

Choice between delegated and implementing rule-making – The contribution of delegated acts and implementing acts to the creation of norms

Lisbon Comitology & Tertiary Law – The example of food law: application requirements, fine-tuning of scope, positive and negative lists

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The four pillars of food policy

- Food security and food defence
- Food safety
- Food information
- Nutrition

Constitutionally based on Article 114 TFEU (internal market) and Article 43 TFEU (agriculture), with reference, where relevant, to Article 168 TFEU (health) and Article 169 TFEU (consumer protection)

EU Food Legislation – Overview

- General Food Law
- Food Information Law: product labelling, health claims, advertising
- Functional Food: fortified food, food supplements, food for specific groups (FSG)
- Food Improvement Agents: additives, enzymes, flavours, smoke flavours
- Novel Food
- Food Safety: biological (hygiene), chemical (residues/contaminants) and radiological; food imitates; food contact material
- Vertical provisions for certain foods (honey, chocolate, fruit juice etc.) as well as alcoholic beverages (wine, spirits)
- Common Market Organisation (relevant for product denominations)
- Organic Food / Food Quality Labels (PGO, PGI, TSG)

Food and non-food: Packaging Directives; Price Indication Directive

Union farm law (Common Agricultural Policy) – Where Comitology was invented in the 1960s

Overview of ECJ case law on the Commission's implementing powers provided by Advocate General Mengozzi (Opinion on Case C-355/10, paragraphs 26-29)

1987 – First comitology decision (after Single European Act)

Incremental rise of parliamentary control:

1999 – *droit de regard*

2006 – *droit de contrôle*

Food Law Governance – The makers of tertiary law

In 2016 the Commission adopted 137 delegated acts and 1494 implementing acts (all fields of Union policy)

European Commission Directorate General “Health and Food Safety” (DG SANTE) being a heavy user of ‘Lisbon Comitology’, second only to DG “Agriculture and Rural Development” (DG AGRI)

SANTE statistics for 2015 (only implementing acts and pre-Lisbon comitology):
21 Comitology Committees held 106 meetings and went through 437 written procedures while issuing 736 statements

Output: 671 implementing acts adopted as well as 62 measures adopted under the pre-Lisbon ‘regulatory procedure with scrutiny’ – RPS

Source: COM(2016) 772 final of 5/12/2016

Parliamentary powers I – Objecting against delegated acts

Example: Nano-Labeling, [then] based in Food Information Regulation (EU) No. 1169/2011

12/3/2014: Objection of the European Parliament pursuant Article 290(2)(b) TFEU with Article 51(5) of Regulation (EU) No. 1169/2011

Result: delegated act could not enter into force and is still not adopted (destructive force of veto)

Parliamentary powers II – Revocation of legal base of delegated act

Fictitious example: Commission's entitlement to regulate nano-material in food may be withdrawn by European Parliament or by the Council pursuant Article 290(2)(a) TFEU in conjunction with [now] Article 32(4) of the Novel Food Regulation (EU) 2015/2283

Likely result: probably a regulatory stalemate

Parliamentary powers III – Reminder against implementing act

Example: Commission Implementing Regulation (EU) No. 1337/2013 (origin labelling of fresh meat)

6/2/2014: European Parliament (non-binding) Resolution pursuant Article 11 of Comitology Regulation (EU) No. 182/2011, so called 'reminder' (OJ C 93, 24/3/2017, p. 103)

Result: a three-page follow-up document issued by the Commission on 15/4/2014, but the implementing act has become law and is applied since 1/4/2016

Why “Lisbonisation” is a policy choice

The European Parliament sees delegated acts as its preferred option of tertiary law-making, because it is empowered to veto a delegated act but is unable to stop an implementing act being passed.

Member States, on the other hand, are inclined to prefer implementing acts for tertiary law-making, as there is the possibility for them to negotiate and vote on a draft implementing act in a comitology committee, as opposed to only debating a delegated act in an expert group and (possibly) vetoing it in the Council.

Hence the interest in the choice of instrument in the “Lisbonisation” process.

“Lisbonisation” of Food Law

“Omnibus 2.0” proposal (COM(2016) 799 of 14/12/2016 + Annex)
Affecting 168 legislative acts

- Switch from RPS to delegated acts (as a rule)
- Switch from RPS to implementing acts (as an exemption)
- Exempts eight food and farm legislative acts from its scope because they are considered too intricate to deal with in package law (“reflecting of whether there is a more appropriate way to structure these acts as concerns individual authorisations / setting of values / listing of specific substances”).
“SANTE Mini-Omnibus” for Lisbonisation under preparation.

Tertiary law – Legislative or executive powers?

Delegated act ⇔ Implementing act
Last step of law-making ⇔ First step of implementation

Constitutionally straightforward but practically intricate

“Granted, the borderline between supplementing a legislative act with non-essential elements and providing more detailed implementing rules is not always easy to draw.” (Opinion of Advocate General Jääskinen of 12/9/2013, paragraph 78)

Tertiary law – Legislative or executive powers?

Case C-427/12 “Biocide”: delegated act to achieve the adoption of rules ⇔ implementing act to provide further detail – while the choice between both instruments is at the discretion of the Union legislator and amenable to judicial review

Case C-65/13 “EURES”: implementing acts (i) must comply with the essential general aims pursued by the legislative act (ii) must be necessary or appropriate for the implementation of that act – without supplementing or amending it

Case C-88/14 “Visa”: neither the existence nor the extent of the discretion conferred on the EU-Executive 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

Case C-286/14 “Connecting Europe”: strict dichotomy in Article 290 TFEU between amending a legislative act (modification) and supplement it (completion)

Creating the secondary law legal base for tertiary law

Example 1: Union list of substances under FSG-Regulation (EU) No. 609/2013
Struggle in legislative process about the use of either delegated acts or implementing acts (documented in COM(2013) 241 of 23/4/2013, point 3.3 (p. 6) and by the statement by the United Kingdom (OJ C 170E, 15/6/2013, p. 27))
Result: Union list established by secondary law, amended by tertiary law (delegated act)

Example 2: Union list of novel foods under Regulation (EU) 2015/2283
Struggle in legislative process about the use of either delegated acts or implementing acts
Result: Union list established by tertiary law (implementing act), amended by tertiary law (implementing act)

The use of tertiary law in Union food law – Creating Commission powers

Delegated acts creates legal base for implementing act
Example of 'gluten-free' labelling:

Secondary law	Article 36(4) FIR 1169/2011 + recital 41 FSG-Regulation 609/2013
Tertiary law at first level (amending)	Delegated Regulation (EU) No. 1155/2013 adding Article 36(3)(d) FIR
Tertiary law at second level (implementing)	Implementing Regulation (EU) No. 828/2014 establishing the relevant criteria

The use of tertiary law in Union food law – Skeleton laws with no flesh on the bones

Example: Two-step approach towards regulating smoke flavours

- Secondary law: Regulation of the European Parliament and of the Council (EC) No. 2065/2003 [criteria for authorising smoke flavouring products]
- Tertiary law: Commission Implementing Regulation (EU) No. 1321/2013 [Union list of authorised smoke flavouring products – the ‘positive list’]
- Case law: Case C-66/04 [ECJ sees no problem with this approach]

The use of tertiary law in Union food law – Application requirements

Application criteria for novel food applications (indispensable for filing a valid application)

To be established by implementing acts pursuant Article 13 and Article 20 of Regulation (EU) 2015/2283 (*not yet enacted*)

The use of tertiary law in Union food law – Fine-tuning of scope

Interpretation decisions by implementing act

Examples:

- Food Additives – Article 19 of Regulation (EC) No. 1333/2008
- Food Enzymes – Article 9 of Regulation (EC) No. 1332/2008
- Food for Specific Groups – Article 3 of Regulation (EU) No. 609/2013
- Novel Food – Article 5 of Regulation (EU) 2015/2283

Commission is entitled to define what products fall within the scope of secondary law and which products escape its provisions

The use of tertiary law in Union food law – Positive lists

Examples mentioned already:

- Smoke flavours (RPS → delegated act)
- Substances permitted in food for specific groups (delegated act)
- Novel foods (implementing act)

Many more examples of so-called ‘regulated products’ in food law usually requiring a pre-market authorisation (“requests for authorisations of the placing on the market of products or substances” in the wording of p. 5 of the explanatory memorandum to the Commission proposal (COM(2017) 85 of 14/2/2017))

The use of tertiary law in Union food law – Negative lists

Example: Substances other than vitamins and minerals for use in food and food supplements may be put under scrutiny or be banned

Article 8 of Regulation (EC) No. 1925/2006 amending the Regulation's Annex III
Today: 'Regulatory procedure with scrutiny' – RPS
Proposed: Delegated act (No. 161 of the Annex to the 2016 Commission proposal)

Member States able to act in absence of Union rules (Case C-282/15, judgement of 19/1/2017)

The use of tertiary law in Union food law – Warning lists

Example: Labelling of substances or products causing allergies or intolerances
Article 21 and Annex II to Food Information Regulation 1169/2011 (FIR)

Can be amended (N.B.: not supplemented (Case C-286/14)) by delegated act (Articles 46 and 51 FIR) under condition that the amendment serves the objective of either

- Technical progress
- Scientific developments
- Consumers' health
- Consumers' need for information

Can be amended by urgency procedure (Article 52 FIR)

A constitutional challenge: Member States regulating *en lieu* of the Commission

Example: Commission is tasked with fixing of maximum doses of vitamins and minerals in food supplements by tertiary law, but remained inactive since 2002; Member States began regulating the area; challenged by stakeholders but approved by the ECJ – under condition that Member States abide by Union rules when taking action in place of the Commission

Case C-446/08 (“Solgar”) – ECJ judgment 2010

Case C-672/15 (“Noria”) – ECJ judgment expected 2017

Commission president Jean-Claude Juncker on farm law comitology

“During our mandate, I would like you to focus on the following: [...] Within the first six months of the mandate, reviewing the existing decision-making process applied to genetically modified organisms (GMOs), in line with the Political Guidelines.” (Mission Letter of 1/11/2014 to Commissioner Vytenis Andriukaitis)

“We also have to take responsibility in recognising when some decisions are not for us [*the European Commission*] to take. It is not right that when EU countries cannot decide among themselves whether or not to ban the use of glyphosate in herbicides, the Commission is forced by Parliament and Council to take a decision. So we will change those rules – because that is not democracy. The Commission has to take responsibility by being political, and not technocratic.” (State of the Union address 14/9/2016)

The announcement

The Commission confirmed in its work programme at the end of October that it would table proposals to “align the rules for secondary legislation to the updated Treaty rules” (legislative, 1st quarter 2017) and an “assessment of the democratic legitimacy of existing procedures for the adoption of delegated and implementing acts” (non-legislative, 1st quarter of 2017). Vice-President Frans Timmermans, in charge of the Commission’s drive towards ‘better regulation’, is chef de file on this dossier.

Persisting Problems in Farm Law

... with GMO and pesticides: Commission was obliged to adopt 17 authorisations despite ‘no opinion’ vote in Appeal Committee

... but the Commission was happy to take a decision in a ‘no opinion’ vote for seed treatments:

Commission Implementing Regulation (EU) No. 485/2013 (‘neonic ban’) – Recital 20: “The Standing Committee on the Food Chain and Animal Health did not deliver an opinion. An implementing act was deemed to be necessary and the chair submitted the draft implementing act to the appeal committee for further deliberation. The appeal committee did not deliver an opinion.”

subject to pending Case T-451/13 and Case T-584/13

The Answer? – Politicising Comitology

Commission proposal of 14/2/2017 to amend Comitology Regulation 182/2011 in the name of transparency, political guidance and accountability

- Appeal Committee may convene at ministerial level
- Making Member States votes public
- 'Call back' to Council