



Brussels, 1 December 2017
(OR. en)

15294/17

LIMITE

INST 449
JUR 574

'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 - Draft position to be taken on behalf of the Council in forthcoming 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. The purpose of this draft position is to allow the Presidency on behalf of the Council to enter into the interinstitutional negotiations, both at political and at technical level.
3. The Presidency will report back to Coreper with a view to update that position as much as necessary, in particular when the other Institutions will have made their views known on that basis.

¹ OJ L 123, 12.5.2016, p.1

4. If an agreement is tentatively reached among negotiators at the end of the process, it will be submitted to the Coreper/Council with a view to adopt a joint declaration supplementing the Common Understanding on Delegated Acts.
5. As regards the text in the Annex below, it is structured in the following way: the first column contains the Commission proposal from 2015 (as made in the context of the proposal for IIA² and as confirmed by the Commission in view of the forthcoming negotiations on the delineation criteria foreseen in point 28 of the IIA) and the second column contains a draft position to be taken on behalf of the Council on each proposed criterion. The draft position in this document is built on the basis of and further elaborates the draft Council position contained in the Luxembourg Presidency non-paper of 2015 distributed to the delegations in the context of the negotiations of the IIA.
6. After two working sessions at legal advisors level on 26 October 2017 and 7 November 2017 followed by a written consultation, the Antici Working Party confirmed agreement on the text of the draft position on this subject at its meeting on 5 December 2017.
7. It is therefore suggested that Coreper endorse the draft position as set out in the Annex as an I-item.

² Doc. 9121/15 ADD1

Annex

Draft Council position

on non-binding delineation criteria between delegated and implementing acts

COMMISSION PROPOSAL BR IIA, Annex 1	COUNCIL
	<p><i>Insert a chapeau:</i></p> <p><i>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".</i></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.	<p><i>Not acceptable. The Council can only accept non-binding criteria, as decided by the three institutions in the IIA, paragraph 28.</i></p> <p><i>It is also important to recall that it is the legislator's prerogative to decide whether or not the power to adopt further measures should be given in a legislative act and for which kind of measures.</i></p> <p><i>Alternative text:</i></p> <p><i>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).</i></p> <p><i>Paragraph about essential elements (moved from point 5): Acceptable, with the following drafting suggestion.</i></p> <p><i>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.</i></p> <p><i>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 to Article 291(2) of the TFEU for the adoption of an implementing act in accordance with Regulation (EU) N°182/2011.</i></p>

In each case the nature, content and context of the envisaged measure must be taken into account.	<p><i>Acceptable, but with the suggestion to add “objectives”.</i></p> <p><i>Alternative text:</i></p> <p>3. In each case the nature, objectives, content and context of the envisaged measure must be taken into account.</p>
These criteria should not be considered as exhaustive.	<p><i>Acceptable</i></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><i>Not acceptable. The reference to Article 291 TFEU is not acceptable, given that the Council is of the view that also non-binding measures can take the form of implementing acts.</i></p> <p><i>Alternative text:</i></p> <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.</p>

	<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 acts of general application by means of delegated acts.	<p><i>Not acceptable. It could be understood as preventing the adoption of implementing acts of general application.</i></p> <p><i>Alternative text:</i></p> <p>6. A legislative act may confer the power to adopt delegated acts only on the Commission. Delegated acts may only be of general application.</p>
Measures of individual application may not be adopted by means of delegated acts, but may be adopted by implementing acts.	<p><i>Acceptable, but wording to recall that implementing acts may also be of general application should be added.</i></p> <p><i>Alternative text:</i></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>
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.	<p><i>Acceptable, but stick to the wording of the Court. See T-338/08 Stichting Natuur en Milieu, para 30:</i></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>

	<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.	<p><i>Acceptable</i></p> <p>10. Legislative acts can only be amended by means of legislative or delegated acts.</p> <p><i>The following text is to be added:</i></p> <p><i>The delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislature in that act (Case C-286/14, §42).</i></p>
This includes amendments of annexes to legislative acts, as such annexes are an integral part of the legislative act.	<p><i>Acceptable, with the following amendment in order to adapt the Commission's text to the addition in 4.a.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></p>
Annexes are not to be added to or deleted from an act with the aim of triggering or avoiding the use of delegated acts.	<p><i>Not acceptable and should be deleted. It would unduly restrict the legislator's discretion. See paragraph 43 of the Court's judgment of 16 July 2015 in Case C-88/14.</i></p>

<p>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.</p>	<p><i>Acceptable, with the following addition :</i></p> <p>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.</p> <p><i>The legislator is never obliged to provide for annexes in legislative acts and can decide for empowerments for delegated or implementing acts instead.</i></p>
<p>5. The essential elements of legislation must be determined by the legislator and cannot be the subject of a delegated or implementing act.</p>	<p><i>Acceptable, with a drafting suggestion. Moved under point 1.</i></p>

	<u>4th criterion: additional rules supplementing the basic act</u>
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.	<p><i>Not acceptable. The category of "additional substantive rules and criteria" is too wide and the criterion is too prescriptive ("will, by definition" in the first part and "may only" in the second part). It would clearly cover a wide range of measures, which currently are adopted by means of implementing acts. (Cfr. also the Biocides judgment). The main criterion is not this one, but rather whether it is a question of implementation of the legislative act, which can be harmonised only by means of implementing acts, or a question of supplementing the legislative act with non-essential elements, which are not of an implementing nature.</i></p> <p><i>Alternative text:</i></p> <p><i>13. Measures designed to lay down additional rules building upon the content of the basic act and coming 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.</i></p>

	<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.	<p><i>Not acceptable. The words "without modifying the substance of the rights or obligations stemming from it" are restricting the scope too much.</i></p> <p><i>Alternative text:</i></p> <p><i>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 through implementing acts.</i></p>
In 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.	<p><i>Not acceptable. The word "fully" should be deleted since it is too restrictive.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></p>

	<u>6th criterion: measures establishing a procedure, a method or a methodology</u>
7. Measures establishing a procedure (that is to say a 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 the nature, content and context of the provisions set out in the basic act.	<p><i>Acceptable, but the definition of procedure is too limited.</i></p> <p><i>Alternative text:</i></p> <p><i>16. Measures establishing a procedure (that is to say a 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.</i></p>
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.	<p><i>Not acceptable. The formulation is too wide.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></p>

<p>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><i>Acceptable, except that IAs are not limited to details.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></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 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.</p>	<p><i>Acceptable, but "the nature" and "objectives" should be added at the end.</i></p> <p><i>Alternative text:</i></p> <p><i>19. As with procedures, an empowerment to determine methods (that is to say ways of doing something in particular in a regular and 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.</i></p>

	<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.	<p><i>Not acceptable. The statement is too general. A case-by-case analysis would be necessary.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></p>
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.	<p><i>Not acceptable. Only the “format” is too restrictive, other arrangements for the provision of information (such as the types, the format, the frequency, etc) can also enable uniform implementation.</i></p> <p><i>Alternative text:</i></p> <p><i>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.</i></p>

	<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.	<i>Acceptable</i> 22. Annual and multiannual work programmes implementing financial instruments should be adopted by means of implementing acts.
