



Delegated Acts: streamlining the scrutiny

KEY RECOMMENDATIONS

- The EU Council and the European Parliament should better define the scope and conditions of delegation of powers to the European Commission in basic legal acts, which would prevent uncertainties around which provisions qualify for being “essential” when drafting delegated acts
- The co-legislators should give much more consideration to realistic implementation timelines when delegated acts need to be prepared after adoption of the basic act
- The basic act provisions on delegated acts should not become a regular hostage of last-minute political deals in trilogue negotiations
- The Commission should increase the transparency and early involvement of stakeholders when preparing delegated acts, including when their content is prepared by the European agencies
- The co-legislators should significantly reinforce the scrutiny of delegated acts by dedicating sufficient resources to that end
- To aid the improvements in scrutiny, impact assessments must always be carried out on delegated acts with significant effects, which is rarely the case today
- Impact assessments of the basic act should also analyse the choice of delegation better, weighing different regulatory alternatives



COMMENTS

Context

The delegation of powers to the European Commission is one of the widely used legislative tools in modern EU law-making. The delegation of powers may significantly contribute to clarity of the EU law, facilitate its application, and thus also help the business environment, the objectives that BusinessEurope supports. It may take various forms (e.g., implementing acts, delegated acts, Commission decisions). This position paper focuses on the assessment of the use of *delegated acts* only.

The delegation of powers through delegated acts naturally has its roots in the EU Treaties. However, it is important to see an overall framework which is created through the Treaty on the Functioning of the European Union (TFEU), the 2016 Inter-institutional Agreement on Better Law-making (IIA) and the Common Understanding on Delegated Acts annexed to it, the 2021 Better Regulation Guidelines and Toolbox as well as some relevant decisions of the Court of Justice of the EU (CJEU).

TFEU. The right of co-legislators to delegate powers to the Commission via delegated acts is established and defined in Article 290 of TFEU. It opens a possibility for the Commission to adopt “non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.” The Treaty demands that the objectives, content, scope, and duration of such a delegation should be “explicitly defined in the legislative acts.”

IIA and the Common Understanding. In the IIA’s chapter V, all the 3 EU institutions agree that delegated acts are “an integral tool for Better Law-making, contributing to simple, up-to-date legislation...”, this way additionally defining the objectives to be pursued through delegated acts, i.e., simplicity and fitness of the regulatory framework for realities of today. The Common Understanding spells out procedural aspects of cooperation on delegated acts among the three institutions and stakeholders, among others opening a possibility of consultation with stakeholders during the phase of preparation of delegated acts.

Better Regulation Guidelines and Toolbox. The Guidelines explicitly state that stakeholders must be given a possibility to comment on draft delegated acts. Moreover, the toolbox (tool#42: Delegated and Implementing Acts) states that impact assessments should be prepared for delegated and implementing acts “when the expected economic, environmental or social impacts of EU action are likely to be significant *and* the Commission has a margin of discretion regarding the content of the act.” Given the fact that all initiatives accompanied by an impact assessment should apply the 1in-1out principle, the delegated acts accompanied by impact assessments should also propose the offsetting of regulatory burdens (i.e., the 1in-1out would apply to delegated acts in many instances). However, the tool #42 does not expand



much further compared to the provisions in the IIA with its Common Understanding and is a re-shuffled set of guidelines of the latter.

CJEU rulings. Case C-355/10 brings in some clarifications, though. The CJEU states that not only the co-legislators can decide what provisions of a given legislative act are essential. The qualification as “essential” can also be based on “objective factors amenable to judicial review”, while taking into consideration the “characteristics and particularities of the domain concerned”. However, the CJEU goes also further to limit the interpretations of its approach and refers that **“provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated”**.

As the core debate is about how far the Commission uses the delegation granted by co-legislators, it is important to note that there is **no definition or explanation of what “non-essential elements of the legislative act” are** (nor there is a definition or criteria for “essential” elements). Each of the institutions have a certain degree of discretion to interpret, depending on the clarity of the basic act that delegates powers. At the same time the above-mentioned CJEU ruling that brings in **the element of “political choices” is very important**.

Scrutiny. In the above-mentioned context, the right of the Council and the European Parliament to scrutinise delegated acts (i.e., to object delegated acts or revoke the delegated powers) may also not be very robust. It may be a reason why only **very few delegated acts have not passed the Council or EP scrutiny**.

As few examples, in 2019 **the EP objected** to a delegated act in the area of migration, establishing “controlled centers”. The EP questioned the legality because such a notion – as essential – did not exist in the EU legislation and co-legislators should have first introduced it. In December 2021 **the Council objected** a delegated decision on waste. The Council Working Party on Environment justified its objection on grounds of the scope of the draft delegated act that went beyond delegation granted by the basic act.

BusinessEurope has been following the overall trend in the use of delegated acts, with more focus on how the Commission uses the delegation of powers rather than how precise the co-legislators in conferring the powers are. There are numerous challenges the business community faces, as *very often delegated acts make the regulatory frameworks less certain and business environment in general less predictable*, instead of doing the opposite (“an integral tool for Better Law-making, contributing to simple, up-to-date legislation...”). We take note with great interest that some research on the matter is underway, by Lund University of Sweden for example¹.

BusinessEurope has identified various types of re-occurring misuse of delegated acts and has the following observations with examples.

¹ [Transparency and stakeholder participation in executive EU lawmaking](#), Maria Strömvik & Jelle Verheij, 2022



Staying within the limits of “non-essential elements”

The Commission very loosely interprets the notion of “non-essential elements” and often goes into alternations of the scope of basic acts. Even though there is no definition of the “essential”, some examples demonstrate that a delegated act does (or may) **expand the scope of application** of the basic act. Such instances, among others requiring political choices, should be deemed contrary to the Treaty provisions and the prohibition to change essential provisions.

Article 290 TFEU foresees two clearly distinguished categories of delegated powers, namely “to amend” or “to supplement” the basic act. Pursuant to the CJEU case law the delegated power to amend allows the amendment of non-essential elements of the legislative act. The delegated power to supplement allows the adoption of separate measures that supplement the legislative act by introducing additional detail on non-essential elements (see Case C-286/14, *Parliament v Council*). BusinessEurope has also noted the cases where a delegated act, based on the delegation to only *amend* the basic act, attempts to also *supplement* it without a respective basis in the basic act. It also supplements the “essential” elements such as definitions.

Example 1: delegated acts under the Artificial Intelligence Act proposal

- amendment to the definition of AI (list of AI “techniques”)

Issue: Article 4 of the proposed AI Act empowers the Commission to adopt a delegated act to update Annex 1 which contains a detailed list of approaches and techniques for the development of AI (linked to the *definition* of AI). This would cause market unpredictability for AI developers, given that additional techniques could be added in the future which would result in an extension of the scope. Since the definition of AI is an essential provision of the Regulation, adjustments should only be made by way of an ordinary legislative procedure.

Impact: Market unpredictability for AI developers given that additional techniques would result in an extension of the scope with far-reaching requirements under the Regulation.

- amendment to the list of high-risk standalone AI systems (Annex 3)

Issue: A delegated act is also used in the proposal to update the list in Annex 3 (which basically concerns the *scope* of the AI Act) by adding high-risk AI systems under certain conditions and based on a list of criteria. While the Commission is only empowered to add AI systems that are intended to be used in the areas already listed in that Annex 3, the concern is about *vague criteria* listed in Art. 7, which empower the Commission to add high-risk AI systems, notably in cases of ‘adverse impact on fundamental rights’. In this instance, a change in *scope* via a delegated act is possible if the co-legislators do not define much clearer conditions which would trigger such additions.

Impact: Loose criteria allowing dynamic alterations of the scope will cause great unpredictability for the market and risks undermining AI rollout in the future.



Example 2: delegated acts foreseen under the Ecodesign Requirements for Sustainable Products Regulation (ESPR) proposal as well as the Construction Products Regulation proposal (CPR)

Issue: On the 30th of March the Commission presented an ESPR proposal covering horizontal aspects and to be applied to all the products put on the EU market except for food, feed, and medicinal products. The proposal includes performance and information requirements, to be applied on a product-specific basis in the next regulatory step. The product-specific requirements would be specified in numerous upcoming delegated acts, according to the ESPR proposal.

The proposal on the Revision of CPR, which was also presented on the 30th of March, partly copies the ESPR approach. The proposal foresees widespread empowerments to regulate product requirements and environmental obligations via delegated acts. In relation to the delegated acts under ESPR as the core of this example, it is important to note the Commission's intention to make ESPR an additional "safety net" for construction products: "*In addressing construction products, this Regulation [ESPR] should set requirements on final products only when the obligations created by [the revised Construction Products Regulation] and its implementation are unlikely to sufficiently achieve the environmental sustainability objectives pursued by this Regulation.*" (ESPR Recital 43)

In the end, the two regulations might give the Commission widespread empowerments to regulate product requirements for construction products.

Impact: Defining performance and information requirements for products in delegated acts goes far beyond the right for the Commission to supplement or amend certain *non-essential* elements of the legislative act, as it would create the whole additional body of rules changing the scope of sector-specific legislation. The links of some sectoral legislation, as per the CPR reference above, extend the impact even much further.

Example 3: a draft delegated act under Directive 2014/40/EU – Tobacco Products Directive (TPD)

Issue: The delegated powers granted in Article 7(12) and 11(6) of TPD are "to amend", namely, to remove certain exemptions for the previously known categories of tobacco products in case a "substantial change of circumstances" occurs. The Commission's draft Delegated Directive, however, seeks to amend and supplement simultaneously. It amends Article 7 and 11 of TPD but it is also a separate act because its Article 1 would *supplement* TPD by requiring Member States to introduce in their national law a definition of heated tobacco product (HTPs) that is not foreseen in TPD. This goes beyond the power to *amend* granted by Articles 7(12) and 11(6). Introducing a new definition also goes beyond adding non-essential elements as it affects the scope of application.

Impact: According to TPD, tobacco products that do not involve combustion are considered smokeless tobacco products and should be labelled as such. Amending TPD to apply



additional labelling to HTPs is therefore inconsistent with TPD itself and also causes market unpredictability.

Changes to the nature of legal provisions

Another type of misuse is **deviation from the framework legislation principles and provisions** other than the basic act. Such cases do not only change the scope of application of the basic act but also change the legal architecture in a wider regulatory area going beyond one sole basic act, without the consent of co-legislators. For example, the framework for product regulation in the EU (the New Legislative Framework for products, NLF) provides for a *choice* of the product traceability system deemed most appropriate by a manufacturer, which is established through the basic provisions on traceability in Decision 768/2008/EC. The Commission attempts to take this availability of choice away via its proposed delegation of powers under the presently negotiated General Product Safety Regulation.

Example 4: the delegated act on traceability systems under the proposed General Product Safety Regulation (GPSR)

Issue: Article 17 of the proposed GPSR empowers the Commission to adopt delegated acts to introduce “more stringent systems of traceability” in the case of products “susceptible to pose a serious risk to the people’s health and safety”. The Commission would be empowered to lay down measures determining the “type of data to be collected and stored” but also the “modalities to display and to access data” among others. This is undermining the well-established principles in the Union harmonisation legislation (Decision 768/2008/EC of the NLF) where manufacturers are free to choose the traceability system which they deem most appropriate in relation to their products and their manufacturing and distribution systems.

Impact: Such a delegation of power would enable the Commission to deviate from related basic acts (the NLF) which would undermine legal certainty. It might also prescribe traceability technologies and thus deny the technological neutrality principle (this aspect is addressed further below).

Maintaining technological neutrality

Adherence to certain legislative principles, such as technological neutrality, sometimes may be at stake. It also relates to political choices the co-legislators make and the Commission’s loose interpretation of delegated powers. Delegated acts clearly **favouring one technology option** (ring-fencing a market) are controversial unless the co-legislators decide otherwise. Such a type of the misuse of delegated acts also relates to the basic notion of what elements are “essential” and bringing about significant economic, environmental, and social impacts.



Example 5: a sensitive debate that was triggered in 2019 in relation to the delegated act on the framework for large-scale deployment of cooperative and intelligent transport systems (C-ITS), including minimum requirements for interoperability.

Issue: The Commission introduced the choice of technology (Wi-Fi) and the notion of “backward inter-operability”, raising concerns with the framework that favours one technology and restricts the use of others in the future without the co-legislators’ endorsement.

Impact: While the matter at stake could be the matter of a political choice, it is related to preferential conditions created to one technology over another and bearing significant impacts on the market.

Pre-empting future legislative acts

Linked to the above points are the instances where the Commission uses delegated acts for “**pre-empting**” future legislative acts which are still to be proposed and negotiated by the co-legislators. It may constitute a manipulation of the future legislative process by unfairly establishing certain provisions “*en avance*” and putting the co-legislators in a disadvantageous position, should the scrutiny by them fail.

Example 6: the delegated act on climate change mitigation and adaptation under the Taxonomy Regulation

Issue: The Commission in its delegated act takes an extremely discriminatory and counter-legislative approach, for instance towards the concept of “substances of concern” (SoC) in the taxonomy “technical screening criteria” on climate mitigation and adaptation – concept which is not even defined in the REACH Regulation that is currently under revision.

The recently adopted technical screening criteria to not significantly harm (DNSH) the pollution prevention and control objective (Appendix C) use references to the Chemicals Sustainability Strategy (CSS) which has not been implemented (first and foremost through a series of foreseen *legislative* measures). The most well-known example is the reference to the ‘essential use’ derogation, obliging companies to conduct an essentiality test on SoC used during the manufacturing process of products. However, the criteria for essentiality of chemicals are still to be defined by legislation.

Impact: As a consequence, economic activities including “SoC” (essentially, any activity) may in the end be restricted to manufacture, place on the market or even use the listed chemicals (which represent the majority of manufactured chemicals). The “technical screening criteria” defined via a delegated act are preempting the future legislation for which discussions have not even started yet.



Protecting the environment for innovation and tech-proofing

Certain cases of delegation of powers relate to **deviation from the basic principles of product regulation in the EU** (the NLF as mentioned above already) **and proportionality**. Many new regulatory initiatives address the challenges of complex modern products and services, setting the essential requirements in different segments of the modern economy that is undergoing the twin green and digital transition. Such provisions require compliance by means of state-of-the-art technologies which are developed by the industry at unprecedented speed with the top-skilled people and massive investment behind. It is therefore disproportionate and runs counter the objective to support innovation when delegated acts are used to prescribe technical specifications by the Commission that may objectively be well behind the latest tech solutions available on the market.

BusinessEurope acknowledges it is a matter of the political choice of the co-legislators and calls for vigilance so that respective delegated acts do not stifle innovation.

Example 7: the delegated act to further specify a list of the essential requirements on interoperability for data spaces operators under the proposed Data Act

Issue: Article 28 of the proposed Data Act describes a list of essential outcome-oriented requirements to facilitate interoperability of data, data sharing mechanisms and services. The Commission can amend this list of the essential requirements (data structures or data vocabulary, or the technical means to access data, etc.) with a delegated act by further specifying them. The expertise that is necessary to specify the technical means for data sharing is extremely complex and found in a very fast-changing environment.

Impact: While the matter at stake requires top-of-the-class technical knowledge, delegating powers to detail such technical specifications to the Commission would be disproportionate, potentially add unnecessary burdens and miss out on the fast-evolving solutions on the market.

Transparency, stakeholder involvement and timing of preparation of delegated acts

Transparency of preparation of delegated acts is not up to the standards sought in the Commission's Better Regulation Guidelines. Often stakeholders are not involved in a meaningful way. BusinessEurope notes with concern that transparency is also insufficient when the content of a delegated act is prepared for the Commission by the respective European agencies.

Bottlenecks in terms of transparency also relate and lead to late preparation and adoption of delegated acts, undermining effective and uniform implementation. On numerous occasions,



the implementation deadlines set in the basic acts lead to pressures on the preparation of delegated acts and ultimately too short implementation periods for the Member States, businesses, and other stakeholders. Late adoption of a delegated act may force unprepared implementation of the basic act, sometimes even without all the necessary elements, specified in the delegated act, in place. In such instances, businesses need to comply by making adaptations without knowing the real final details for compliance.

Example 8: the delegated act regarding technical screening criteria under the Taxonomy Regulation

Issue: Not all relevant stakeholders that are largely affected by the technical screening criteria have been included in the platform elaborating the delegated act regarding technical screening criteria under the Taxonomy regulation. This has for example been the case for experts from the wood and furniture industry and experts with knowledge of forestry in different parts of the EU. Moreover, the evidence used to draft the final delegated acts has not been disclosed by the Commission in the impact assessments or explanatory memorandum. The disclosure of relevant studies and analyses should be a normal procedure to meet the standards of better regulation.

Impact: The lack of early consultation with all relevant stakeholders have resulted in criteria which are poorly adapted to the industries and businesses concerned. This entails great difficulty for them to apply and interpret the requirements, which does not only lead to heavy administrative burdens but also hampers the comparability of Taxonomy reports. Such an outcome runs counter to the objective of the Taxonomy as transparency tool enabling investors to compare the sustainability performance of businesses.

Ultimately, it may undermine the overall confidence in the taxonomy which would have a negative effect on allocation of financial resources to relevant and sustainable activities.

Example 9: the delegated acts for Directive on the Promotion of the Use of Energy from Renewable Sources (2018/2001/EU, RED II)

Issue: Not all relevant stakeholders have been included in the early preparation of the draft delegated acts for RED II. This has been the case for experts from the industry that is expected to do the necessary investments in production of, for example, e-fuels needed to fulfil the objectives of the directive. They possess key knowledge in this area and thus could have provided with important feedback on the early drafts and their impacts. It is mentioned in the draft delegated act that “several consultation exercises have been carried out by the Commission including (xx) meetings of the expert group on renewable fuels and [xx] stakeholder workshops”. Business Europe notes that the expert group on renewable fuels only includes Member States’ experts and does not include any business stakeholders. Neither it is transparent on how the targeted consultation workshops were carried out and what stakeholder representation was reached. The process was also much delayed, compared to



the initial deadline of 31 December 2021, and there is no transparency on what is happening with the proposal or on any renewed timetable.

Impact: The lack of transparency and possibility for all relevant stakeholders to provide feedback in the early preparation stages of the draft delegated acts has led to the criticism from a large number of stakeholders at a later stage in the context of the public consultation, with requests to redraft different parts of the delegated act under RED II and subsequent delays. It is highly unlikely that investments in production of e-fuels, for example, will take place before the process and the draft delegated act are clarified.

BusinessEurope will keep on monitoring how delegation of powers is used in the EU regulatory initiatives relevant to our members and keep on updating the analysis and list of examples.