delegated act without having to rely on any particular legal justification. They can insist on revocation simply because they are dissatisfied by the Commission's use of its prerogatives. While this represents an extreme mechanism of control that probably will not be used often, it will confer powerful leverage on the Council and Parliament in their dealings with the Commission.

## PRACTICAL IMPACT

Although it is difficult to predict all the consequences of the new rules, several outcomes seem likely as a practical matter:

### Institutional Realignment

- The Commission's powers with respect to delegated acts were also enhanced in the initial phases of the process, but at a cost of greater oversight by the Council and the EP in later phases. Thus, while the Commission retains great influence, it will not be enough for companies to have only the Commission on their side if they wish to ensure a favorable outcome.
- The EP has gained significant new powers under the revised rules, particularly in reference to delegated acts. Thus, companies seeking to influence EU policy in this sphere must have the capacity to advocate effectively before that institution.
- The Council as an institution wields less influence under the new rules, but the Member States acting in the form of various committees retain great influence and will need to be included in any effective lobbying strategy.

### Visibility and Complexity

- The adoption of new rules has drawn attention to a trend that was already underway towards greater reliance on EU policy-making by means of non-legislative acts. Companies that take note of this development and use the rules will have an important advantage over their competitors.
- A key open issue is how the line will be drawn between delegated acts and implementing acts, since this distinction triggers fundamentally different processes of adoption and hence lobbying strategies.
- The classification choice (delegated act versus implementing act) is likely to be a highly sensitive and politicised decision. It probably will not be resolved in a single instance but only over time, and companies need to keep a close eye on the issue as it evolves.

### Need for Forward Looking Strategy

- The EP and Council have wide leeway to decide whether a particular piece of legislation should later be elaborated by means of implementing acts or delegated acts, subject to the important caveat that any such classification must conform to the principles of the TFEU.
- It is probably fair to say that the process for adopting delegated acts is in general more cumbersome than the process for adopting implementing acts. Thus, by lobbying for a particular classification in the basic legislation, companies can set the stage for facilitating (or making more difficult) the adoption of later measures that elaborate the legislation.

- Companies have a recourse when they fail to secure a classification they sought, or competitors secure a classification they oppose. A non-legislative act adopted improperly via the wrong procedure (because it was wrongly classified as an implementing act or a delegated act in the first place) is void and can be overturned in the EU Courts.

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