

# SÉNAT

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## RAPPORT D'INFORMATION

*on the place of delegated acts in European legislation,*

Mr Simon SUTOUR,  
Sénateur.

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## SUMMARY OF PROPOSALS

### *A. FOR THE EUROPEAN LEGISLATOR, DELEGATING POWER*

1. In the legislative acts, limit references to the Commission's delegated acts to those which are strictly necessary;
2. Specify as clearly as possible the scope and coverage of delegations;
3. Make full use of its right of call-back to control and amend proposed delegated acts.

### *B. FOR THE COMMISSION, DELEGATEE*

4. Strictly comply with the delegations of power, as specified in the basic act;
5. Strictly comply with the intention of the European legislator, as stated in the political compromise at the trialogues, in which the Commission itself took part;
6. Even with the practice of delegated acts, return to the method of committees of Member State experts, the only system that guarantees pluralism.



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## FOREWORD

The European Commission is the main executive body of the European Union. Article 17 of the Treaty on the European Union states that it "*shall ensure the application (...) of measures adopted by the institutions*" and "*exercise coordinating, executive and management functions, as laid down in the Treaties*". The Treaty of Rome made no special provision on this subject, however, the need was soon felt to supplement – even amend – the general standard adopted by the legislator (then just the Council), without having to follow the constraints and red tape of the ordinary legislative procedure.

Since 1961, the European Commission has had a delegation of power – an implementing power – designed to enable it to adopt the standards for implementing a European legal act, i.e., in practice to adapt, supplement and apply the basic acts adopted by the European legislator.

Before the Treaty of Lisbon, this delegation – then only from the Council – was regulated by two provisions. On the one hand, the Commission only had this delegated power if the basic legal act provided for it. On the other hand, the delegation was overseen by committees made up of experts from Member States. This procedure was known as "comitology".

The Treaty of Lisbon changed this procedure quite profoundly. Articles 290 and 291 of the Treaty on the Functioning of the EU (TFEU) provide for a delegation of power to the Commission in two forms: delegated acts and implementing acts. There is now much less control by Member States than in the past.

In relation to the drafting of the Treaty of Lisbon, marked by the rejection of the draft European Constitution in several countries, these provisions have barely been mentioned. However, questions have arisen with use. More and more voices are expressing concerns about this issue, even talking about a declining of the legislator's jurisdiction.

After the intervention of several other national parliaments, and several occasional warnings, the Committee on European Affairs of the French Senate wishes to express its concern about what is fast appearing to be an insidious and poorly managed transfer of power to the European Commission.



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## I. COMITOLGY PROCEDURES, IMPLEMENTING ACTS, DELEGATED ACTS

### A. THE SYSTEM IN EFFECT PRIOR TO THE TREATY OF LISBON: COMITOLGY

Prior to the Treaty of Lisbon, the system of delegating implementing powers to the Commission was tightly controlled by Member States. Control of the Commission's proposals was assigned to committees comprised of Member State representatives – in fact, in most cases these were senior officials of the relevant central governments for the text under discussion. The first committee of this type was established in 1961. It was only in 1999 that the system was set out in the "comitology" decision<sup>1</sup>.

The comitology system covered five different procedures: the advisory procedure, the management procedure, the regulatory procedure and more rarely the regulatory procedure with scrutiny (RPS) and the safeguard procedure.

The advisory procedure, the fastest, was implemented when the changes to be made were not politically sensitive. The Commission's proposal was presented to the committee which issued an opinion of which the Commission had to take account, even though it was not legally bound by it. Within the committee, each Member State had one vote. Voting was by simple majority.

As for the management procedure, this was mainly used within the framework of the Common Agricultural Policy (CAP), the Common Fisheries Policy (CFP) or the implementation of the main European Union (EU)-funded programmes. Voting was by qualified majority with weighted votes. In the event of a qualified majority against the Commission's proposal, the Council was informed and had to decide by qualified majority whether to support the Commission's proposal or make another decision. In the absence of a Council decision or in the case of a vote in favour by qualified majority, the Commission could adopt its text. Furthermore, after reviewing the Commission's proposal, when the committee decided in favour of the text by qualified majority or was unable to make a decision (either in favour or against), then the Commission was free to adopt the text. This freedom of action available to the Commission in cases where the committee was unable to make a decision was specific to the management procedure. In the other procedures, the absence of a vote in favour or against by the committee does not allow the Commission such freedom.

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<sup>1</sup> Council Decision 1999/468/EC, of 28 June 1999, amended by Council Decision 2006/512/EC of 18 July 2006.

The regulatory procedure was applied to amend non-essential elements of a basic act. As with the management procedure, the committee voted by qualified majority, but this time, given the more sensitive nature of the acts concerned, a vote in favour by qualified majority was required for the Commission to be able to adopt its text. If there was no qualified majority or the text was opposed by qualified majority, the measure was referred back to the Council. Under this procedure, the European Parliament had right of scrutiny.

It could pass a non-binding resolution if it considered that the Commission had exceeded its authority.

The regulatory procedure with scrutiny, introduced in 2006, was used to amend non-essential elements of measures of general application, adopted under codecision. This procedure was used in certain politically sensitive areas such as the environment, financial services, public health and even cooperation between law enforcement authorities. This procedure involves a vote in favour by qualified majority from the committee. After a vote in favour by qualified majority was obtained from the committee, the European parliament and the Council had three months to oppose the measure. There are three ways in which this could be invoked:

- The Commission exceeds its powers provided for in the basic act;
- The measure is incompatible with the aim or the content of the basic act;
- The principles of subsidiarity or proportionality were ignored.

In the event of an unfavourable opinion or no opinion from the committee, the measure was referred to the Council which had two months to make a decision. It could either oppose the measure which was then referred back to the Commission, or it could decide to adopt the measure or not to state a position, the European Parliament then had two months to make its decision.

Although this had been the procedure formally giving the States the most power of control, it was also the one that had the most faults.

This shortcoming can be illustrated by the authorisation system for genetically modified organisms (GMOs). In 2004, the Commission was tasked with deciding whether or not to authorise the import and sale of canned GM sweetcorn, based on the regulatory committee procedure. In this procedure, when the proposed measure – in this instance import authorisation – did not comply with the prior opinion of the committee, the Commission escalated the case to the Council, and for information, to the European Parliament. The Council had to give its agreement by qualified majority or make an amendment by unanimous vote. In the absence of a Council decision, the Commission took the implementing measures unless this was opposed by the Council, again by qualified majority. In this case,

the Council was incapable of meeting the qualified majorities that would allow it to make a decision, whether to approve the Commission's proposal, amend it or oppose it, therefore enabling the Commission to make the contested decision.

## **B. THE PROCEDURE IN EFFECT SINCE THE TREATY OF LISBON**

The Treaty of Lisbon sets out two types of acts, delegated acts (article 290 TFEU) and implementing acts (article 291 TFEU).

### **1. The delegated acts procedure**

**Treaty on the Functioning of the European Union  
Article 290**

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

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

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

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

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

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

*3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.”*

The delegated acts procedure enables the European Union legislator to delegate the power to the European Commission to adopt non-legislative acts of general application that amend or supplement non-essential elements of the legislative act.

This procedure is frequently used in many areas: consumer law, the common agricultural policy, personal data protection, financial regulation and even structural funds.

In the field of consumer law and consumer protection, delegated acts are used to specify product information, using labelling for example<sup>1</sup>.

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<sup>1</sup> Commission Delegated Regulation (EU) No. 1061/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of household washing machines. Annex I fo the Regulation presents the information that must be specified on the label.

The common agricultural policy is another area where the delegated acts procedure is frequently used, to set out the eligibility rules for aid for example.

With regards to personal data protection, the use of delegated acts is used, for example to amend the amount of the fees to be paid to consult the registered traveller system<sup>1</sup> or even to amend the conditions governing the legality of data processing in some cases<sup>2</sup>.

Finally, there is intense reliance on delegated acts under structural funds. Indeed, the legislative package on structural funds 2014-2020 can only be fully adopted once the Commission has adopted a series of delegated acts.

Only legislative acts can be subject to a delegation of power to the Commission within the framework of delegated acts. Under the delegation, the Union legislator must regulate the Commission's action. To this end, it establishes the objectives, content, scope and duration of the delegation along with the conditions to which the delegation is subject.

The Treaty limits the scope of delegated acts insofar as they can only relate to non-essential elements of the basic legislative act. In fact, the essential elements fall under the exclusive competence of the European Union legislator, but this concept is not defined in the treaties. The Court of Justice has provided several elements to clarify this concept; it is clear from its case law<sup>3</sup> that determining non-essential elements depends in particular on the characteristics and features of each subject. The Court also estimates that the qualification of an essential element must be based on "*objective evidence amenable to judicial review*" and cannot solely be at the discretion of the Union legislator. Furthermore, the Court stated that the provisions "*which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature*" must be considered as essential elements that cannot be delegated. In another, older judgement<sup>4</sup>, the Court also held that provisions intended to "*give concrete shape to the fundamental guidelines of Community policy*" must be classified as essential in the sense of the Treaty.

The Commission may be assisted by an expert group but these are not experts who are "Member State representatives", these may be professional or scientific experts, experts from just a few Member States or even international experts. This is the major difference between the previous

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council COM(2013)97 final, of 28 february 2013 establishing a Registered Traveller Programme.

<sup>2</sup> Proposal for a Regulation of the European Parliament and of the Council COM(2012)11 final, of 25 january 2012 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

<sup>3</sup> Judgment of the Court of Justice (Grand Chamber) of 5 September 2012. *European Parliament v Council of the European Union*. - Case C-355/10, not yet published.

<sup>4</sup> Judgment of the Court of Justice of 27 October 1992. - *Federal Republic of Germany v Commission of the European Communities*. - Case C-240/90, *European Court reports 1992 Page I-05383*.

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comitology procedure and the Treaty of Lisbon. Finally, the formal opinion of the committee of experts is not necessary for the text to be adopted.

The Union legislator (European Parliament and Council) is notified of the Commission's proposal. Both bodies then have two months to study the text. This timeframe can be extended by two months on the initiative of the European Parliament or Council. After this time, the Parliament or the Council may simply revoke the delegation of power or oppose the entry into force of the Commission's proposal. To oppose the text ("express an objection") the European Parliament must decide by an absolute majority vote, while the Council decides by qualified majority.

Both legislators can oppose the Commission's delegated act for any reason. The delegation can also be revoked by either the European Parliament or the Council.

## 2. The implementing acts procedure

**Treaty on the Functioning of the European Union**  
**Article 291**

*“1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*

*2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.*

*3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*

*4. The word ‘implementing’ shall be inserted in the title of implementing acts. ”*

In the implementing acts procedure, the Commission has an implementing power where uniform conditions for implementing legally binding Union acts are needed. The procedure is very similar to that of the old comitology system, with the presence and control of committees composed of Member State representatives. A 2011 regulation (Regulation (EU) No. 182/2011 of 1st March 2011) clarifies this new comitology system, with a hierarchy among the three procedures. Under the advisory procedure, the committee shall decide by simple majority. The Commission shall take the utmost account of this opinion but is not required to follow the committee's opinion. Under the examination procedure, the most common procedure, which replaces the old management and regulatory procedures, the committee must adopt an opinion by qualified majority. This procedure applies to the CAP. In the event of a negative opinion, the Commission does

not adopt the draft measures but can submit the draft to an appeal committee (in fact a Council configuration). The Parliament and the Council can exercise a right of scrutiny by adopting a non-binding resolution at any time. There is also a special procedure applicable in exceptional circumstances.

The new procedure for delegated acts was used for the first time in 2010. The Regulation (EU) No. 438/2010 on the animal health requirements applicable to the non-commercial movement of pet animals was the first to refer to a delegated act.

Since then, the procedures provided for in Articles 290 and 291 have been broadly used and the positioning has become more refined.

For an observer familiar with European procedures, the European Parliament would tend to favour delegated acts because it has more powers than before, up to opposing the draft delegated act; the Council would support implementing acts because the procedure is similar to the old comitology system, retaining the committees of Member State representatives; the Commission finds benefits in both procedures: in the case of delegated acts, it is not bound by the opinion of the committees of experts, in the case of implementing acts, it makes the final decision except in the case of a qualified majority against, which is very rare. According to an informed observer "*the Commission always works to avoid a deadlock situation and almost always manages to get its drafts passed*".

The political importance of delegated acts is becoming increasingly clear. The very next day after our Committee on European Affairs examined this report, the Greek Minister for Development and Competitiveness presented his government's priorities to the European Parliament Committee on Regional Development, asking this question: "*obviously, the adoption of delegated acts will require an intense discussion among States (...) The question of delegated acts is an important priority and it may be that it becomes an eminently political issue*"<sup>1</sup>.

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<sup>1</sup> in *Europolitics* No. 4793 of 23 January 2014

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## II. CONCERNS ABOUT THE USE OF DELEGATED ACTS

### A. WHERE DO THESE CONCERNS COME FROM?

#### 1. The European institutions

The European institutions themselves have been the first to share their concerns regarding the delegated acts procedure. The European Parliament and even the European Economic and Social Committee have expressed concerns.

- The European Parliament used its power of control on 19 December 2012 by voting for a "resolution for an objection" on a proposal for a delegated regulation on over-the-counter derivatives, central counterparties and trade repositories. In order to avoid this resolution for an objection on the procedural time limit being discussed by the Parliament in plenary session, the Commission had to assure it that its concerns were groundless and that its future action would comply with Parliament's wishes<sup>1</sup>. This proposal was eventually withdrawn in February 2013 after the European Parliament obtained certain assurances from the Commission.

More recently, on 14 January 2014, the European Parliament Committee on the Environment, Public Health and Food Safety introduced a motion denouncing the excessive use of delegated acts under a proposal on the labelling of the geographic origin of ingredients. The Commission was proposing to limit the information on the label to "EU Origin" or "non-EU". The ENVI committee thinks that the proposed delegated regulation exceeds the delegation provided for by the basic regulation (EU) No. 1169/2011<sup>2</sup>.

- Similar observations had been made by the European Economic and Social Committee.

On 30 July 2013, the Section for the Single Market, Production and Consumption of the European Economic and Social Committee (EESC) published an information report entitled "*Better regulation: implementing acts and delegated acts*". The EESC questions the Commission's use of the procedure under Article 290 of the TFEU and the implementation of control mechanisms. The EESC highlights the fact that the Commission is increasingly using this procedure even though it is designed to amend or supplement "non-essential elements": "*The question therefore arises as to why so many delegated acts are provided for measures which are supposed to be 'non-essential'*".

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<sup>1</sup> See debates at the European Parliament on delegated regulations C (2012) 9593 and C (2012) 9623, on 17 february 2013 : <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20130207+ITEM-005-05+DOC+XML+V0//EN>

<sup>2</sup> See Motion for a Resolution of 14 january 2014 : doc B7-0000/2014

## 2. The National Parliaments

- *Several national parliaments* have also made various critical observations on these delegations of power.

The German Bundesrat, the Austrian Federal Council, the British House of Commons and the Italian Senate have criticised the use of the delegated acts procedure set out by the proposal for a regulation adapting to Article 290 and 291 TFEU a number of legal acts providing for the use of the regulatory procedure with scrutiny (COM(2013)751 final)<sup>1</sup>. Furthermore, the Austrian National Council adopted a political opinion and the Polish Sejm (the Polish lower house) concluded the proposal's incompatibility with the principle of subsidiarity.

In these different political opinions and communications, the national parliaments all have similar concerns regarding the use of the delegated acts procedure.

The main criticism, common to all, focuses on the abusive use of the delegated acts procedure. The German Bundesrat considers it necessary to "*reduce the use of delegated acts to the absolute minimum and clearly identify the purpose, content and scope of the delegated act*". A similar criticism is made by the Austrian upper house while reminding of the usefulness of such acts. The underlying concern about the overuse of delegated acts is the national parliaments' concern that they will see their power of control questioned.

- Several times in 2013, *the French Senate* expressed reservations about the use of delegated acts. Several intervention channels have been used:

- Review by written procedure by the Committee on European Affairs - as was the case with the review of a proposal for regulation on fees payable to the European Medicines Agency for the conduct of pharmacovigilance activities (COM (2013) 472 final).
- European Resolutions, as was the case on two occasions in October and November 2013, during the review of the legislative package on animal and plant health. On the proposal of Mrs Bernadette Bourzai rapporteur for the text on animal health (COM (2013) 260 final) and the proposal of Mr Jean Bizet and Mr Richard Yung, rapporteurs for the text on the making available on the market and patentability of seeds and plant variety rights (COM (2013) 262

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<sup>1</sup> See the opinions of the national parliaments on IPEX Website : <http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2013&number=0365&appLng=EN>

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final), the Committee on European Affairs adopted two proposals for resolution, denouncing the abusive use of delegated acts<sup>1</sup>.

- Political opinions sent to the European Commission, as with the political opinion adopted by our Committee on European Affairs on 28 November 2013, on the proposal of our colleague Richard Yung, on indices used as benchmarks in financial instruments and financial contracts (COM (2013) 641 final).

### 3. Member States

However, the strongest opposition has come from the Member States.

This may be an individual State. Thus on 13 January 2014, France "*submitted, to the Council, an application to set aside a proposal for a delegated regulation*" on the provision of food information to consumers.

The States may also have a collective position, for example, during the preparation of the delegated acts under the reform of the common agricultural policy (CAP). The reform was adopted by the European legislator – European Parliament/Council – after eighteen months of negotiation, under difficult conditions. It is presented in the form of three core regulations a "direct payments" regulation, a "common organisation of markets" regulation and a "rural development" regulation. Many provisions have been retained after political compromise between the European Parliament and the Council, and even after informal or formal dialogues.

These three texts refer to a large number of delegated acts. Without waiting for the formal and final adoption of the "legislative package", on 23 December 2013, the Commission prepared these acts. A first unofficial version has been sent to the European legislator. Each of the co-legislators then noticed that the number of provisions in these texts went beyond the delegation given to the Commission by the co-legislators, and even contradicted certain measures arising from the political compromises adopted through the dialogues.

Spill-overs deemed unacceptable by almost all Member States, who, in the paper of 8 November 2013, provide a reminder that the "*objectives and scope of the delegation, specified in the basic act, must be respected – "fully respected"* – ", and calling on the Commission to correct its draft acts "*urgently*".

The note was formally signed by only twenty four Member States. Germany and the United Kingdom did not sign, but orally supported the vote. Lithuania and Greece abstained due to the current and future

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<sup>1</sup> *European Resolutions of the French Senate No. 44 (2013-2014) of 6 December 2013 et No. 63 (2013-2014) of 17 January 2014.*

Presidency of the Council. Undoubtedly, this was only a response to a single draft act, but this case provides concrete examples of irregularities in the spirit of the treaties and the letter of European legislation.

## **B. WHAT DO THE CONCERNS COVER?**

This broad opposition has highlighted several shortcomings and potential irregularities, that cover the procedures, the institutional balance when drawing up delegated acts, experts' participation in the Commission's decisions, the number of delegated acts, the actual content of the delegated acts and the risk of misapplication of the intention of the legislator.

### **1. Procedural issues.**

*- The scope of the delegation.*

Since the adoption of the Treaty of Lisbon, legal theory has been concerned with assessing the scope of delegated acts, debating the meaning of Article 290 of the TFEU that provides that the delegated act supplements the basic act and must focus on non-essential elements. Although there has not yet been a real dispute on these issues, the debate remains open.

While the procedures for adopting the texts are very different, the division between implementing acts and delegated acts is still very unclear. The Austrian Federal Council and the German Bundesrat highlight the difficulty of making the distinction between so-called "essential" and "non-essential" elements in the sense of the Treaty. Indeed, the delegated act can only amend a non-essential act, since essential acts fall under the exclusive competence of the European legislators. The Bundesrat even believes that some matters should automatically be considered as essential elements, for example consumer protection.

The very purpose of the delegation was contested by the French Senate in 2013 in the particularly important area of personal data protection. The proposed directive should establish the framework for personal data protection under police cooperation and judicial cooperation in criminal matters<sup>1</sup>. This text leaves to the Commission the task of adopting the delegated acts to clarify the criteria and requirements applicable to the establishment of a data breach. On 12 March 2013<sup>2</sup>, the Senate adopted a resolution on the proposal of the Committee on European Affairs, questioning the Commission's authorisation. The Senate considered that since Article 290 TFEU only authorises the delegation of power to the Commission to supplement or amend non-essential elements of the legislative act, the Commission should not be able to adopt delegated acts in

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<sup>1</sup> COM (2012)10 final.

<sup>2</sup> European Resolution of the French Senate No. 108 (2012-2013) of 12 March 2013.

an area as essential as that of the criteria and requirements establishing a data breach.

*- Time limits for review by the European legislator.*

The practical issue of the procedural time limits is frequently raised. In the procedure of Article 290 TFEU, the European Parliament and the Council exercise a certain control over the Commission's proposed act. They can oppose the Commission's adoption of the draft act. The Council and the Parliament have a time period of two months, from the day they receive the Commission's draft act to oppose its adoption. They can also withdraw the delegation at any time.

This two-month time period is considered to be too short. The Bundesrat is asking for this time period to be extended to three months. Furthermore, the European Parliament itself considers that the current time period of two months is not adequate. Such was the purpose of the proposed resolution for an objection adopted in December 2012. This proposed resolution was withdrawn by the Parliament after the Commission gave assurances that it would act so as "*to provide it with a long enough time period for evaluation*". This is indeed proof that the Parliament was concerned about the short duration it had to evaluate the text and potentially oppose its adaptation.

## **2. Institutional questions when preparing acts**

The concerns also focus on two institutional issues, with significant political consequences.

Firstly, in the case of the delegated acts procedure, the States are almost completely absent from the decision-making process in relation to technical issues, implementing acts and practical application. "*For us, this is a disaster*", is sometimes heard in the French administrations. A priori control now relies solely on the European Parliament and the Council under conditions that do not guarantee full effectiveness.

Will the European Parliament be interested in the details of the texts? Will it have the capacity and be able to oppose the content of a delegation that it voted in itself? In the majority of cases, the conditions of majority voting and time limits are such that it will be extremely difficult to evoke – amend – the content of proposed delegated acts, let alone revoke them.

As can be heard in the French administration services, "*under their technical aspect, the delegated acts are the most important step towards government by the Commission, almost without control*".

Secondly, the national parliaments may be concerned about a practice contrary to an important point in the spirit of the Treaty of Lisbon.

The Treaty has developed the role of the national parliaments and, in order to provide a solution to the democratic crisis, given them a power of control over subsidiarity. An additional protocol to the Treaty sets out the possibility for national parliaments to comment on any European Union legislation. However, they can only exercise their control of subsidiarity on proposed legislative acts, which does not include delegated acts. The national parliaments' control of subsidiarity does not apply to the delegated acts procedure, insofar as these acts are not legislative acts. Strengthening the powers of national parliaments to monitor European legislation therefore stops at the threshold of delegated acts.

The increase in delegated acts therefore automatically reduces the national parliaments' option to monitor subsidiarity. The Austrian Federal Council mentions this concern, believing that "*the influence of national parliaments in the procedures of delegated acts or implementing acts is insufficient*".

### **3. Composition of the committees of experts**

Concerns also focus on the decision-making process itself. The composition of the committees of experts assisting the Commission in the delegated acts procedure is a key issue.

- Under the delegated acts, the Commission can be assisted by a group of experts, but not experts who are "Member States representatives" as in the old comitology system. These may be professionals, scientists, academics, experts from just a few Member States and even, potentially, international experts. This is a major difference from the previous comitology procedure. Under the comitology system (and implementing acts), the committees of national experts - actually senior officials of the relevant central governments on the subject - provided broad control, taking into account the national and even local specificities of everyone, including small Member States. A guarantee removed under the new framework for the committees of experts that are listed and selected by the Commission alone.

It is easy to imagine that when adopting or specifying a standard in a technical field (noise standards, pollution standards, list of food additives, etc.), the experts called upon - and selected - will not only fully understand the subjects addressed, but can be sensitive to the concerns of the industrial environments involved. On certain oligopolistic markets (automotive, energy, etc.), large organisations, even competitors have an objective interest in defining common technical regulations and avoiding national specificities. "*The practice of delegated acts paves the way for the most powerful and organised lobbies*", "*the lobbies will make the law*", is sometimes a concern.

The Member State experts guaranteed a plurality and mobility, given the changes of assignments within governments, which no longer exists in the new formula. There is nothing to prevent the same experts being

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re-appointed over several years, leading to an extremely damaging "group culture".

- The issue of international experts must also be addressed. Nothing formally prevents the Commission from appointing experts who are not from European Union Member States. This is far from just a textbook case.

During the review of a proposal for a regulation on data protection at European and international level in 2009, our committee heard from Mr Alex Türk, President of the CNIL (*Commission nationale de l'informatique et des libertés*). Mr Alex Türk had produced a document on a Commission proposal to create a group of experts, most of whom were not European! A group which "*in reality, would have represented Anglo-Saxon interests*":

*"The European Commission has decided to set up a group of experts to start the debate on the revision of the 1995 Data Protection Directive. I would remind you that this directive is extremely important since it is central to national legislation in this field. The mission of this group of experts is both far reaching and difficult since it will have to make proposals to the European Commission on the revision of the 1995 Directive, but also on the issue of data protection in sovereign matters under the third pillar.*

*However, the composition of this group of experts raises very serious questions. It is in fact comprised of five people, four of whom are from American companies or law firms with their main place of business also based in the United States. Only one member of this group is from Europe, this is the President of the Dutch authority responsible for data protection. (extract of the speech by Mr Alex Türk, President of the CNIL, 3 February 2009).*

This information resulted in an immediate reaction from our committee then under the Presidency of Hubert Haenel. European Resolution No. 203 (2008-2009) adopted by the Senate "*sought clarification from the European Commission about the conditions under which this group of experts was appointed and put pressure on it so that the proposals that will be taken into account for any changes to the legal framework for data protection in the European Union are drafted under conditions that preserve the independence of the European Union's analysis in evaluating its own legal rules and comply with the principle of multilingualism*".

Upon the resulting outcry and under pressure from the Senate, this group did not ultimately continue, but the European Commission's disconcerting initiative must be remembered.

The ambiguity surrounding the appointment of these experts is also expressly condemned by some national parliaments. The Austrian Federal Council questions the legitimacy of these experts given the way in which they were appointed and considers that the appointment of experts who are Member State representatives to be the only acceptable solution.

The practice of delegated acts is far from insignificant and requires, even demands great political vigilance.

#### 4. The abuse of delegated acts

Delegated acts are frequently used in a great number of sectors. They are found in financial and banking regulations as well as technical regulation.

Certainly, there is no objection in principle to this delegation, which is useful, necessary and even desirable in ensuring the implementation of texts passed by the European legislator. However, this delegation must be measured and appropriate.

The rapporteurs responsible for informing your Committee on European Affairs and the Senate about legislative proposals introduced by the European Commission are regularly surprised and now, concerned about the importance given to delegated acts. The opposition seems well-founded when the delegation, through its frequency and extent, gives excessive responsibility to the Commission. This situation was commented on several times during 2013.

Our committee has already mentioned this issue in two political opinions. In November 2013, our colleague Richard Yung, responsible for presenting a proposal for a regulation on indices used as benchmarks in financial instruments and financial contracts noted that *"the text frequently refers to delegated acts that the European Commission has adopted alone. However, the matters concerned seem to be essential. In particular, they cover governance requirements, codes of conduct, methods for compiling the indices and specific requirements applicable to exchange rate indices"*. The political opinion of 28 November 2013 contained this criticism, highlighting that *"the proposed regulation refers too frequently to delegated acts on the technical aspects of the system. These subjects are supposed to be regulated by the legislator or by the ESMA"*.

The same problem arose, for example, for the fees payable to the European Medicines Agency for the conduct of pharmacovigilance activities (COM (2013) 472 final). Member States welcomed the Commission's proposal, but several delegations, including France expressed their disagreement with the Commission's willingness to use delegated acts to fix the amount of the fees, given that these amounts should be fixed either directly in the text or by implementing acts.

However, it is in the agricultural sector that fears of an insidious removal of legislative power have been most strong. An anxiety which has resulted in several European Resolutions, such as the recent case regarding the making available on the market and patentability of seeds and plant variety rights (COM (2013) 262 final). In their proposal for a European Resolution, Mr Jean Bizet and Mr Richard Yung estimate that *"too often, the text refers to the Commission's delegated acts or implementing acts"*. They believe that *"the text should directly provide for all essential provisions, such as the list of*

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species covered by the obligations related to mandatory certification" (European Resolution No. 218 - 2013-2014).

This was also the case for the review of the proposal for a regulation on animal health (COM (2013) 260 final). The rapporteur, Mrs Bernadette Bourzai, dedicated part of her review to this practice of delegated acts, even mentioning "*the fears of a blank check to the Commission – This proposal for a regulation is characterised by a considerable number of secondary acts: the 260 basic articles refer to some 106 delegated acts and 57 implementing acts. The text sometimes feels as if it is "an empty shell" that will be filled out later. Filled out by the Commission, under its delegated powers and implementing powers. So, the secondary acts refer to the detail of this legislation. Some old provisions would be repealed without the assurance that they will be included in the implementing act. For example, this is the case with the concept of epidemiological surveillance networks defined in directive 64/432/EEC and which is so useful in France, but which is not either contained in the basic act, or mentioned in the implementing acts. (...) Each State may be sensitive to a particular field and be concerned about a transfer of power". The Senate's resolution of 6 December 2013 "*deplores the clearly excessive use of delegated acts and implementing acts – 163 in total – which gives inordinate power to the European Commission*" (proposal for a resolution No. 109 (2013-2014) and European Resolution No. 44)*

Finally, the overuse of delegated acts was also denounced by the Senate in 2012 in the particularly sensitive area of personal data protection. The proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM (2012) 11 final) referred to delegated acts or implementing acts over fifty times. In a public session on 6 March 2012, the Senate adopted a resolution contesting the considerable use of delegated acts in this proposal for a regulation<sup>1</sup>.

## **5. The content of delegated acts and the risk of misapplication of the intention of the European legislator**

It might seem unnecessary to specify, that delegated acts should obviously be consistent with the basic act. However, several recent examples have shown that this clarification is not superfluous.

The first example concerns consumer law. France formulated objection in January 2014 against a draft delegated act on the labelling of food products, about the information that the Commission was proposing no longer to appear on labels.

This information is governed by Regulation (EU) No. 1169/2011. This provides that all ingredients, including those manufactured from nanomaterials, are shown in the list of ingredients for products. Yet, in its

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<sup>1</sup> European Resolution of the French Senate No.110 (2011-2012) of 6 March 2012

proposal for a delegated regulation, the Commission suggests that certain nanoscale additives are not considered as manufactured materials and are therefore exempt from labelling, while the current definition does not provide for such an exemption. This concerns several additives such as titanium dioxide (E171), a white colouring used in confectionery, silicon dioxide (E551), an anti-caking agent used in powdered foods such as salt for example, and several other additives. The Commission justifies its proposal by mentioning in particular the risk of confusion between "nano" and "new".

Essentially, without being able to judge the appropriateness and usefulness of giving the consumer this technical information – because who really knows the meaning of E509, E171, E551, E172, etc.? –, for the Commission, the fact of deliberately breaking the rules set by the European legislator is in itself open to criticism and must be resolutely denounced.

The second example concerns the CAP reform.

The CAP naturally lends itself to delegated acts. This was the case in the past, when it came to establishing the amount of refunds per country or agricultural pricing policy. It was also in this area (prices) that the Commission's first delegated regulation was made in 1961. This is still the case today for specifying the terms of the single payment entitlement, cultural practices, etc. The three core regulations that make up the reform of the CAP refer to a large number of delegated acts.

However, the joint paper by Member States of 8 November 2013 reports numerous inconsistencies between the two levels of legislation, and even outright misapplications in the drafting of the basic act and the European legislator's intention. The States list no fewer than ten cases where the delegated act contains provisions not covered by the basic act.

There are several scenarios:

- the addition of eligibility criteria not covered; this is the case in areas of ecological interest, one of the three components of the greening of direct aid. The Commission states in its draft delegated act that plantations designed to capture nitrates should be crops without the addition of fertilizer which excludes any conventional production although some crops are effective nitrate sinks. This is an addition to the basic text ("*stringent conditions which were absolutely not foreseen in the basic act*");

- a reduction in the scope of the provisions adopted; this is the case with regard to coupled support. The basic act provides for the retention of coupled aid for sheep and goats. However, in its delegated act, the Commission limits this coupled support to just females. This is also the case for protein production. The Commission is drawing up a list of eligible crops which are not covered by the basic act;

- changing an optional system into a compulsory one, as with the use of the national fishing reserve;

- the addition of new criteria, as with the aid to young farmers, that the Commission only allows for farmers operating under their own name, thus excluding farmers operating under other legal forms;

- this may even result in the clear circumvention of the letter of the basic act and the intention of the legislator. This is the case when determining the scope of areas of ecological interest. The Commission states that areas bordering forests should not have any agricultural production. A condition that had been explicitly excluded by the Council and the trialogue (*"this condition of strips of eligible hectares along forest hedges was explicitly ruled out by Ministers and the Council position was subsequently agreed in trialogue. The intention of both legislators is then absolutely clear and cannot be circumvented"*).

In these various examples, the Commission has clearly exceeded its power and its delegated competence. Even if, in this instance, it was only a simple unofficial draft delegated act that the Commission was going to review, this unfortunate and shocking initiative has been a warning signal for greater vigilance.

**Thus, several times, the Commission seems to have attempted to go beyond the limitations set down by the delegations of power. All the concerns raised by the observers and parliamentary assemblies were confirmed.**

Even if it must be recognised that some of these irregularities come from the European legislator itself. The source of this irregularity is often found in the imprecision of the basic text. The legislator must ensure that the regulation supporting the delegation, the basic text, is as comprehensive as possible and that the essential elements are clear. Often, the Commission merely enters a breach opened up by the legislator itself.



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***Political opinion***  
***on the place of delegated acts in European legislation***

Having regard to Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU),

Having regard to the Proposal for a Regulation of the European Parliament and of the Council on Animal Health (COM (2013) 260 final).

Having regard to the Proposal for the Commission Delegated Regulation (EU) No 1363/2013 of 12 December 2013 amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards the definition of 'engineered nanomaterials' (C (2013) 8887 final),

Having regard to the Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny (COM (2013) 451 final),

Having regard to the Proposal for a Regulation of the European Parliament and of the Council adapting to Articles 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny (COM (2013) 751 final),

Whereas the power delegated to the European Commission in order to supplement the basic acts adopted by the European legislator in accordance with the ordinary legislative procedure is a practical necessity which is not questioned;

Deplores the systematic, and even in some cases, clearly excessive use of delegated acts which gives inordinate power to the European Commission;

Whereas this use should be better regulated;

Reminds that several parliamentary assemblies have already expressed their reservations about the excessive use of delegated acts;

Highlights that the National Parliaments cannot exercise their control of subsidiarity over legislative acts;

Observes that it is extremely difficult to meet the required majorities in the European Parliament and in the Council to "express objections" and *a fortiori* amend draft delegated acts;

Is concerned about the selection procedure for the committees of experts responsible for assisting the Commission in the preparation of delegated acts;

And in the selection of members for the aforementioned committees of experts, wants the Commission to return to the practice of experts from Member States;

Deplores that in some cases, the Commission has clearly chosen to ignore the guidance advocated by the European legislator and the limitations set down by the delegations of power provided for in the basic text itself;

Consequently, requests that the regulations supporting the delegation is as comprehensive as possible and that the essential elements are specified in order to reduce the use of delegated acts to a minimum;

Asks the European Commission to prepare delegated acts only in strict compliance with the delegations set out in the basic act.