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'I' ITEM NOTE

From:	Presidency/General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
Subject:	Non-binding delineation criteria between delegated and implementing acts - Updated draft position to be taken on behalf of the Council in the interinstitutional negotiations

1. In accordance with the last subparagraph of paragraph 28 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making (IIA)¹, the European Parliament, the Council and the Commission have committed to entering into negotiations without undue delay after the entry into force of the Agreement, with a view to supplementing the Common Understanding on Delegated Acts annexed to the IIA by providing for non-binding criteria for the application of Articles 290 and 291 of the TFEU.

2. On the basis of the position endorsed by Coreper on 6 December 2017², the Presidency on behalf of the Council entered into interinstitutional negotiations on 1 February 2018. On that occasion, the European Parliament confirmed that its negotiations position was the one contained in resolution 2012/2323 ("Szajer Report")³.

¹ OJ L 123, 12.5.2016, p. 1.

² ST 15294/17.

³ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0127>.

Therefore, the European Parliament requested the two other institutions to make their views known on its position, as confirmed.

3. It is therefore appropriate to update the above mentioned position to be taken on behalf of the Council, in accordance with paragraph 3 of the note submitted to Coreper on 6 December 2017.

4. The table in the Annex to this note is structured in the following way: the first column contains the Commission proposal from 2015; the second column contains the European Parliament position based on the above mentioned resolution; the third column contains the Council position, as updated in order to address the European Parliament position (new elements **in bold**); the fourth column contains indications of relevant case-law and the fifth column is reserved for a future possible compromise text.

5. Following a written consultation of legal advisors, the Antici Working Party confirmed agreement on the text of the updated draft position on this subject at its meeting of 13 March 2018.

6. It is therefore suggested that Coreper endorse the updated draft position as set out in the Annex as an I-item.

Annex

Draft Council position

on non-binding delineation criteria between delegated and implementing acts

Commission position (based on COM(2015)216	European Parliament position (based on EP resolution 2012/2323 (INI))	Council position	Case law/examples	Compromise text
		<p>In point 26 of the Interinstitutional agreement on Better Law-Making ("the IIA"), the three institutions underlined the important role played by implementing and delegated acts in Union law, and that used in an efficient, transparent manner and in justified cases, they are an integral tool for Better Law-Making, contributing to simple, up-to-date legislation and its efficient, swift implementation. In point 28 of the IIA, the three institutions envisaged to supplement the Common Understanding on Delegated Acts annexed to the IIA "by providing for non-binding criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union".</p>		

		<u>General principles</u>		
1. The criteria set out in the following points shall be used in deciding whether an empowerment should be given pursuant to Article 290 of the Treaty for the adoption of a delegated act or pursuant to Article 291(2) of the Treaty for the adoption of an implementing act. In each case the nature, content and context of the envisaged measure must be taken into account. These criteria should not be considered as exhaustive.	Considers that the following non-binding criteria should be followed by Parliament in applying Articles 290 and 291 TFEU; this list of criteria should not be considered as exhaustive	<p>1. The IIA recalls that “it is the competence of the legislator to decide whether and to what extent to use delegated or implementing acts, within the limits of the Treaties” (paragraph 26 of the IIA, cf Case C-427/12 "Biocides", §40).</p> <p>The essential elements of legislation must be determined by the legislator in the basic act and may not be laid down in a delegated or implementing act.</p> <p>2. Subject to the evolution of the case-law of the CJEU, the following non-binding criteria aim to provide guidance to the institutions as to whether, in case the legislator decides to give an empowerment to the Commission ,that empowerment should be given pursuant to Article 290 of the TFEU for the adoption of a delegated act or pursuant</p>	<p>C-427/12 (Biocides),paragraph 40</p> <p>C-88/14 (Visa), paragraph 28</p>	

		<p>to Article 291(2) of the TFEU for the adoption of an implementing act in accordance with Regulation (EU) N°182/2011.</p> <p>3. In each case the nature, objectives, content and context of the envisaged measure must be taken into account.</p> <p>4. These criteria should not be considered as exhaustive.</p>		
		<u>1st criterion: binding or non-binding measures</u>		
2. Only the power to adopt legally binding acts may be conferred under Articles 290 and 291 of the Treaty.	<p>(indent 1) Only the power to adopt legally binding measures may be delegated under Article 290 TFEU.</p> <p>The binding or non-binding character of a measure must be decided on the basis of its nature and content;</p>	5. Only legally binding acts may be adopted under Article 290 TFEU as delegated acts. Non-binding measures shall not be adopted by means of delegated acts.		
		<u>2nd criterion: measures of general or individual application</u>		
3. A legislative act may only confer on the Commission the power to adopt non-legislative	(indent 13) A legislative act may only delegate to the Commission the power to	6. A legislative act may confer the power to adopt delegated acts only on the	C-270/12 (Short Selling), paragraphs 79, 83, 86	

acts of general application by means of delegated acts. Measures of individual application may not be adopted by means of delegated acts, but may be adopted by implementing acts. An act is of general application if it applies to objectively determined situations and produces legal effects, either with respect to certain categories of persons or in general terms.	adopt non-legislative acts of general application. Measures of individual application may not, therefore, be adopted by means of delegated acts. An act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons generally and in the abstract.	<p>Commission. Delegated acts may only be of general application.</p> <p>7. Measures of individual application may not be adopted by means of delegated acts.</p> <p>8. Implementing acts may be of individual or general application.</p> <p>9. A measure is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract.</p>	T-338/08 (Stichting Natuur en Milieu), paragraphs 29, 30 and 45	
		<u>3rd criterion: amendments of legislative acts and their annexes</u>		
4. Legislative acts can only be amended by means of legislative or delegated acts. This includes amendments of annexes to legislative acts, as such annexes are an integral part of the legislative act. Annexes are not to be added	(indent 2) The Commission may only amend legislative acts by means of delegated acts. This includes amendment of annexes, as annexes are an integral part of the legislative act. Annexes are not to be added to or deleted with the	<p>10. Legislative acts can only be amended by means of legislative or delegated acts.</p> <p>The delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-</p>	C-88/14 (Visa) paragraph 31, 42, 43 C-65/13 (Eures), paragraph 43, 44, 45	

to or deleted from an act with the aim of triggering or avoiding the use of delegated acts. If the legislator considers that a text should be an integral part of the basic act, it may decide to include that text in an annex.	aim of triggering or avoiding the use of delegated acts; if the legislator considers that a text should be an integral part of the basic act, it may decide to include that text in an annex. This is particularly true as regards Union lists or registers of authorised products or substances which should remain, in the interests of legal certainty, an integral part of the basic act, if appropriate, in the form of an annex. Measures intended to further define the exact content of the obligations spelt out in the legislative act are designed to supplement the basic act by adding non-essential elements.	essential elements laid down by the legislature in that act (Case C-286/14, §42). 11. Amendments of annexes to legislative acts can be made only by way of legislative or delegated acts, as such annexes are an integral part of the legislative act. 12. If the legislator considers that a text should be an integral part of the basic act, it may decide to include that text in an annex. The legislator is never obliged to provide for annexes in legislative acts and can decide for empowerments for delegated or implementing acts instead.		
		<u>4th criterion: additional rules supplementing the basic act</u>		
5. The essential elements of legislation must be determined by the legislator and cannot be the subject of a delegated or	(indent 4, first part) Measures designed to lay down (further) conditions, criteria or requirements to be met – the	13. Measures designed to lay down additional rules building upon the content of the basic act and coming	C-355/10 (Schengen), paragraphs 64, 65, 66, 67, 68 and 80	

implementing act. Measures designed to lay down additional substantive rules and criteria to be met – by the Member States or by other persons or entities directly concerned by the legislation – will, by definition, alter the content of the legislation and add new rules of general application. Consequently, the creation of such further rules or criteria may only be laid down by means of a delegated act.	fulfilment of which must be ensured by the Member States or other persons or entities directly concerned by the legislation – will, by definition, alter the content of the legislation and add new rules of general application. Consequently, the creation of such further rules or criteria may be accomplished only by means of a delegated act.	within the regulatory framework as defined by the basic act may be adopted through delegated acts, provided that such measures do not touch upon essential elements of the basic act. The objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting the delegation. This criterion may, in particular, be met by additional binding measures of general scope building upon the basic act that affect in substance non-essential rules laid down in the basic act.	C-427/12 (Biocides), paragraph 38, 43 C-44/16P (Dyson), paragraphs 53, 58 to 62 C 696/15 (ITS), paragraph 49 (versus C696/15 (Eures), paragraph 46 for implementing acts) C-286/14 (CEF), paragraph 40, 41 and 53	
		<u>5th criterion: additional rules implementing the basic act</u>		
6. By contrast, the implementation of the rules or criteria already established in the basic act or a delegated act, without modifying the substance of the rights or obligations stemming from it can take place through implementing acts. In	(indent 4, second part) By contrast, the implementation of the rules or criteria already established in the basic act (or in a future delegated act), without modifying the substance of the rights or obligations stemming from them and without making	14. By contrast, implementing or giving effect to the rules already established in the basic act by providing further detail in relation to the content of that act, without modifying the substance of the legislative framework, should take place	C-427/12 (Biocides), paragraphs 34, 35, 39, C-65/13 (Eures), paragraph 46	

particular authorisations in cases in which the Commission decision is fully based on criteria contained in the basic act are to be considered implementing acts.	further policy choices, can take place through implementing acts. (indent 12) Authorisations can be measures of general application. This is for instance the case where decisions concern the authorisation or prohibition of the inclusion of a specific substance in food, cosmetics etc. Those decisions are general because they concern any operator willing to use such substance. In such cases, if the Commission decision is fully based on criteria contained in the basic act, it could be an implementing act; where, however, the criteria still allow the Commission to make further non-essential/secondary political or policy choices such authorisation should be a delegated act, because it would supplement the basic act.	through implementing acts. 15. In particular authorisations in cases in which the Commission decision is based on criteria contained in the basic act are to be considered implementing acts.		
		<u>6th criterion: measures establishing a procedure, a method or a methodology</u>		
7. Measures establishing a procedure (that is to say a way	(indent 9) Measures establishing a procedure (i.e. a	16. Measures establishing a procedure (that is to say a		

<p>of performing or giving effect to something) can be laid down either in a delegated or in an implementing act (or even be an essential element of the basic act), depending on the nature, content and context of the provisions set out in the basic act. Measures establishing elements of procedures involving further non-essential policy choices in order to supplement the legislative framework laid down in the basic act should in general be laid down in delegated acts. Measures establishing details of procedures in order to ensure uniform conditions for the implementation of an obligation laid down in the basic act should in general be implementing measures.</p>	<p>way of performing or giving effect to something) can be laid down either in a delegated or in an implementing act (or even be an essential element of the basic act), depending on their content, context and the nature of the provisions set out in the basic act. Measures establishing elements of procedures involving further non-essential policy choices in order to supplement the legislative framework laid down in the basic act should in general be laid down in delegated acts. Measures establishing details of procedures in order to ensure uniform conditions for the implementation of an obligation laid down in the basic act should in general be implementing measures.</p>	<p>way of achieving a certain result defined in the basic act) can be laid down either in a delegated or in an implementing act (or even be an essential element of the basic act), depending on the nature, objectives, content and context.</p> <p>17. For instance, measures establishing elements of a procedure which build upon the content of the basic act and which come within the regulatory framework as defined by the basic act should in general be laid down in delegated acts.</p> <p>18. By contrast, measures establishing procedures in order to ensure uniform conditions for the implementation of a rule laid down in the basic act should be implementing measures.</p>		
<p>8. As with procedures, an empowerment to determine methods (that is to say ways of doing something in particular in a regular and</p>	<p>(indent 10) As with procedures, an empowerment to determine methods (i.e. ways of doing something in particular in a regular and</p>	<p>19. As with procedures, an empowerment to determine methods (that is to say ways of doing something in particular in a regular and</p>		

systematic way) or methodology (that is to say rules to determine the methods) can provide for delegated or implementing acts depending on the content and the context.	systematic way) or methodology (i.e. rules to determine the methods) can provide for delegated or implementing acts depending on the content and the context.	systematic way) or methodology (that is to say rules to determine the methods) can provide for delegated or implementing acts depending on the nature, objectives, content and context.		
		<u>7th criterion: measures related to an obligation to provide information</u>		
9. A measure that determines the types of information to be provided under the basic act (that is to say the exact content of information required by the basic act) generally supplements the obligation to provide information and should be carried out by means of a delegated act.	(indent 7) A measure that determines the type of information to be provided under the basic act (i.e. the exact content of the information) generally supplements the obligation to provide information and should be carried out by means of a delegated act.	20. A measure relating to an obligation to provide information can take place through delegated or implementing acts depending on the nature, objectives, content and context. For instance, a measure designed to lay down additional rules building upon the content of an obligation to provide information should be in general adopted through a delegated act.		

10. A measure determining arrangements for the provision of information (that is to say the format) does not generally add to the obligation to provide information, but it enables uniform implementation. This should therefore, as a general rule, be taken as an implementing act.	(indent 8) A measure determining arrangements for the provision of information (i.e. the format) does not generally add to the obligation to provide information. Instead, such a measure enables uniform implementation. This should therefore be carried out, as a general rule, by means of an implementing act.	21. By contrast, measures designed to determine inter alia the types, format or frequency of information to be provided in order to ensure comparability of data or effective enforcement of obligations laid down in the basic act, would ensure that the basic act is being implemented under uniform conditions. Such measures should therefore be adopted as implementing acts.		
		<u>8th criterion: measures relating to financial instruments</u>		
11. Annual and multiannual work programmes implementing financial instruments should be adopted by means of implementing acts.	(indent 6) Depending on the structure of the financial programme in question, non-essential elements amending or supplementing the basic act, such as those concerning specific technical matters, strategic interests, objectives, expected results, etc. could be adopted by delegated acts to the extent that they are not included in the basic act. Only for elements that do not reflect any further political or policy orientation the legislator may	22. Annual and multiannual work programmes implementing financial instruments should be adopted by means of implementing acts.		

	decide to allow for their adoption through implementing acts.			
	(indent 3) Measures leading to a choice of priorities, objectives or expected results should be adopted by means of delegated acts, if the legislator decides not to include them in the legislative act itself.	<i>Not acceptable: these measures can be laid down either in a delegated or in an implementing act (or even be an essential element of the basic act if they entail political choices falling within the responsibilities of the legislator), depending on the nature, content and context of the provisions set out in the basic act. For instance, if these measures are technical or further develop the choices of the legislator without laying down additional rules coming within the regulatory framework, they may be of an implementing nature.</i>		
	(indent 5) Under certain circumstances the Commission is empowered to adopt additional binding rules of general scope that affect in substance the rights or obligations laid down in the basic act. Those measures will, by definition, supplement	<i>Acceptable in principle. In so far as the text elaborates on “supplement” and subject to appropriate rewording it can be included in the text of the 4th criterion (see alternative text inserted under the 4th criterion).</i>		

	those laid down in the basic act, further defining the Union policy. This can be achieved only by means of a delegated act.			
	(indent 11) In general, delegated acts should be used where the basic act leaves a considerable margin of discretion to the Commission to supplement the legislative framework laid down in the basic act.	<i>Not acceptable: superseded by ECJ case-law (cf C-88/14, Visa reciprocity, & 32 : "neither the existence nor the extent of the discretion conferred on [the Commission] by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 or Article 291 TFEU" C-427/12, Biocides, & 40. "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.").</i>	C-88/14 (Visa), paragraph 32	
	(Indent 14) Implementing acts should not add any further political orientation and the powers given to the	<i>Not acceptable: superseded by ECJ case-law (cf C-88/14, Visa reciprocity, & 32 : "neither the existence nor</i>	C-88/14 (Visa), paragraph 32	

	Commission should not leave any significant margin of discretion.	<i>the extent of the discretion conferred on [the Commission] by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 or Article 291 TFEU";</i> <i>C-427/12, Biocides, & 40. "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.")</i>		
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