

## **Recent case law of the Court of Justice on delegated and implementing acts**

### **1. Judgment of the Court of 17 March 2016 – [C-286/14](#), *EP, supported by Council v Commission (Connecting Europe Facility)***

Keywords: concepts of “Supplementing” or “amending” – scope of the power conferred on the Commission

Because of the differences between a delegation of a power to ‘supplement’ or ‘amend’, article 290(1) TFEU requires the legislature to determine the nature of the delegation that it intends to confer on the Commission. This cannot be left to the Commission to determine. The Commission may not, in the context of the exercise of a power to ‘supplement’ a legislative act, add an element to the actual text of that act.

In 2013 Regulation 1316/2013 (basic act) establishing the Connecting Europe Facility was adopted, conferring on the Commission the power to ‘detail’ funding properties within this facility. The text of the basic act does not specify whether the Commission should amend or supplement the basic act. The Commission adopted Delegated Regulation 275/2014 by adding the funding priorities to an annex of the basic act. The EP claimed the Commission has exceeded its powers by adding the text of the delegated act to the basic act, instead of adopting a separate act. The EP claimed the Commission was solely empowered to supplement, not amend the basic act and sought to annul the Delegated Regulation. The CJEU agreed with the EP and annulled the act.

According to the CJEU, the wording of the basic act (‘to detail’) ought to be regarded as conferring a delegated power within the meaning of Article 290(1) TFEU. The delegation of a power to ‘supplement’ a legislative act is meant only to authorise the Commission to flesh out that act. Where the Commission exercises that power, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified. By contrast, the delegation of a power to ‘amend’ a legislative act aims to authorize the commission to modify or repeal non-essential elements laid down by the legislature in that act (thus in cases where the Commission exercises that power, it is not required to act in compliance with the elements that the authority conferred on it aims precisely to ‘amend’.) The CJEU held that, because of these differences, article 290(1) TFEU requires the legislature to determine the nature of the delegation that it intends to confer on the Commission. This cannot be left to the Commission to determine. In this particular case, detailing the funding priorities amounts to supplementing the basic act.

In addition, the CJEU held that Commission should have adopted a separate act when exercising its supplementing power: the Commission may not, in the context of the exercise of a power to ‘supplement’ a legislative act, add an element to the actual text of that act. Such incorporation would be liable to create confusion as to the legal basis of that element, and would make it impossible for the Commission to replace or delete parts of the delegated act when necessary.

### **2. Judgment of the Court of 1 March 2016 - [C-440/14](#), *National Iranian Oil Company v Council***

Keywords: Legal basis of 290(2) TFEU - adoption of implementing acts by the Council

It is clear from the wording of Article 215 TFEU that that provision does not preclude a regulation adopted on the basis of that provision from conferring implementing powers on the Commission or the Council under the conditions laid down in Article 291(2) TFEU. The Council may reserve implementing powers for itself, in justified and duly motivated cases.

The National Iranian Oil Company (NIOC) was listed in the list of persons and entities subject to the freezing of funds and economic resources based on Implementing Regulation 954/2012. This Implementing Regulation was adopted based on the Regulation 267/2012 (basic act), which required

restrictive measures against Iran to be put in place. NIOC sought the annulment of these restrictive measures. NIOC claimed the legal basis of the listing is incorrect: instead of an implementing act, the legal basis of article 215 TFEU should have been used. The CJEU of Justice rejected the arguments of NIOC.

According to the CJEU, it is clear from the wording of Article 215 TFEU that that provision does not preclude a regulation adopted on the basis of that provision from conferring implementing powers on the Commission or the Council under the conditions laid down in Article 291(2) TFEU. Nor does article 215 TFEU provide that individual restrictive measures must be adopted based on article 215 TFEU.

The Council had reserved the power to adopt the implementing act to itself. Normally this power is conferred on the Commission. Article 290(2) TFEU stipulates that implementing powers may be conferred on the Council in duly justified cases. The CJEU examined whether these requirements had been met. The basic act (Regulation 267/2012) conferred on the Commission wide implementing powers, among others relating to lists of goods, technologies, equipment and metal. The Council had reserved to itself the power to amend the list of persons or entities. This power is the most sensitive, as it has a particular significant impact on the persons or entities concerned. This according to the CJEU, justified the conferral of implementing powers on the Council. The Council should however, also properly explain why this exception is made. Based on recitals of previous versions of the Regulation and the political context in which the act was adopted, the CJEU found that the conferral of implementing powers was indeed justified.

### **3. Judgment of the General Court of 16 December 2015 - [T-521/14](#) ,*Sweden v Commission***

CLS Note: 5148/16

Keywords: failure to adopt a delegated act by the set deadline

The Commission has a legal duty to comply with the deadline fixed by the co-legislators, when the provision in the basic act imposes a clear, precise and unconditional obligation on the Commission to adopt the relevant delegated acts by a certain date.

In 2012 the EP and Council adopted Regulation 528/2012 concerning the making available on the market and use of biocidal products. The regulation contains an obligation in article 5(3) for the Commission to adopt delegated acts specifying scientific criteria for the determination of endocrine-disrupting properties in biocides, no later than 13 December 2013. As the Commission had not yet adopted the delegated acts by July 2014, Sweden started a case before the GC, stating that the Commission had failed to act in infringement of the Treaties. The GC agreed.

The GC confirmed in its judgment of 16 December 2015 that the provision in the Regulation imposes a clear, precise and unconditional obligation on the Commission to adopt the relevant delegated acts by a certain date. Therefore, the Commission has a legal duty to comply with the deadline fixed by the EP and the Council. The EU legislature had not amended the text of the Regulation, nor did the Commission propose to amend the relevant text. Further, the GC rejected the arguments of the Commission that an impact assessment was needed, or that earlier scientific criteria were criticized. According to the GC, this does not relieve the Commission of its duty to adopt a delegated act within the parameters decided by the EU legislature.

### **4. Judgment of the General Court of 8 October 2015 - Joined Cases [T-659/13](#) and [T-660/13](#), *Czech Republic v Commission***

Keywords: obligation for Member States to comply with delegated act

When the basic act provides that Member States do not have to comply with the relevant article in the basic act (optional article), Member States cannot be held to comply with the delegated acts adopted based on this article. When a Member State does choose to implement the optional article in the basic act into national legislation, this Member State needs to comply with the delegated acts as well.

The Czech Republic requested the annulment of two delegated acts. These delegated acts supplement Directive 2010/40 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport. The Czech Republic was of the opinion that the Commission exceeded its competences by adopting these delegated acts. According to the Directive, the deployment of the Intelligent Transport Systems is without prejudice to the right of each Member State to decide on its deployment of such applications and services on its territory. The Czech Republic believed that the obligation to deploy such a transport system is still imposed on Member States by these delegated acts.

In its ruling on 8 October 2015 the GC rejected the argument that the obligation of the deployment of the transport system is imposed on Member States by the delegated acts in question. When a Member State chooses to implement this transport system, this Member State needs to comply with the delegated acts. When a Member States chooses not to deploy the system, the relevant delegated acts do not apply in these Member States.

#### **5. Judgment of the General Court of 23 September 2015 - Joined Cases [T-261/13](#) and [T-86/14](#), *Netherlands v. Commission (Eurostat)***

Keywords: Regulatory procedure with scrutiny – institutional balance

It is important to bear in mind that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves.

The Kingdom of the Netherlands argued that Article 5(3) and Article 14(3) of Regulation No 2494/95 (basic act) concerning harmonised indices of consumer prices, as regards establishing owner-occupied housing price indices, require the application of the regulatory procedure with scrutiny for the adoption of implementing measures for that regulation. The provisions in the Regulation adopted by the Commission however, provide that Eurostat is to establish and update the methodological frameworks without being required to follow the regulatory procedure with scrutiny. The GC agreed with the Netherlands.

The General Court (GC) noted that it is important to bear in mind that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves. The GC decided that the above mentioned methodological frameworks constitute implementing measures which must be complied with in order to give practical effect to the applicable regulations and to ensure the comparability of harmonised indices of consumer prices. It follows that the contested provisions should have provided for application of the regulatory procedure with scrutiny for the adoption of the necessary implementing measures, as provided for in Regulation No 2494/95. The GC annulled the contested provisions.

#### **6. Judgment of the Court of 16 July 2015 - [C-88/14](#), *Commission v. Parliament and Council (visa reciprocity mechanism)***

Keywords: Amendment of the legislative act – extent of discretion

Neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU.

The Commission brought an action for annulment of the revised reciprocity mechanism, in so far as the provisions confer on the Commission a delegated power in accordance with Article 290(1) TFEU rather than an implementing power within the meaning of Article 291(2) TFEU. In its judgment of 16 July 2015 the CJEU rejected the Commission's plea.

The CJEU noted that contrary to the Commission's arguments, neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU. It follows from the wording of Article 290(1) TFEU that the lawfulness of the EU legislature's choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative act.

The contested provision gives the Commission the power to amend Annex II of the Regulation. This annex contains the list of third countries whose nationals are exempt from a visa requirement for stays of no more than 90 days in any 180-day period. The CJEU decided that the insertion in Annex II of a footnote next to the name of the third country concerned (as a result of the delegated act), demonstrates the intention of the EU legislature to insert the act adopted on the basis of that provision in the actual body of the Regulation. In those circumstances, the EU legislature conferred power on the Commission to amend the normative content of that legislative act within the meaning of Article 290(1) TFEU.

#### **7. Judgment of the Court of 15 October 2014 - [C-65/13](#), *European Parliament v. Commission* ("EURES Case")**

Keywords: Scope implementing power

Further clarification of the Biocides judgment: the Commission must be deemed to provide further detail in relation to the legislative act if the provisions of the implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it.

In its judgment of 15 October 2014 the CJEU dismissed the action of the European Parliament (EP), seeking the annulment of Implementing Decision 2012/733/EU, considering that the Commission had not exceeded its implementing powers.

The CJEU first noted that the implementing power conferred on the Commission is delimited by both Article 291(2) TFEU and the provisions of Regulation No 492/2001 (basic act). In the Biocides judgment the CJEU has held that when an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States. The CJEU further clarifies this judgment. The Commission must be deemed to provide further detail in relation to the legislative act if the provisions of the implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it.

#### **8. Judgment of the Court of 18 March 2014 - [C-427/12](#), *European Commission v. European Parliament and Council* ('Biocides Case')**

CLS note: 8912/14

Keywords: choice of legal basis, article 290 TFEU - 291 TFEU

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. Consequently, judicial review is limited to manifest errors of assessment.

On 18 March 2014, the CJEU handed down its judgment in the Biocides Case, concerning the use of implementing acts instead of delegated acts. The Commission claimed Article 80(1) Biocides Regulation (528/2012) should have conferred a delegated power on the Commission, since, according to the Commission, the power conferred was in the nature of "supplementing" the basic act. In its judgment, the CJEU upheld the Council's arguments and dismissed the Commission's action.

The CJEU provided some general guidance regarding the contrasting legal natures of delegated and implementing acts. When the EU legislature confers a delegated power on the Commission, the Commission is called on to adopt rules which supplement or amend certain non-essential elements of that act. The objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting such a delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act.

By contrast, when the EU legislature confers an implementing power on the Commission the Commission is called on to provide 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.

The CJEU noted 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. Consequently, judicial review is limited to manifest errors of assessment.

### **9. Judgment of the Court of 5 September 2012 - [C-355/10](#), *European Parliament v Council and Commission***

Keywords: essential elements

Implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements. Which elements are essential must be based on objective factors amenable to judicial review. These objective factors are, among others, whether the rules entail political choices falling within the responsibilities of the EU legislature and the possible interference with fundamental rights.

The Court of Justice of the EU (CJEU) annulled Decision 2010/252 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders.

The European Parliament (EP) did not agree with the use of the Regulatory Procedure with Scrutiny (RPS) for the adoption of the decision supplementing the Schengen Borders Code, arguing that the provisions of the decision concerned essential elements of the basic act, and therefore ought to have been adopted by means of a legislative act.

The CJEU agreed with the EP. The CJEU deemed it important that based on the Decision the border guards are given enforcement powers. This entails political choices falling within the responsibilities of the European Union legislature (EU legislature), in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. Furthermore, the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required. For instance, persons may be apprehended on a ship.