Jean Monnet Working Paper Series
-
Environment and Internal Market

Vol. 2026/3

The Implementing and Delegated Acts fleshing out the EGD Legislative Acts

by

N. de Sadeleer

N de Sadeleer, Full Professor UCLouvain, St Louis
Jean Monnet Chair

Published on https://tradevenvironment.eu/
© Nicolas de Sadeleer, 2012
desadeleer.nicolas@gmail.com

Table of content

Abstract

The Lisbon Treaty distinguishes between legislative acts, and two categories of non-legislative acts of general application: delegated and implementing acts. Drawing the line between these different categories has since 2009 proven challenging. Due to the technical nature and the complexity of the subjects covered by recent European Green Deal (EGD) legislation, the EU legislature has extensively conferred delegated and implementing powers to the European Commission. The implementation of the new powers vested in the Commission raises considerable legal difficulties. This is particularly true in the case of delegated acts fleshing out the basic regulation on taxonomy.

Table of contents

Introduction 3

A. The distinction between legislative and non-legislative acts 4

1. Introductory remarks 4
2. Legislative Acts 5
3. Non-legislative acts 6
   (a) Delegated acts (Art. 290 TFEU) 7
   (b) Implementing acts (Art. 291 TFEU) 10
4. Grey areas between delegated and implementing acts 12
5. Judicial review of the Treaty limits on delegation 13

Conclusions 17

Introduction

The European Green Deal (EGD) led the European Parliament and the Council of the Union to adopt between 2021 and 2024 a flurry of legislative directives and regulations covering areas as diverse as the extension of the carbon market, renewable energies, energy efficiency, sustainable finance, sustainable transport, waste management, the circular economy, listed installations, nature restauration, urban wastewater treatment, etc. All in all, the number of legal acts adopted in such a short time and their technical nature are impressive. That being said, the transition envisaged under the EGD in terms of decarbonisation, zero pollution and ecosystem conservation can only be achieved if this legislation is implemented through a series of measures to be adopted by the European Commission.[1] Indeed, it is up to the EU executive branch to adopt hundreds of delegated and implementing regulations in order to determine the scope of the obligations contained in the various legislative acts.

By way of illustration, the Packaging and Packaging Waste Regulation (PPWR) foresees the adoption of more than 15 delegated acts in the coming years.[2] These acts are deemed to cover various aspects such as design for recycling criteria, recyclability performance standards, minimum reusability requirements, and other technical specifications needed to implement the regulation effectively. By the same token, the Battery and Battery Waste Regulation provides for the adoption of a total of 32 delegated acts and 15 implementing acts.[3] These acts are scheduled to be adopted between 2024 and 2031, covering various aspects such as carbon footprint methodology, performance classes, recycled content targets, and waste management procedures. Needless to say, the task ahead is considerable.

However, the Commission's room for manoeuvre is far from absolute. Its delegated and implementing acts must comply with the rules of primary law introduced by the Treaty of Lisbon, as interpreted by the Court of Justice (CJEU).

This working paper attempts to shed light on the implementing powers conferred by the legislature to the European Commission. It is structured as follows. The first section addresses the distinction between legislative and non-legislative acts of general application. It is with the issue of delegated acts that the second section is concerned. The third section then identifies the specificities of the implementing acts. The fourth section deciphers grey areas. The last section examines the judicial review of of the delegated powers conferred to the Commission in accordance with the basic regulation on taxonomy.

---

[1] N de Sadeleer, 'The European Green Deal: *greenwashing compounded by deregulation* (Omnibus law) or a genuine paradigm shift?', (2025) European Journal of Risk Regulation 1-32.

[2] Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, *OJ L, 2025/40,*

[3] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, OJ L, 2025/*191.*

A. The distinction between legislative and non-legislative acts

1. Introductory remarks

Until the Treaty of Lisbon came into force, the qualification of an act as a directive, a regulation, or a decision did not determine its place in the hierarchy of norms. A regulation was not necessarily superior to a directive, which was not itself necessarily prevailing over a decision. The type of act in question was thus irrelevant. The Treaty of Lisbon introduced a major innovation by making several distinctions:

- between legislative and non-legislative acts with general scope,
- within non-legislative acts, between those with general scope and those with individual scope,
- between delegated acts and implementing acts.

As we shall see, of significance is the distinction between:
– legislative acts – adopted in accordance with an ordinary or special legislative procedure, on the one hand,
– and delegated acts and implementing acts, on the other hand.

While legislative acts are adopted by the Council in accordance with a special legislative procedure or jointly with the European Parliament when adopted in accordance with an ordinary legislative procedure, the delegated and implementing acts are adopted by the Commission, which has less democratic legitimacy. Given that the European Parliament embodies the core of democratic requirements,[4] the abusive use of non-legislative acts could deprive it of its powers and thus undermine the principle of democracy[5].

To make matters more complex, a regulation, a directive and even a decision may be classified as either legislative or non-legislative. Consequently, nine categories of regulatory acts can be distinguished on the basis of the three categories of binding acts referred to in Article 288 TFEU and, on the other hand, of the different categories of powers set out in Articles 290 to 291 TFEU. In addition, the specific nature of the CFSP must also be taken into account.

[4] Art.10 (1) and (2) TEU.
[5] Art. 2 (1) TEU.

	Legislative competence (art. 289 TFUE)	Delegated competence (art. 290 TFUE)	Implementing competence (art. 291 TFUE)
Directive	Adopted by the Council and, where applicable, by the European Parliament	Adopted by the Commission	Adopted by the Commission
Regulation	Adopted by the Council and, where applicable, by the European Parliament	Adopted by the Commission	Adopted by the Commission
Decision	Adopted by the Council and, where applicable, by the European Parliament	Adopted by the Commission	Adopted by the Commission

2. Legislative Acts

The Treaty of Lisbon distinguishes between two legislative procedures. In virtue of Article 294 TFEU, the ordinary legislative procedure consists of the adoption of a regulation, directive or decision jointly by the European Parliament and the Council, on a proposal from the Commission. In specific cases provided for in the Treaties, the adoption of a regulation, directive or decision by the Parliament with the participation of the Council or by the Council with the participation of the Parliament constitutes a special legislative procedure.

Legislative acts are defined according to a procedural criterion, since they consist of 'legal acts adopted by legislative procedure' (Article 289(3) TFEU). In effect, the ordinary legislative procedure applies only where the provision of the Treaties forming the legal basis for the act in question '[makes] reference' to that legislative procedure (Article 289(1) in conjunction with Article 294(1) TFEU). It is therefore the procedure for adopting the secondary legislation that determines its legislative nature.[6] Thus, legal acts adopted in accordance with a provision of the Treaties that expressly refers either to the ordinary legislative procedure or to the special legislative procedure.[7] The content of the act is not relevant to its status as a legislative act. [8]

On the other hand, regardless of its content and effects, an act that is not adopted in accordance with legislative procedure, whether ordinary or special, formally classifies as a non-legislative act. As the ordinary legislative procedure provided for under Articles 114, 192(1), 194 TFEU is prescribed for the enactment of the internal market, environmental, and energy legal acts, then these acts are *ispso facto* classified as legislative acts, notwithstanding that their content might well be regarded as administrative in nature. Where the treaties do not specify the type

[6] P Craig, *The Lisbon Treaty* (Oxford, OUP, 2010) 253.
[7] Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* [2017] ECLI:EU:C:2017:631, para 62.
[8] P Craig, *The Lisbon Treaty*, above, 256.

of act to be adopted (which is the case of the legal bases of the environmental, energy, and internal market policies), the institutions are free to select the most relevant instrument on the case-by-case basis.[9]

The CJEU stressed that 'a systemic approach of that kind provides the requisite legal certainty in procedures for adopting EU acts, in that it makes it possible to identify with certainty the legal bases empowering the institutions of the European Union to adopt legislative acts and to distinguish those bases from bases which can serve only as a foundation for the adoption of non-legislative acts.'10

Furthermore, the distinction between legislative and non-legislative acts is of particular importance, since only the adoption of legislative acts is subject to the following obligations:

- the participation of national parliaments in accordance with Articles 3 and 4 of Protocol No. 1 and Articles 6 and 7 of Protocol No. 2 to the TFEU;
- the requirement that the Council holds public meetings when deliberating and voting on draft legislative acts (Article 16(8) TEU; Article 15(2) TFEU).11

3. Non-legislative acts

All secondary measures involve some addition to the primary act: they are supposed to bring greater exactitude to the meaning of the provisions laid down by the legislature.[12] The difficulties encountered at national level in delimiting the powers of the executive branch are exacerbated in EU institutional law, which is seeking to strike an unprecedented institutional balance.

We will address the specificities of the two main categories of non-legislative acts: delegated acts (a) and implementing acts (b). Articles 290 and 291 TFEU are among the main innovations introduced by the Treaty of Lisbon to the Union's regulatory architecture.[13] This treaty paved the way for what Advocate General Cruz Villalon called 'a new way of legislating', based on collaboration between the Parliament and the Council on the one hand, and the Commission on the other.14 In contrast to the legislative acts referred to in Article 289(3) TFEU, non-legislative acts are regulations, directives or decisions that are adopted by means other than a legislative procedure. That being said, many delegated acts are nonetheless legislative in nature, because they are of general application, and can supplement or amend certain non-essential elements of legislative acts.[15]

---

[9] N de Sadeleer, *Manuel de droit institutionnel et de contentieux européen,* 2nd ed. (Brussels, Paradigm, 2025) 561-594.
[10] Cases C-643/15 and C-647/15, op. cit., para 63.
[11] *Ibid.*, para 169.
[12] P Craig, *EU Administrative Law,* 3rd ed (Oxford, OUP, 2018) 139.
[13] Prior to the entry into force of the Lisbon Treaty, the term 'implementing powers' in Article 202 EC covered the entire realm of implementing measures now divided between delegated and implementing acts.
[14] Case C-427/13 *Commission* v *European Parliament and Council* [2014] ECLI:EU:C:2014:2121, para 2, Opinion AG. Villalon 19 December 2013.
[15] P Craig, *The Lisbon Treaty*, above, 264.

Although the EU legislature has discretion when deciding to confer delegated powers (Article 290(1)) or implementing powers (Article 291(2)) on the Commission, those powers are not absolute. They must be implemented in accordance with the conditions laid down in those two provisions.[16]

In addition, the Commission must adopt each non-legislative act in accordance with the provisions of the legislative act that serves as its legal basis. By way of illustration, a delegated or implementing regulation must comply with the provisions of the basic directive or regulation from the Council and/or Parliament (*acte de base*). In other words, without a proper legal basis, the Commission's implementing measures are unlawful.

(a) Delegated acts (Art. 290 TFEU)

The concept of a delegated act is defined in Article 290 TFEU, which calls for several observations.

With regard to the *ratio legis* of Article 290, it should be noted that this provision is testament to the constitutional law of several Member States, which allows the executive branch to supplement or to amend legislation. The use of this technique makes it possible to adapt legislation more quickly to new circumstances. In addition, the CJEU is taking the view that Article 290 was conceived to 'enable the legislature to concentrate on the essential elements' to a legislation 'in respect of which it finds it appropriate to legislate'. As a result, the Commission is entrusted with the task of 'supplementing' certain non-essential elements of the legislative act adopted or 'amending' such elements within the framework of the power delegated to it'.[17] The use of delegated acts relieves the legislator of non-essential regulatory work.

Insofar, Article 290 excludes comitology, the Commission is not subject to the control of regulatory committees. This strengthens the Commission's powers. As a result, the Council, which since the early 1960s has relied on comitology to control the Commission's implementing acts, can only rely here on its powers of revocation and the veto of a particular delegated act, which are difficult to activate.[18] Conversely, the revocation of the delegation, or the veto of a particular delegated act, has increased the European Parliament's powers over delegated acts.[19] However, the Parliament committees have not developed such expertise.

---

[16] Case C-427/13, above, para 40.
[17] Case C-286/14 *European Parliament v Commission* [2016] ECLI:EU:C:2016:183, para 54; Case C-44/16 P *Dyson* v *Commission* [2017] ECLI:EU:C:2017:357, para 58; Case T-625/22 *Austria v Commission* [2025] ECLI:EU:T:2025:869, para 101 and the case-law cited.
[18] According to Craig, Member States representatives of the Council clearly have neither the time no expertise to perform such a control unaided. See p. 262.
[19] So far, these controls did not give rise to adjudication before the EU courts.

As regards the place of delegated acts in the normative hierarchy, they are 'non-legislative acts of general application', which has the effect of excluding acts of individual application. They are thus hybrid in nature because they are:

– neither 'legislative acts' *stricto sensu* (the act has not been and will not be adopted in accordance with the ordinary or special legislative procedure);
– nor 'implementing acts', insofar as they can both supplement and amend a 'legislative act'.

With regard to the personal scope of delegated acts, the powers of delegation are conferred by the Council and/or Parliament on the Commission – and not on the Council, unlike certain implementing acts.

With respect to the material scope of Article 290, as shown in the table below, the Commission must comply not only with the objectives, but also with the content, scope and duration of the delegation.20

	Obligations
Legislative Act	Determination of the objectives, content, scope and duration of the delegation; terms and conditions for revocation
Delegated Act	Add to or amend non-essential elements of the legislative act in accordance with the delegation requirements

The following table highlights the distinction between the formal and substantive aspects.

Delegated Acts subject to amendments	**Legal nature**
Formally	non legislative
Susbtantially	legislative

(aa) Two categories of delegated acts: amending or supplementing.

The scope of the delegated acts is limited given that their purpose is either to 'supplement' the basic legislative act or to 'amend' non-essential elements of the legislative act itself. A distinction must therefore be made between "amending delegation" and "supplementing delegation".21

- The delegation leading to the "amendment" of the legislative act empowers the Commission to amend, modify, add or delete non-essential elements that appear in it or do not appear in it.

[20] Case C-696/15 P *Czech v Commission* [2017] ECLI:EU:C:2017:595, para 51.
[21] C Blumann 'La jurisprudence de la Cour de justice et du Tribunal en matière de contentieux institutionnels et interinstitutionnels', (2017) 2 *R.D.U.E.* 67.

- However, by delegating to the Commission the power to 'supplement' the basic legislative act, the legislature authorises it to "give effect to that act". When the Commission exercises such power, its mandate is limited to the 'development in detail of non-essential elements of the legislation in question that the legislature has not specified'.22

According to AG Mengozzi, the aim of this distinction is to avoid mixing genres, insofar as delegated acts that 'supplement' legislative acts and are formally non-legislative should not be included in legislative acts, as this could distort the latter.[23] *Connecting Europe Facility* is a case in point[24]: in that case, the European Parliament argued that in inserting the annex in the basic act, the Commission had exceeded its power to adopt a delegated act, because it should instead have adopted a separated delegated act. The Court held that delegation of a power to 'supplement' the basic act only authorized the Commission to flesh out that act and not to modify or amend the non-essential elements laid down in that act. The contested regulation was thus invalid, since the Commission could not insert an annex in the legislative act. On another note, the insertion of a footnote in an annex to a legislative regulation constitutes an amendment for the purpose of Article 290. [25]

This distinction entails very practical consequences.

- In the case of "delegation-amendment", since the non-essential normative content of the legislative act is being modified, the amended 'non-essential elements' will be incorporated into the legislative act.26 This is therefore an amending regulation.
- The 'supplementary delegation' must be carried out by means of a legal act separate from the legislative act. Consequently, no changes are made to the legislation.

(bb) Distinction between essential and non-essential elements

Delegation only allows the Commission to amend 'non-essential elements'. Conversely, essential elements of legislation are not subject to any form of delegation. Needless to say, it is challenging to draw the dividing line between 'essential' (legislation that is not capable of delegation) and 'non-essential' (non-essential legislative elements that can be delegated). The 'role' of the Court of Justice in policing the frontier between 'the essential' and the 'non-essential' is, by the nature of things, limited: its opinion 'cannot be substituted for that of the legislature under any hypothesis'.[27]

[22] Case C-286/14, above, para 41.
[23] AG Mengozzi Opinion in case C-88/14, *Commission v European Parliament and Council* [2015] ECLI:EU:C:2015:304, para 43.
[24] Case C-286/14.
[25] Case C-88/14, *Commission v European Parliament and Council* [2015] ECLI:EU:C:2015:499, para 44.
[26] *Ibid.*, p. 69.
[27] Opinion AG M Pedro Cruz Villalón in Case C-427/12 *Commission v Parliament and Council* [2014] ECLI:EU:C:2013:871, para 71.

Under the former treaties, the CJEU had interpreted the concept of 'essential elements of the matter to be regulated' very restrictively. It covered only those provisions whose purpose was to flesh out the fundamental objectives of EC policy.28 By way of illustration, prior to the Lisbon Treaty, the Court had to verify whether a Commission regulation allowing the use of GMOs in organic farming was not encroaching on the essential elements of a basic GMO regulation. That Council regulation did not expressly prohibit the use of GMOs in organic farming. The Court held that the secondary regulation adopted by the Commission did not go beyond the principles laid down by the basic regulation.[29]

That being said, the Court has become stricter in requiring that 'the definition of the power conferred is sufficiently precise, in that it must indicate clearly the limits of the power and must enable the Commission's use of the power to be reviewed by reference to objective criteria fixed by the EU legislature'.[30] The essential elements of a basic set of rules are those which require political choices falling within the responsibilities of the EU legislature,[31] in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments, or if it means that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required.[32] Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned.[33]

(b) Implementing acts (Art. 291 TFEU)

(aa) Competent authorities

In accordance with Article 291(1), executive power lies with the Member States, which adopt all the measures of domestic law necessary to implement EU legally binding acts. Alternatively, where 'uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission,…'. Therefore, the power vested in the Commission is subject to the need to establish 'uniform conditions of implementation' throughout the EU, which is generally the case for rules relating to the functioning of the internal market.[34] As a result, where uniformity is required in order to foster the functioning of

[28] Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany v Commission* [1997] ECR I-645, paras 36 and 37; Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461 ECLI:EU:C:1999:310 para 21.
[29] Case C-156/93 *European Parliament v Commission* [1995] ECR I-2019 ECLI:EU:C:1995:238, paras 18 to 25.
[30] Case C-291/86 *Central-Import Münster* [1988] ECLI:EU:C:1988:361, para 13; Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:449, para 90; Case C-696/15 P, para 49.
[31] See, to that effect, Case C-355/10 *European Parliament* v *Council* [2012] ECLI:EU:C:2012:516, para 65.
[32] See C-696/15 P, above, para 78; Case T-625/22, above, para 104.
[33] See C-540/14 P *DK Recycling und Roheisen* v *Commission* [2016] ECLI:EU:C:2016:469, para 48 and the case-law cited.
[34] N de Sadeleer, *EU Environmental Law and the Internal Market* (OUP, 2010).

the internal market, or the implementation of climate and environmental legislation, the Commission becomes the main holder of executive power.

With regard to the scope of executive powers before the entry into force of the Lisbon Treaty, the concept of 'implementation' was broadly defined by the Court of Justice. Consequently, the Council was empowered to grant the Commission broad powers.35

Due to the changes introduced by the Lisbon Treaty, the scope of application of Article 291 is therefore limited by Article 290.[36] Accordingly, when exercising its implementing powers, the Commission may not amend or supplement the legislative act, even in its non-essential elements.[37] Indeed, it could only amend or supplement non-essential elements of the basic act within the framework of the powers delegated to it.

Given that it intervenes in a subsidiary capacity, the Commission's implementing powers must be controlled by the Member States through comitology. On 16 February 2011 the Council and the European Parliament adopted Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. We have already seen from the proceeding discussion that there are no comitology constraints among the ex-post controls listed in Article 290. Accordingly, the European Parliament and Council are excluded from the terrain of implementing acts.[38]

(bb) Scope of implementing acts

Implementing acts are intended to 'implement legally binding acts of the Union' (Art. 291(1) and (2), TFEU). Their scope is general (regulation, directive or decision of general application) and not individual. It follows that a standard administrative decision addressed to an undertaking, which is falling within the definition of decision for the purpose of Article 288, cannot be qualified as an implementing act. In effect, such an administrative decision has nothing to do with 'uniform conditions for implementation' within the meaning of Article 291.[39] Last, Article 291(4) TFEU requires the term 'implementing' to be included in the title of these acts.

With respect to environmental issues, the committees play a key role on the grounds that they intervene especially in relation to the inscription of active hazardous substances in the annexes of regulations concerning the protection of the health or safety of humans, animals, or plants.

[35] Case C-66/04 *UK v European Parliament and Council* [2005] ECLI:EU:C:2005:743, para 52.
[36] P Craig, *The Lisbon Treaty* (Oxford, OUP, 2010) 275.
[37] Case C-65/13 *European Parliament v Commission* [2014] ECLI:EU:C:2014:2289, para 45.
[38] Ibidem, 278.
[39] Ibidem, 283.

4. Grey areas between delegated and implementing acts

Can the legislature exercise discretion between these two categories? Are the scopes of Articles 290 and 291 entirely distinct? Where does delegation end and implementation begin? Is there any 'grey area'? The question arises as to whether a secondary measure is adding something to the basic act with a view to supplementing it (recourse to a delegated act under Article 290) or whether it is fleshing it out (recourse to an implementing act under Article 291)?

Needless to say, the choice between the two categories is likely to affect the interinstitutional balance of power. Each institution is seeking to classify secondary measures in order to maximise their control.[40] The Council is favouring measures to be categorised as implementing acts, notwithstanding that is has no formal veto. The Comitology rules confer on Member States representatives – and not on the Council – the right to endorse or to oppose the Commission's proposal.[41] The European Parliament, by way of contrast, is favouring the adoption of delegated acts, since it has little power under Article 291.[42] Indeed, that provision has little to offer to the European Parliament. Finally, the Commission argues for a broad reading of Article 290 because ex-post controls are difficult to trigger. In addition, it opposed comitology ever since it was created insofar as this procedure requires it to obtain the approval of the State authorities represented in the committees.

On 18 March 2014, in *Biocidal Products*, the CJEU clarified the respective scope of these two categories of non-legislative acts, although this initial decision provided little guidance on the nature of this distinction. The guiding principle of the system of fees from the undertakings trading in biocidal products provided for in the 2012 Biocides Regulation[43] was laid down by the legislature itself when it decided that the fees should be used solely to cover the costs of the ECHA' services. Accordingly, the EU did not confer delegated power on the Commission.[44] In such a case, the conferral of an implementing power on the Commission under Article 291(2) TFEU may be considered reasonable for the purposes of ensuring uniform conditions for the implementation of that system within the EU.[45]

The concept of an implementing act within the meaning of Article 291 TFEU must be assessed 'in relation to the concept of a delegated act, as derived from Article 290 TFEU'.[46] In exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements.[47] When the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide

[40] P Craig, *EU Administrative Law,* 3rd ed (Oxford, OUP, 2018) 140.
[41] Neither the Council nor the European Parliament were accorded a direct role on the committees.
[42] J Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU law' (2012) 19 *CMLR* 913.
[43] Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 2012/167.
[44] Case C-427/12, above, paras 43 to 52.
[45] Ibidem, para 52.
[46] Ibidem, para 35.
[47] Case C-65/13, above, para 45.

further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States'.[48] Accordingly, the dividing line is drawn as follows:

- With regard to delegated acts, insofar as the objectives, content, scope and duration of the delegation of power must be explicitly defined by the legislative act conferring such delegation (Art. 290), they must fit 'within the regulatory framework as defined by the basic legislative act'.[49] These acts may thus amend or supplement the basic act.
- As regards implementing acts, they must enable the Commission to 'provide further detail in relation to the normative content of that act'.50

To sum up, delegation allows a measure of discretion which is not mirrored in the case of 'implementation' where the Commission is called on to flesh out in detail one of the essential elements of the basic act.[51] The criterion to be applied therefore relates to the complementary or amending nature of the delegated act, on the one hand, and the need for precision specific to the implementing act, on the other.

Finally, the choices made by the legislature between these two categories are not exempt from judicial review, even if such review must be limited to censuring manifest errors of assessment. [52] Given that the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU, judicial review is limited to manifest errors of appraisal.[53]

5. Judicial review of the Treaty limits on delegation

It is for the EU courts to police the limits on delegation. Given that the vast majority of EGD legislations were adopted between 2021 and early 2025, the EU courts had little opportunity to rule on the matter. Nevertheless, at the end of 2025, the General Court handed down three rulings regarding taxonomy. Cases T-583/22, *Fédération environnement durable,* T-592/22 *ClienEarth v Commission,* and T-625/22 *Austria v Commission* not only provide a better understanding of taxonomy obligations but also highlight the limited judicial review of the manner in which the Commission implements its delegated powers.

The objective of the Taxonomy Regulation[54] is to establish the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of determining

[48] Case C-427/12, above, para 39; Case C-88/14, above.
[49] Case C-427/12, above, para 38; Case C-88/14, above, para 29.
[50] Case C-427/12, above, para 52.
[51] Ibidem, para 62.
[52] Ibidem, para 40.
[53] Ibidem.
[54] Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 2020/198 ('the Taxonomy Regulation'). The EU Taxonomy framework has been revised in July 2025, in order to simplify sustainability reporting obligations for companies and financial institutions. The amended Regulation significantly shortens and

the degree to which an investment is environmentally sustainable.[55] Accordingly, the Regulation establishes a unified classification system which harmonises the criteria at EU level for determining whether an economic activity qualifies as environmentally sustainable, which gives investors and other economic operators a common understanding of environmentally sustainable economic activities.[56]

To qualify as environmentally sustainable, an economic activity must satisfy the 'criteria for environmental sustainability' laid down in Article 3 points (a) to (d), that is to say,

- where it contributes substantially to one or more of the environmental objectives set out in Article 9 of that regulation (climate change mitigation and adaptation, circular economy, pollution prevention, biodiversity, etc.)

- does not significantly harm any of those objectives,

- is carried out in compliance with the minimum safeguards laid down in Article 18 (OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights, including the principles and rights),

- and complies with the technical screening criteria established by the delegated acts of the Commission.[57]

Articles 10 to 15 lay down the conditions under which an economic activity qualifies as contributing substantially to each of the objectives set out in Article 9. For each environmental objective, the Commission is called on to flesh out the uniform criteria for determining whether economic activities are likely to contribute substantially to that objective. As the discussion will evidence, the legislative requirements determining the sustainable nature of the activities at hand are couched in open-textured terms that leave a lot of discretion to the Commission.

---

streamlines reporting templates, deleting sector-specific templates for fossil gas and nuclear activities and integrating those disclosures into the general framework. Financial institutions will report exposures to these sectors only in aggregated form, aligning disclosures more closely with those of their counterparties. Moreover, with the aim of reducing compliance costs, the Commission also amended certain "do no significant harm" (DNSH) criteria, particularly those relating to chemicals. See Commission Delegated Regulation (EU) 2026/73 of 4 July 2025 amending Delegated Regulation (EU) 2021/2178 as regards the simplification of the content and presentation of information to be disclosed concerning environmentally sustainable activities and Delegated Regulations (EU) 2021/2139 and (EU) 2023/2486 as regards simplification of certain technical screening criteria for determining whether economic activities cause no significant harm to environmental objectives.

[55] Article 1.
[56] Recitals 6 and 12.
[57] Article 10(5) and Article 11(5) of the Taxonomy Regulation.

Article 19(1) sets out a series of requirements which concern both the content of the technical screening criteria[58] and the form that those are to take.[59]

When establishing and updating the technical screening criteria, the Commission must identify the minimum requirements necessary to avoid significant harm to other objectives while respecting the principle of technological neutrality.

The Commission should also ensure that its criteria are based

- on the relevant EU law,[60]
- on 'conclusive scientific evidence' and the precautionary principle enshrined in Article 191 TFEU,[61]
- are developed by taking into account life-cycle considerations, including existing life-cycle assessments,
- and are updated regularly.[62]

Regarding the form of the technical screening criteria, the EU has left to the Commission some leeway : the standards must be 'quantitative and contain thresholds to the extent possible', or 'otherwise be qualitative'.[63] In *Fédération environnement durable*, the applicants criticised the fact that the Commission's technical screening criteria for electricity generation from wind power did not provide that the CO2 emissions per kilowatt hour (kWh) of electricity generated from wind power must comply with a specific threshold. In effect, the Delegated Regulation[64]merely provides, as a technical screening criterion for the substantial contribution to climate change mitigation, that 'the activity generates electricity from wind power'. The

[58] See, in particular, paragraph 1(a) and (b).
[59] See, in particular, paragraph 1(c).
[60] Article 19(1)(d) of the Taxonomy Regulation, and recitals 43 and 44. The fact that existing legislation regarding climate change is obsolete is not capable in itself of demonstrating non-compliance with the requirements established by the Taxonomy Regulation. References to other legislative instruments in the technical screening criteria should be interpreted as referring to their most recent version in force. see Case T-592/22 *ClienEarth v Commission* [2023] EU:T:2023:708, paras 65 and 95.
[61] Article 19(1)(f) of the Taxonomy Regulation. Regarding the Commission's interpretation of the concept of 'conclusive scientific evidence', see Case T-592/22, paras 42 to 45.
[62] Recital 40.
[63] Article 19(1)(c). It must be noted that most EU harmonization measures are based on objective thresholds which set a dividing line between what is lawful and what is unlawful. Accordingly, a flurry of provisions outlaw or regulate airborne, water, and soil pollutants. Other provisions set out product standards, process standards, concentrations of substances, upper limits, decibel levels, etc. See N de Sadeleer, *EU Environmental Law and the Internal Market* (OUP, 2010) 211-213.
[64] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, OJ L 2021/442.

General Court dismissed their plea. It held that Article 10(3)(a) refers only to the 'conditions under which' an activity qualifies as contributing substantially to climate change mitigation. It follows from that provision that it requires a 'determination of whether and to what extent the Activity' makes such a contribution. 'The said provision does not in fact contain any reference to the idea of a necessarily quantitative assessment, in the sense of compliance with a defined threshold.'[65] It is regrettable that technical thresholds have often been discarded, as they allow for a better assessment of the contribution of economic activities to sustainable development.

Moreover, the technical screening criteria are not merely a scientific discipline. Pursuant to Article 19(1), the room for manoeuvre left to the Commission is reinforced by the obligation to take into account a number of factors, pursuing different objectives, including environmental, scientific, economic, financial and feasibility objectives.[66] The question arose as to whether the Commission is erring in law when it is balancing these different requirements. In other words, is the Commission adopting a 'political' decision in balancing the requirements laid down in Article 19(1) of the Taxonomy Regulation? In the case on bioenergy activities, the General Court held that the establishment of the screening criteria depends on a weighing up of different interests (environmental, social and economic externalities). Accordingly, the Commission may balance the various requirements set out in Article 19(1).[67] It must seek, where appropriate, a 'practical concordance between them, having regard to the diversity of their objectives and natures'.[68] This balance is all the more important given that the criteria are not necessarily convergent.[69] The applicant must demonstrate that the Commission misapplied that weighing of interests.

By way of illustration, Article 19(1)(g) gives the Commission 'a certain margin of discretion' to consider the life cycle requirement in conjunction with the other requirements laid down in that paragraph. That discretion did not oblige it to set, in the technical screening criteria for bioenergy activities, a life cycle GHG emissions threshold for all activities falling within the scope of its Delegated Regulation. [70]

From a procedural point of the view, the Commission must carry out appropriate consultations in line with the Better Regulation Agenda.[71] In particular, it must 'gather all necessary expertise', including though the consultation of the Technical expert group on sustainable finance ('TEG'), which is assisting the Commission in developing the taxonomy.[72] That expert group has issued several recommendations concerning the technical screening criteria for economic activities which would make a substantial contribution to the environmental objectives set out in Article 9 of the Taxonomy Regulation.

[65] Case T-583/22 *Fédération environnement durable* [2025] ECLI:EU:T:2025:863, para 110.
[66] See, in particular, Article 19 (1) (g) to (i) and (k).
[67] Case T-592/22, above, paras 56 and 94.
[68] Ibidem, paras 57 and 94.
[69] Ibidem.
[70] Ibidem, para 83.
[71] Recital 50.
[72] Article 23(4) of the Taxonomy Regulation.

On 4 June 2021, the European Commission adopted a delegated regulation, which establishes technical screening criteria in order to include certain activities in the nuclear energy and fossil gas sectors in the category of activities deemed to contribute substantially to climate change mitigation.[73] In the Nuclear case, Austria submitted that the object of the delegated regulation encroached upon the essential elements of the Taxonomy Regulation due to the political and controversial nature of the inclusion of nuclear energy in the taxonomy. The General Court reached the conclusion that that legislature left open the possibility of defining all types of activity meeting those criteria as sustainable,[74] apart from fossil fuels, which are expressly excluded.[75] In enacting the Taxonomy Nuclear delegated act, the Commission established technical screening criteria that do not fall within essential elements of the Taxonomy Regulation.[76]

The General Court held that the essential elements of the Taxonomy Regulation consist in :

- the definition of environmental objectives,
- the environmental sustainability criteria,[77]
- and the requirements applicable to the technical screening criteria.[78]

Conclusions

The Lisbon Treaty distinguishes between legislative acts and non-legislative acts of general application. With respect to the latter, the EU legislator has a margin of discretion when deciding whether to confer on the Commission' either delegated powers (Article 290(1) TFEU) or implementing powers (Article 291 TFEU). The choice between the delegated powers and implementing powers is nothing of a pure academic exercise. The legislature must choose whether secondary rules should be adopted by the Commission pursuant to Article 290 or Article 291, provided that it complies with the criteria in the TFEU for the divide between delegated and implementing acts.[79] Within the limits laid down by the legislature, the Commission is authorized to adopt all measures necessary or appropriate for implementation of that act.[80]

Due to the technical nature of the subjects covered by recent EGD legislation, the EU legislature has extensively conferred delegated and implementing powers to the European Commission. As a result, a vast amount of implementing rules will have to be adopted in the coming years by the EU's executive branch. Since the criteria established by the CJEU are not always very clear (the choice depends on the level of generality or specificity of the legislative provisions),

[73] Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, OJ L 2022/188.
[74] Case T-625/22, above, para 115.
[75] Article 19(3) of the Taxonomy Regulation.
[76] Case T-625/22*,* above, para 118.
[77] Article 3 of the Taxonomy Regulation.
[78] Case T-625/22*,* above, para 116.
[79] Case C-88/14, above, para 28.
[80] P Craig, *EU Administrative Law,* above, 146.

it is difficult to assess whether the distinction made hitherto between delegated and implementing powers in the EGD legislation is consistent with the case law. Indeed, there is no shortage of borderline cases between in instances of 'delegation' where recourse to Article 290 is warranted, and instances of 'implementation' subject to Article 291.

The greater number of provisions providing for the adoption of delegated acts than implementing acts can be explained by the following reason. The recourse to delegated acts offers a twofold advantage for the Commission. On the one hand, this institution is endowed with considerable discretion that it does not have in relation to implementing measures, which are intended to clarify with precision the scope of the articles of the basic act. Secondly, the Commission has always been hostile to comitology, which plays an essential role in the adoption of implementing acts. Regulations are legal acts that are used by the EU lawmaker when conferring delegated powers on the Commission under Article 290. Conversely, directives have not been considered as the appropriate instrument.

Time and again, the Council and European Parliament have been facing difficulties to delineate precise parameters for the exercise of delegation. As a result, the vagueness of the objectives, content, scope of the delegations in many EGD legislation is likely to limit the intensity of judicial review. In addition, the General Court seems to be unwilling to review too vigorously the delegated acts as it is mindful of the difficulties faced by the Commission in these complex fields. It comes thus as no surprise that the European Commission is deemed to be the key actor in the implementation of the new EGD legislation.

Finally, the implementation of the numerous laws adopted between 2021 and 2025 will undoubtedly require more norms than the delegated and implementing acts we have discussed above. The new implementing powers framework put in place in the Lisbon Treaty has not precluded other normative developments (EU agencies, hybrid cooperation formulas involving EU and national executive actors, etc.).[81] Furthermore, the Commission will, in any event, continue to adopt an array of soft law instruments as it has done hitherto. These instruments will be applied by the national administration with a view to interpreting the EGD binding legal norms.

[81] A H Türk, 'Delegated Rulemaking in the European Union Fifteen Years Post-Lisbon: Taking Stock and Forward-Looking Reflections', (2024) European Journal of Risk Regulation 1-6.

Bibliography

John Bast, ‘New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU law’ (2012) 19 *CMLR* 913.

Claude Blumann ‘La jurisprudence de la Cour de justice et du Tribunal en matière de contentieux institutionnels et interinstitutionnels’, (2017) *R.D.U.E.*, n° 2.

Paul Craig, *The Lisbon Treaty* (Oxford, OUP, 2010)

Paul Craig, *EU Administrative Law,* 3rd ed (Oxford, OUP, 2018)

Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (OUP, 2010).

Nicolas de Sadeleer, 'The European Green Deal: *greenwashing compounded by deregulation* (Omnibus law) or a genuine paradigm shift?', (2025) European Journal of Risk Regulation 1-32.

Nicolas de Sadeleer, Manuel de droit institutionnel et de contentieux européen, 2nd ed. (Brussels, Paradigm, 2025)

Alexander H. Türk, ‘Delegated Rulemaking in the European Union Fifteen Years Post-Lisbon: Taking Stock and Forward-Looking Reflections’, (2024) European Journal of Risk Regulation 1-6.