

EU Constitutional Law: VI. The types of legal acts and decision-making procedures

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VI. Types of legal acts and decision-making procedures

- Generally,
 - the TFEU establishes the types of act used in all policy areas except for:
 - acts in the area of CFSP, which are regulated by the TEU.
- This chapter deals with
 - the levels and types of act as well as the legislative procedure in the TFEU.
 - the types of act and decision-making under the TEU.

1) TFEU – levels of acts

Generally speaking, there are three different levels of Union acts:

- First: legislative acts (Art. 289 TFEU) issued either under the ordinary legislative procedure under Art. 294 TFEU or the special legislative procedure, e.g. the budget procedure under Art. 314 ff. TFEU.
- Second: delegated acts (Art 290 TFEU) defined as Commission's 'non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.'
- Third: implementing acts (Art 291 TFEU) defined as Commission (or exceptionally Council) acts for cases 'where uniform conditions for implementing legally binding Union acts are needed.'

a) Legislative acts – Art. 289

Definition in Article 289 TFEU

- as the outcome of
- the ordinary legislative procedure under Article 294 TFEU.
- Or a special legislative procedure, e.g. budgetary provisions under Art. 310 et seq. TFEU.

Legislative acts thus are defined in a formal way: as regulations, directives or decisions that have been adopted by the legislative procedure.

Ordinary legislative procedure – Art. 294 TFEU

- The Commission submits a **proposal** to the EP and Council (Art. 294.2 TFEU)
- **First reading** / première lecture / erste Lesung
 - EP gives the proposal a first reading and adopts its position. It may approve, reject or suggest amendments to the Commission proposal.
 - Council gives the proposal a first reading on the basis of the EP's position. It may
 - Approve the draft, together with the amendments proposed by the EP's position, in which case the proposed act is adopted,
 - If the Council does not approve of the EP's position, it adopts its own position and refers it back to the EP.

Legislative procedure

- **Second reading / deuxième lecture / zweite Lesung:**
 - Within three months, the EP may:
 - approve the Council's position or not take a decision at all, in which case the proposed act is adopted in accordance with the Council's position,
 - reject the Council's position by a majority of its component members in which case the proposed act is not adopted,
 - propose amendments to the Council's position by the same majority in which case the amended draft is forwarded to the Council and the Commission.
 - Within three months of the matter being referred to it by the EP, the Council may:
 - approve the EP's amendments by QMV in which case the proposal is adopted in this amended form. The Council acts unanimously on those amendments, on which the Commission has delivered a negative opinion.
 - If the Council does not approve, the Conciliation Committee / comité de conciliation / Vermittlungsausschuß is convened.

Legislative procedure

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Legislative procedure

- The Conciliation Committee (Article 294(10) TFEU):
 - Task: reach an agreement on a joint text on the basis of the positions of the EP and Council in second reading.
 - consists of an equal number of representatives of the EP and of the Council, with the participation of the Commission.
 - Approves a joint text by QMV of representatives of the Council and by a majority of EP representatives

Legislative procedure

- **Third reading** / troisième lecture / dritte Lesung

On the basis of that joint text, within six weeks, the

- EP by majority and the Council by QMV may adopt the text – the draft act is then adopted.
- If the majorities in either house is not reached, the draft act is not adopted.

EXCURSUS: Demanding the Commission to make an Initiative

- The Treaties provide for several ways to request the Commission to develop an initiative:
 - The citizens initiative under Art. 11 TEU
 - It allows for at least 1 Mio citizens from a significant number of MS to ask the Commission to bring forward proposals on a particular issue.
 - The Commission is then obliged to consider the proposal. It maintains its exclusive right of initiative.
 - Details to be regulated by legislation under Art. 24 TFEU.
 - The EP's request for an initiative under Art. 225 TFEU, under which the Commission will be politically but not legally bound to issue a proposal.

Non-legislative acts

- Legislative acts can delegate decision-making powers
- Reasons for delegation:
 - Delegation constitutes an inevitable aspect of any complex legal system.
 - The legislative procedures provide for legitimacy of decisions but are often too slow and in-flexibel to allow for effective decision-making. Also, certain questions require specific expertise, which legislators not always possess.
 - Delegation is a logical part of a legal system embodying the principle of separation of powers and consequentially in principle a specialisation of institutions in particular kinds of activity.

The TFEU has created not one, but **two different** forms of non-legislative acts in Articles 290 and 291 TFEU. Both have differing possibilities of control.

b) Delegated acts – Art. 290 TFEU

- Pursuant to Art 290(1) TFEU, a legislative act may delegate power to ‘**supplement or amend** certain **non-essential elements**’ of the delegating legislative act.
- Essential elements on the other hand are explicitly ‘reserved for the legislative act and may not be subject to a delegation of power.’
- Definition of *essentialness*:
‘the **objectives, content, scope and duration** of the delegation of power’ belong to the essential elements and shall be explicitly defined in the legislative act.

Delegated acts

Three limits to the legislative discretion of deciding on delegation of powers under Art. 290 TFEU:

1. *Institutional*: only the Commission may receive delegation.
2. *Material*: the delegation of powers
 - must be clear and precise by requiring that ‘content, objectives and scope’ of delegation should be defined.
 - May only be directed at issuing acts ‘of general application’ (as opposed to concrete-individual acts).
3. *Temporal*: by requiring that the duration of delegation be defined, allowing for:
 - So called ‘sunset-clauses’ = automatic cessation of delegation with a fixed moment in time.
 - Explicitly indeterminate delegation.
 - Cessation of delegation with the occurrence of a certain event.

Delegated acts

Forms of control under Art. 290 TFEU:

- The legislative act must define the ‘conditions to which the delegation is subject.’
- Possibilities to be defined in a delegating legislative act:
 - the Council (by QMV) **or** the EP (by majority of its members) may opt to revoke the entire delegation. Each institution can act independently from the other. Neither needs a proposal from the Commission to act.
 - the Council or the EP may object to a an individual delegated act to be taken by the Commission.
 - Open question: may the legislature invent further forms of control? May the legislature not provide for any form of control, neither revocation nor objection?

c) Implementing acts – Art. 291 TFEU

The conferral of powers for the adoption of implementing acts under Article 291 TFEU constitutes the traditional arrangement for delegated law-making at Union level.

- Article 291(1) TFEU
 - recalls that implementation is first and foremost the task of the MS. This is a specific regulation of the general principle of sincere cooperation under Art. 4(3) TEU, which requires MS to undertake all necessary measures to implement EU law.
 - Exception:
 - Delegation of implementing powers to the Commission and exceptionally the Council under Art. 291 TFEU
 - Only where ‘uniform conditions for implementing legally binding Union acts are needed’.

Implementing acts

- Content of implementing powers:
 - Unlike delegated acts which can only be ‘of general application’
 - Implementing acts may be of abstract general and concrete individual nature.
 - Problem: how to distinguish between abstract general implementing acts (Art. 291) from quasi-legislative abstract general delegating acts (Art. 290)?
- Who can confer implementing powers?
 - Any ‘legally binding Union act’ can confer implementing powers (unlike delegation under Art. 290 TFEU, which explicitly requires a legislative delegation). This
 - allows and even calls for sub-delegation from the Commission as author of delegated acts (under Art. 290) to the Commission for issuing implementing acts (under Art. 291).
 - This risks the Commission evasion of control mechanisms.

Implementing acts

Control of implementing powers:

- Under Art. 290(3) a legislative regulation ‘shall lay down in advance the rules and general principles concerning the mechanisms for control by MS of the Commission’s exercise of implementing powers.
- So far, these rules and principles are addressed in a ‘comitology decision’ adopted by the Council under the old Art. 202 EC
 - providing for 3 types of committee procedures:
 - Advisory
 - Management
 - Regulatory
 - Each with increasing powers of scrutiny and revocation by the Council with generally very few powers of information of the EP.

d) Distinguishing Art. 290 from 291 TFEU

Differences in a number of respects:

- First, the *powers of the institutions* differ according to which procedure is applied.
 - The EP
 - has an important role in the conferral and exercise of delegated powers (Art. 290 TFEU)
 - its role under Article 291 TFEU is more limited.
 - However the EP is co-legislator for defining the new comitology control procedures
 - The Commission is subject to strict limitations under Article 290 TFEU, but subject to fewer constraints under Article 291 TFEU.

ART. 290 V 291 TFEU

- Secondly, the *role of the MS* differs as to which type of conferral is applied.
 - While Article 291 TFEU expressly restates that MS implement EU law
 - Article 290 TFEU foresees the adoption of delegated acts as a task of the European Commission.
- Do these differences justify the creation of a differentiation between delegated and implementing acts massively complicating the legal system and making the nature of an act less transparent?

2) Types of binding legal acts in the TFEU

	Regulation 288(2)	Directive 288(3)	Decision 288(4)
Legislative, 289	X	X	X
Delegated, 290 (only acts of 'general application')	X	X	X
Implementing, 291	X	X	X

Types of primary legal acts in the TFEU

These legislative, regulatory and implementing regulations, directives and decisions are accompanied by:

- **Inter-institutional agreements** under Article 295 TFEU = arrangements for the cooperation by the EP, Council and Commission.
- **International agreements** (Articles 216-219 TFEU) for external action with other states or international organisations.
- Other types of act are, however, also possible:
 - This arises *a contrario* from Article 296(3) TFEU which explicitly excludes the use of non-classified acts only for legislative, but not for delegated or implementing acts (e.g. ‘plans’, ‘programmes’...)

a) regulations

- Definition in Article 288 second paragraph TFEU: a **regulation**
 - shall have ‘general application’
 - shall be ‘binding in its entirety and
 - directly applicable *in* all Member States’.
- The legal effect of a regulation is therefore similar to that of legislation or a statute in Member State law:
Regulations
 - have direct effect *within* the legal systems of the MS by creating rights and obligations for MS and individuals *vis-à-vis* MS and other individuals.
 - are binding *in their entirety*, that is, directly applicable as a whole. No national transposition needed.

regulations

- Use of the instrument of a regulation therefore:
 - for abstract general and
 - Concrete individual acts
 - ‘as long as there is no doubt that the measure is applicable as the result of an objective situation of law or of fact which it specifies’ (Case 6/68 *Zuckerfabrik Watenstedt v Council* [1986] ECR 409, para. 415)
- The regulation is the instrument preferred for precise implementing acts adopted, especially in the context of the Commission’s activities.

b) directives

- Definition in Article 288 third paragraph TFEU:
 - ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but
 - shall leave to the national authorities the choice of form and methods’.
- The basic character of a directive:
 - the establishment of common policy goals on the European level
 - while leaving it to the MS to implement those goals within the framework of the directive’s binding elements.
 - Mix of EU policy setting and MS freedom to adapt the policies to their national legal systems and traditions.

directives

- Addressees of a directive are one, several or all Member States.
- MS will be subject to a time-limit for transposing the directive's objectives into their national law.
- They have to transpose a directive into binding legal force, which satisfies needs of specificity, clarity and requirements of legal certainty.

c) decisions

- Definition in Article 288 fourth paragraph TFEU: A decision is
 - ‘binding in its entirety’ without necessarily needing to indicate to whom it is addressed.
- Content and application:
 - A decision’s scope is usually that of individual application, making it an instrument mostly used and best applicable for executive acts of the institutions.
 - A decision may, however, especially when addressed to several or all MS, contain more abstract-general elements, making it comparable with an act of legislative nature.
 - Decisions can equally be used as planning instruments designed to set out the framework of future detailed action. (E.g. Decision 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme, OJ 2002 L 242/1).

d) inter-institutional agreements (IIAs)

- Art. 295 TFEU gives a general legal basis for IIAs
 - Between Council, EP and Commission.
 - To make arrangements for their cooperation, e.g. for
 - the establishment and discharge of the EU's budget.
 - The regulation of details of the EP's right to investigation.
 - Establishing details of the information exchange between the Commission and the EP in administrative matters to ensure supervisory powers of the EP can be exercised etc.
 - Practice of IIAs
 - Currently there are about 110 IIAs in place.
 - It is not excluded that IIAs would be concluded also between other institutions and bodies of the EU including the ECB, agencies etc.

e) international agreements

- The EU has ‘legal personality’ under Article 47 TEU,
- It may enter into international agreements under
 - the procedure laid down in Article 218 TFEU,
 - in specific cases Article 219 TFEU (on agreements for Euro exchange rate agreements) as well as,
 - with respect to CFSP matters, under Article 37 TEU.

T) Entry into force and publication – Art. 297 TFEU

- Legislative acts:
 - Will be signed and published in the OJ.
 - Enter into force 20 days after their publication, unless otherwise specified.
- Non-legislative acts:
 - Acts which do not specify to whom they are addressed, and those which are addressed to all Member States:
 - Will be signed and published in the OJ.
 - enter into force 20 days after their publication, unless otherwise specified.
 - Acts which specify to whom they are addressed,
 - ‘shall be notified to those to whom they are addressed and
 - shall take effect upon such notification’ (Article 297(2) 4th sentence TFEU).
- Non-published acts are valid but can not be held against an individual (Case C-345/06 *Gottfried Heinrich*).

g) Choice of the act to be adopted

Article 296 TFEU establishes three general rules for the choice between regulations, directives, decisions and other types of act:

1. If the Treaty provides for a type of act to choose, that act is to be used. Where there is discretion for the choice, that choice is to be made according to the principle of proportionality by the institution(s) in charge.
2. The choice for the adoption of the act needs to be reasoned.
3. 'when considering *legislative* acts, the EP and Council shall refrain from adopting acts, not provided for by the relevant legislative procedure in the area in question.' (Art. 296(3) TFEU)

3) Types of act in the TEU

Art. 25 TEU provides for

- (a) general guidelines,
- (b) decisions on
 - (i) actions,
 - (ii) positions and
 - (iii) arrangements for implementation of the former as well as
- (c) arrangements for cooperation between the Member States. Decisions are taken in the extraordinary decision-making procedure by the Council.

Implementing measures under (b)(iii) can also be taken by the High Representative and the Member States.

Procedures under the TEU

A decision for the area of CFSP

- is generally taken unanimously by the European Council or the Council of Ministers on proposal by either the Commission or in exceptional cases a Member State.
- Such decisions are implemented by the
 - High Representative of the Union for Foreign Affairs and Security Policy as well as by the
 - Member States (Article 26.3 TEU).
- The creation of a specific instrument for CFSP, fits into the general system of legislative acts since foreign policy has formally been allocated to the executive branch of European government.

FOR INFORMATION:

Legal acts under the old EC/EU

- Formerly (prior to the entry into force of the Treaty of Lisbon on December 1st, 2009), the EU had a three pillar structure. Each pillar had distinct types of legal acts.
- The decision-making procedures leading to the adoption of these legal acts differed:
 - from pillar to pillar and, within the pillars
 - from policy area to policy area.
- Which decision-making procedure was applicable for which policy area was defined in the specific articles of the Treaties dealing with the policy areas.

(a) Former EC legal acts (first pillar)

- Legal acts provided for under **Article 249 EC**:
 - **Regulations,**
 - **Directives,**
 - **Decisions,**
 - **Recommendations and Opinions.**
- Additionally: legal acts which do not fit into these categories:
 - Others referred to in the Treaties, such as the Interinstitutional Agreement / accord interinstitutionnel / interinstitutionelle Vereinbarung (Article 218 EC),
 - Atypical Decisions which are not addressed at anyone specifically (in some language versions they have a distinctive name such as ‘besluit’ (≠ beschikking), ‘Beschluss’ (≠ Entscheidung), e.g. the Comitology Decision),
 - Internal measures such as Notices, Guidelines, Vademecums etc. (which may have an indirect external effect).

Former legislative procedures in the EC

Legislative procedures differ from policy area to policy area. The roles of the institutions are as follows:

- **Commission:** sole right of initiative.
- **Council takes decisions by:** simple majority, qualified majority or unanimity.
- **EP takes decisions by:**
 - Codecision / codécision / Mitentscheidung procedure (Article 251 EC),
 - Cooperation / coopération / Zusammenarbeit procedure (Article 252 EC, very rare),
 - Consultation / consultation / Anhörung (e.g. measures for agricultural policy),
 - Assent / avis conforme / Zustimmung (e.g. Articles 105(6), 107(5), 161 EC; Article 49 EU on the accession of new Member States).
- Involvement of other institutions such as the EESC, CoR, ECB etc. (e.g. Articles 40, first paragraph, and 105(6) EC).

(b) Old EU legal acts (second pillar)

- Legal acts in CFSP/PESC/GASP (Articles 12 et seq. EU)
 - Principles and general guidelines / principes et orientations générales / Prinzipien und allgemeine Leitlinien for the CFSP (defined by the European Council, Article 13(1) EU),
 - Common strategies / stratégies communes / gemeinsame Strategien (determined by the European Council, Article 13(2) EU),
 - Joint actions / actions communes / gemeinsame Aktionen (adopted by the Council, binding for Member States, Article 14 EU),
 - Common positions / positions communes / gemeinsame Standpunkte (adopted by the Council, Article 15 EU).
- Decision-making procedures:
 - Proposals may be submitted by Member States or by the Commission (Articles 22 and 23 EU).
 - The Council takes decisions acting either unanimously or by a qualified majority (in the cases specified in Article 23(2) EU).
 - The EP will be consulted (Article 21 EU) ‘on the main aspects and the basic choices of the common foreign and security policy’.

(c) Old EU legal acts (third pillar)

- Council takes a decision in accordance with Article 34(2)(a), (b), (c) and (d) EU in **matters of police and judicial cooperation in criminal matters**:
 - a) It adopts common,
 - b) It adopts framework,
 - c) It adopts decisions,
 - d) It establishes conventions.
- Decision-making procedures: Proposals may be submitted by Member States or by the Commission. The Council must act unanimously (although it acts by a qualified majority when adopting implementing measures). The Council must consult the EP before adopting any measure referred to in Article 34(2)(b), (c) and (d) (Article 39 EU).