

Delegation of Rulemaking Powers to the European Commission post-Lisbon

Court of Justice of the European Union (Grand Chamber)
 Judgment of 16 July 2015, Case C-88/14, *European Commission v European Parliament (Visa Reciprocity)* Judgment of 17 March 2016,
 Case C-286/14, *Parliament v Commission (Connecting Europe Facility)*

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INTRODUCTION

The Treaty of Lisbon has introduced a new legal regime for the delegation of rulemaking powers by the EU legislature to the European Commission.¹ Articles 290 and 291 TFEU provide, respectively, for the transfer of the power to adopt delegated acts and implementing acts. Each article prescribes its own mechanisms for supervising or ‘controlling’ the Commission. Article 290(1) TFEU defines delegated acts as non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act. The Commission is ‘controlled’ *ex post*. It may adopt a delegated act, but such an act will only enter into force if neither the Council nor the European Parliament have expressed an objection within a period set by the legislative act (Article 290(2)(b) TFEU).² Article 291(2) TFEU describes implementing acts as acts that establish uniform conditions for the implementation of legally binding Union acts. The Commission

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¹The contribution does not discuss delegation to the Council (see Art. 291(2) TFEU and ECJ 1 March 2016, Case C-440/14 P, *National Iranian Oil Company*), private bodies that do not fall under the institutional umbrella of the EU (see e.g. ECJ 13 June 1958, Case 9/56, *Meroni*) and agencies (ECJ 14 January 2014, Case C-270/12, *United Kingdom v Parliament and Council (Short Selling)*).

²Art. 290(2) TFEU. The EU legislature may also confer upon Council and Parliament the power to revoke the delegation.

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is 'controlled' *ex ante* through the system of 'comitology'³: prior to adopting implementing acts, the Commission must consult a committee composed of representatives of the Member States.⁴

The wording of Articles 290 and 291 TFEU leaves many questions unanswered. This is problematic, certainly for the practice of rulemaking in 'Brussels'. The Commission adopts thousands of non-legislative acts annually. Hence, it is of the utmost importance to know when and which procedure is to be followed, and what the precise nature and scope of the decision-making power conferred upon the Commission is. The precise meaning of Articles 290 and 291 and the boundary dividing the two is up for debate, both in academic circles⁵ and in 'Brussels'⁶. The discussions, however, have not provided uniform answers to the various questions. Hence, it may fail to surprise that the institutions have sought the assistance of the European Court of Justice.⁷

³ See further E. Vos, 'Fifty Years of European Integration, Forty-Five Years of Comitology', in E. Vos and A. Ott, *Fifty Years of European Integration: Foundations and Perspectives* (V.M.C. Asser Press 2009) p. 31 and C.F. Bergström, *Comitology – Delegation of Powers in the European Union and the Committee System* (Oxford University Press 2005).

⁴ For the currently applicable system see Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011, L55/13). Three types of procedure now exist: the advisory procedure, the examination procedure, and the regulatory procedure with scrutiny. The last procedure applies to quasi-legislative acts that, post-Lisbon, would seem to fall under Art. 290 TFEU. Abolition of the procedure requires, however, that in all legislative acts in which this procedure is prescribed the reference to it should be replaced by a reference to Art. 290 TFEU. Commission proposals aimed at this (COM (2013) 451 final, COM (2013) 452 final and COM (2013) 751 final) have been opposed by the Member States. By the end of 2016 the Commission is likely to come with new proposals. See the provisional text of 'Interinstitutional Agreement Better Regulation' of 16 December 2015, <ec.europa.eu/smart-regulation/index_nl.htm>, visited 5 October 2016. The regulatory procedure with scrutiny is thus still applied post-Lisbon and may trigger disputes. See e.g. GC 23 September 2015, Joined Cases T-261/13 and T-86/14, *Netherlands v Commission*.

⁵ P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', 36 *ELRev* (2011) p. 672 and the various contributions in C. Bergström and D. Ritleng (eds), *Rulemaking by the European Commission – The New System for Delegation of Powers* (Oxford University Press 2016).

⁶ See e.g. Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM (2009) 673 final); Resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323/INI), <www.europarl.europa.eu/sides/getDoc.do?type = TA&reference = P7-TA-2014-0127&language = EN&ring = A7-2013-0435>, visited 5 October 2016; Common Understanding – Delegated Acts, 14 April 2011, 8753/1/11, <register.consilium.europa.eu/doc/srv?l = EN&f = ST%208753%202011%20REV%201>, visited 5 October 2016.

⁷ See ECJ 15 October 2014, C-65/13, *Parliament v Commission (Eures)* (holding that an implementing act cannot amend a legislative act) and ECJ 5 September 2012, C-355/10, *Parliament*

In the two cases discussed in this contribution, the Court was asked to clarify two points. *Commission v Parliament and Council (Visa Reciprocity)* concerns the dividing line between Articles 290 and 291 TFEU. *Parliament v Commission (Connecting Europe Facility)* involves the distinction made in Article 290 between amending and supplementing a legislative act.

DELEGATED ACT OR IMPLEMENTING ACT?

When the EU legislature decides to delegate rulemaking powers to the Commission, should it opt for Article 290 TFEU or Article 291 TFEU? The answer to this question is not only of practical, but also of constitutional, significance. The choice between them determines whether the Commission is subject to *ex post* control by the legislative institutions, or rather to *ex ante* supervision by the Member States. The choice thus has implications for the division of competences and the political balance of power, both between the Union and the Member States (vertical institutional balance), and amongst the Union institutions (horizontal institutional balance).

One might have expected that the Treaty drafters would clearly indicate when and which of the two Articles was to be used. This, however, is not the case. The most one can discern from the drafting history of Articles 290 and 291 TFEU is that the drafters envisaged a distinction between legislation (in the substantive sense) and implementation.⁸ However, they did not translate this distinction into definitions that clearly demarcate Article 290 from Article 291 TFEU. An act that is aimed at the uniform implementation of EU law (Article 291) may very well also be an act of general application that supplements non-essential elements of a legislative act (Article 290). Some acts exist in a 'grey area', and on the basis of the wording of the two provisions, could be regarded as either delegated *or* implementing acts. The drafters of the Treaty were aware of this, but left it to the EU legislature to determine whether to confer a power to adopt a delegated act or a power to adopt an implementing act on a case-by-case basis.⁹

v Council (Schengenbordercontrol) (holding that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements). On the latter case *see further* M. Chamon, 'How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court. Case C-355/10, *European Parliament v Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 5 September 2012, nyr', 50 *CMLRev* (2013) p. 849.

⁸ Final Report of the Working Group IX on Simplification of 29 November 2002, CONV 424/02, <european-convention.europa.eu>, visited 5 October 2016.

⁹ 'It is the legislative act – and therefore the legislator – which would determine on a case-by-case basis whether and to what extent it was necessary to have recourse to 'delegated' acts and/or to implementing acts and what their scope would be.' Communication from the Commission, *supra*, n. 6, p. 9.

Disputes were inevitable. Each of the institutions involved has its own interests which guide their preference for either Article 290 or Article 291. As a rule, the Commission prefers Article 290 TFEU for the simple reason that, under this provision, it can only be corrected after the fact. Parliament will often share the Commission's preference, as its role in comitology is generally quite modest, and, in many cases, does not include the power to block the adoption of Commission acts. The Council will however often prefer the *ex ante* control by committees composed of Member States' representatives above the *ex post* control of Article 290 TFEU.

Because of the divergent and often opposing interests, it may come as no surprise that the three institutions have so far not been able to agree upon how or precisely where to draw the dividing line between Articles 290 and 291 TFEU. The Commission, in particular, considers clarity on this point desirable and, accordingly, approached the Court.

Commission v Parliament and Council (Biocides)

The first time the Commission did so, in *Commission v Parliament and Council (Biocides)*, the Court did not prove to be of any great help. The case concerned a Regulation on biocides¹⁰ which conferred tasks regarding their evaluation and authorisation for market access upon the European Chemicals Agency. To cover the costs of the various procedures, companies that wished to put biocidal products on the market were required to pay fees to the European Chemicals Agency. The EU legislature had assigned the Commission the task of adopting an implementing act setting the level of those fees. In the Commission's view, however, the legislature should, for this purpose, have conferred the power to adopt a delegated act.

The Court did not agree with the Commission. It refused to specify which criteria must generally be applied to establish the mutual demarcation of Articles 290 and 291 TFEU. The Court did not do much more than cite the wording of the two provisions¹¹, and state '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.'¹² *In casu*, the Court concluded that the legislature could reasonably have taken the view that Article 291 TFEU was to be applied.¹³

In *Biocides*, the Court essentially confirmed what the Treaty drafters had had in mind: in principle, the EU legislature is free to opt for either Article 290 or Article 291.

¹⁰ Regulation (EU) No. 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ 2012, L 167/1.

¹¹ ECJ 16 July 2015, C-427/12, *Commission v Parliament and Council (Biocides)*, paras. 33-39.

¹² *Ibid.*, para. 40.

¹³ *Ibid.*, paras. 41-54.

Some commentators expressed criticism.¹⁴ The fact that the wording of the two provisions does not offer much guidance does not constitute a reason for the Court to refrain from offering clarification. The Court should have clarified the matter by making use of the ‘legislation-implementation’ distinction that the drafters had in mind. More specifically, the margin of discretion given to the Commission should have been recognised as a criterion for drawing the line of demarcation between Articles 290 and 291 TFEU.

Commission v Parliament and Council (Visa Reciprocity)

The Commission shared that critique, and decided to submit the issue once more for the Court’s consideration in *Commission v Parliament and Council (Visa Reciprocity)*. The case concerned a Regulation¹⁵ listing the third countries whose nationals must be in possession of a visa when crossing the Union’s external borders, as well as countries whose nationals are exempt from this obligation. The third countries concerned are mentioned in Annex I (visa obligation) and Annex II (no such obligation) respectively. As regards the countries listed in Annex II, the principle of reciprocity applies: in the event such a third country introduces a visa obligation for nationals of a Member State, the regulation provides for a mechanism aimed at deleting that country from Annex II, and its subsequent listing in Annex I.

In 2013, the Union legislature adopted a regulation that implemented several changes to this mechanism. In brief, the new mechanism consists of three distinct stages at which the Commission needs to make use of differing legal instruments. At Stage I, it adopts an implementing act that suspends the visa requirement exemption for certain categories of nationals of the third country concerned for a period of six months. At Stage II, if the third country persists in maintaining the visa obligation for nationals of an EU Member State, the Commission adopts a delegated act inserting a footnote behind the third country’s Annex II entry indicating that exemption from the visa requirement is suspended with regard to *all* its nationals. Stage III concerns the permanent reinstatement of the visa obligation and the transfer of the third country concerned from Annex II to Annex I. This must be done by legislative act.

¹⁴ See in particular D. Ritleng, ‘The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v Parliament and Council (Biocides)*’, 52 *CMLRev* (2015) p. 243. See also P. Craig, ‘Comitology, Rulemaking, and the Lisbon Settlement – Tensions and Strains’, in Bergström and Ritleng, *supra* n. 5, p. 173 at p. 179-182.

¹⁵ Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended by Regulation (EU) No. 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013, L 182, p.1).

The Commission opposed the use of delegated acts at Stage II.¹⁶ An act which suspends the visa obligation by inserting a footnote behind the third country's Annex II entry merely implies the implementation of the legislative Regulation. Such an act would be technical in nature and does not entail the Commission making use of any powers of discretion. Hence, the legislature should have conferred the power to adopt an implementing act rather than a delegated act.

The Court dismissed the Commission's request for annulment of the contested provision in the 2013 Regulation. It first recalled its reasoning in the *Biocides* ruling: the EU legislature has discretion when it decides whether to confer a delegated power pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291 (2) TFEU on the Commission.¹⁷ That power, however, must be exercised in compliance with the conditions laid down in Articles 290 TFEU and 291 TFEU. Having cited the relevant wording of the two Articles, the Court established that neither the existence of nor the extent to which the discretion conferred on the Commission by legislative act is relevant for determining whether the act to be adopted by the Commission falls under Article 290 TFEU or Article 291 TFEU. Therefore, such discretion constitutes no criterion for demarcating the two Treaty provisions.¹⁸

One criterion does follow from the Treaty:¹⁹ a legislative act cannot be amended by an implementing act ex Article 291(2).²⁰ Hence, the question in the case at hand was whether the EU legislature had remained within the confines of Article 290 TFEU by conferring upon the Commission the power to amend the Annex to the Regulation. The Court concluded that the legislature had indeed stayed within those bounds. By conferring upon the Commission the power to insert a footnote behind the third country's entry according to Annex II of the Regulation, the EU legislature enabled the Commission to amend the normative content of that legislative act within the meaning of Article 290(1) TFEU.²¹

Comments

In *Commission v Parliament and Council (Visa Reciprocity)* the Court confirms that the EU legislature possesses discretion in choosing to confer upon the Commission the power to adopt either a delegated act or an implementing act.

¹⁶ This is perhaps somewhat remarkable in light of the fact that the Commission, as noted above, usually prefers Art. 290 over Art. 291. The text of the ruling of the Court and the Opinion of AG Mengozzi do not reveal what actually motivated the Commission to initiate the case.

¹⁷ ECJ 16 July 2015, C-88/14 *Commission v Parliament and Council (Visa Reciprocity)*, para. 28.

¹⁸ *Ibid.*, para. 32.

¹⁹ ECJ 15 October 2014, C-65/13, *Parliament v Commission (Eures)*. See also ECJ 10 September 2015, C-363/14, *Parliament v Council (Europol)*.

²⁰ ECJ 16 July 2015, C-88/14 *Commission v Parliament and Council (Visa)*, para. 31.

²¹ *Ibid.*, paras. 32-48.

That discretion is restricted by the conditions expressly laid down in Article 290 (act of general application, non-essential elements) and Article 291 (uniformity), but not by the margin of manoeuvre left to the Commission.

As in the *Biocides* case, the Court thus refuses to identify or develop additional criteria for mutually demarcating delegated acts and implementing acts. One indeed could criticise the Court for this and refer, for example, to the case law on identifying the legal basis of legislative acts. That basis must rest on objective factors that are amenable to judicial review.²² It is not the EU legislature but rather the Treaties that determine the procedure to be followed. The Court, as guardian of the principle of institutional balance, sees to it that the legislature observes Treaty rules. As the choice for either Article 290 TFEU or Article 291 TFEU also touches upon institutional balance, one could defend the position that the Court should bear a comparable constitutional responsibility.

Yet, the Court, understandably, does not do so. How or where should the Court precisely draw the dividing line? The criterion suggested to the Commission – the margin of discretion – may be in line with the legislation-implementation distinction the Treaty drafters had in mind, but does not seem to be suitable for establishing clear demarcation. Delegated acts are presumed to be quasi-legislative acts which imply discretion for the Commission. However, the same holds true for implementing acts aimed at establishing uniform conditions for implementing EU acts. It is hard to think of an act that leaves the Commission without any discretion whatsoever. How great should the margin of manoeuvre be?²³ Should it be large, considerable, or not too small? Answers and views may differ, disputes are – and will remain – inevitable. ‘Discretion’ would seem to be too vague and unworkable to serve as a criterion for drawing a clear dividing line between Articles 290 and 291 TFEU.²⁴

²² ECJ 11 June 1991, *Commission v Council (Titaandioxide)*, para. 10.

²³ Compare K. Bradley, ‘Delegation of Powers in the European Union: Political Problems, Legal Solutions?’, in Bergström and Rittleng, *supra* n. 5, p. 55 at p. 79.

²⁴ Admittedly, as regards delegation of powers to agencies the Court does attach importance to the discretion granted to the agency concerned. In brief, and crudely simplified, delegation of precisely delineated powers may be permissible, whereas the opposite holds true for powers allowing for a ‘very large measure of discretion’: ECJ 14 January 2014, Case C-270/12, *United Kingdom v Parliament and Council (Short Selling)*, paras. 41-54. This case law on (regulatory) agencies, however, is still very much underdeveloped and multi-interpretable. See M. Chamon, *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) p. 174-298. Simply put, the Court does not seem to have done much more than say that the EU legislature can only delegate to agencies executive-like powers to the exclusion of powers to make the main policy choices in a given area. The case law does not provide clear criteria for determining how wide the margin of discretion given to agencies may or may not be. The ‘*Meroni* case law’, it is submitted, does not alter the conclusion that ‘discretion’ is an overly vague criterion for demarcating Arts. 290 and 291 TFEU. In fact, one cannot exclude the possibility that the Court at one point in time will realise

Furthermore, why should it always be the Court that draws the dividing line? The institutional balance anchored in Articles 290 and 291 TFEU differs. However, no rule or principle of law which gives preference to the *ex post* control of the Commission above the *ex ante* supervision of Comitology, or *vice versa*, can be deduced from the TFEU. The TFEU does not – certainly not expressly – provide for a hierarchy between Article 290 TFEU and Article 291 TFEU.²⁵ Why could the EU legislature – within the textual limits of the two provisions – not be permitted the choice for one or the other? In the absence of clear criteria laid down in the TFEU, would it not be more logical to consider the development of proper criteria for the classification of non-legislative acts to be a policy matter that can best be left to the EU legislature?

DELEGATED ACT: AMEND OR SUPPLEMENT?

The second case to be discussed, *Parliament v Commission (Connecting Europe Facility)*, deals with another distinction, namely the one made in Article 290 TFEU between ‘amending’ and ‘supplementing’ legislative acts. More concretely, when the legislature gives the Commission the power to adopt a delegated act without specifying whether this involves amending or supplementing the legislative act, is the Commission free to determine how to make use of this power?

Parliament v Commission (Connecting Europe Facility)

The case concerned a legislative Regulation²⁶ establishing the ‘Connecting Europe Facility’, which determines the conditions, methods and procedures for providing EU financial assistance to trans-European networks that support projects of common interest in various sectors, including transport. The Annex to the Regulation contains a list which describes, in general terms, selected projects in the transport sector. The regulation empowers the Commission to adopt delegated acts ‘detailing the transport funding priorities’. The Commission adopted a delegated act which added certain elements to the Annex to the ‘Connecting Europe Facility Regulation’, indeed specifying in greater detail which projects would be given priority.

or conclude that ‘discretion’ is not a very useful or workable criterion for determining the legality of delegation of powers to agencies either.

²⁵ See e.g. J. Bast, ‘Is There a Hierarchy of Legislative, Delegated, and Implementing Acts’, in Bergström and Ritzleng, *supra* n. 5, p. 157. This view, however, does not seem to be shared by all. See e.g. C. Bergström, ‘Patterns and Finds: Five Central Themes’, in Bergström and Ritzleng, *supra* n. 5, p. 257 at p. 258.

²⁶ Regulation (EU) No. 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No. 913/2010 and repealing Regulations (EC) No. 680/2007 and (EC) No. 67/2010 (OJ 2013 L 348, p. 129).

Parliament opposed this. In its view, a power to provide ‘detail’ would not encompass a power to ‘amend’ a legislative act. The Commission would only be empowered to supplement the legislative act, and should therefore have adopted a separate delegated act.

The Court agreed. First, it established that Article 290 TFEU only lists two categories of delegated power, namely the powers to ‘supplement’ and to ‘amend’ a legislative act. That Article does not provide for a third independent category allowing the ‘detailing’ of certain non-essential elements of an act.²⁷

Second, the Court found that a power to ‘detail’ does not give the Commission the freedom to choose as it sees fit between exercising a power to ‘supplement’ or a power to ‘amend’. The two categories of delegated power laid down in Article 290(1) TFEU are clearly distinct. The delegation of a power to ‘supplement’ a legislative act is only meant to authorise the Commission to flesh out that act. If the Commission exercises that power, its authority is limited, in accordance with the entirety of the legislative act, to the development in detail of non-essential elements of the legislation in question which the legislature has left unspecified. By contrast, the Court held that the delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements in that act as laid down by the legislature. In cases where the Commission exercises that power, it does not have to comply with the elements of the legislative act that it aims to ‘amend’.²⁸ The difference between the two categories of delegated power thus precludes the Commission from being granted the power to determine the nature of the delegated power conferred on it. Under those conditions, and in order to ensure the transparency of the legislative process, the Court held that Article 290 TFEU requires the legislature to determine the nature of the delegation that it intends to confer on the Commission.²⁹

Third, the Court established that a power to ‘supplement’ a legislative act requires that the Commission adopt a separate act. It observed that, for reasons of regulatory clarity and the transparency of the legislative process, a power to ‘supplement’ does not allow the Commission to add an element to the actual text of that act. Such an incorporation would be liable to create confusion as to the legal basis of that particular element, given that the actual text of a legislative act contains an element arising from the exercise, by the Commission, of a delegated power which does not entitle it to amend or repeal the act.³⁰

²⁷ ECJ 17 March 2016, C-286/14, *Parliament v Commission (Connecting Europe Facility)*, paras. 32-33.

²⁸ *Ibid.*, paras. 40-42.

²⁹ *Ibid.*, para. 46.

³⁰ *Ibid.*, para. 53. The Court explained that an element included in the legislative act by the Commission in the exercise of a power to ‘supplement’ could, subsequently, only be replaced or deleted by a power to ‘amend’. It would therefore be up to the legislature to intervene and to replace

In the case at hand, and considering the Commission's power to 'detail' financing priorities in the transport sector, the Court found that this should be seen as a power to 'supplement'.³¹ Therefore, as Parliament had indeed claimed, the Commission was not entitled to amend the Annex to the Connecting Europe Facility Regulation and should, to establish the financing priorities, have adopted a separate delegated act.³²

Comments

Parliament v Commission (Connecting Europe Facility) is a bit puzzling. Why did the Parliament, with the Council's support, go to the trouble to initiate the case? What was the actual legal significance of the dispute at hand? Whether a delegated act amends or supplements a legislative act is of no relevance to the power of either Parliament or Council to oppose the act's entry into force under Article 290(2)(b) TFEU. The legal ramifications would appear to be identical whether the Commission chooses to situate a certain measure or element (*in casu* financing priorities) in a legislative act, in an annex to it, or in a separate delegated act. As Advocate General Jääskinen observed in his Opinion on the case, the distinction made in Article 290 TFEU between 'amend' and 'supplement' would seem to be purely formal in nature. If Council and Parliament decide, as they did *in casu*, to transfer the power to adopt delegated acts without specifying whether the intent was to allow the Commission to 'amend' or rather to 'supplement' the legislative act, why would the Commission then not be allowed to decide for itself?

The Court, however, rejects this: to guarantee the transparency of the legislative process, the EU legislature must in each case determine which kind of power it is actually delegating to the Commission. The legislature must indicate beforehand whether it is empowering the Commission to merely supplement, or rather to alter, a legislative act. On the one hand, this makes perfect sense. By demanding that the legislature make a clear choice for 'amend' or 'supplement', conflicting interpretations such as in the case at hand can be avoided. On the other hand, one wonders whether the Court is perhaps not being a little too inflexible. A clear choice for either 'amend' or 'supplement' may contribute to transparency, but the same could be said if the legislature deliberately and explicitly decided to leave that choice up to the Commission. Why, as the ruling suggests, should the legislature be denied that power?

or delete the element concerned either by itself establishing a legislative act or by conferring on the Commission a delegated power to 'amend' the act in question. By contrast, when the Commission 'supplements' a legislative act by adopting a separate act, it may, in so far as necessary, amend that act without being required to amend the legislative act itself. *Ibid.*, paras. 54-56.

³¹ *Ibid.*, paras. 48-51.

³² *Ibid.*, para. 64.

It is a welcome development that the Court currently draws a clearer distinction between ‘amend’ and ‘supplement’. Clarity is achieved not so much by understanding ‘amend’ to mean ‘modify’ or ‘repeal’, nor by describing ‘to supplement a legislative act’ as ‘to flesh out that act’ – the precise meaning of these words could be the subject of endless debate. To distinguish the two terms, the Court opts for a much more concrete and simple criterion: textual amendment. A delegated act that makes changes in the text of a legislative act (or in an annex to it) ‘amends’. A delegated act that leaves the wording or text intact ‘supplements’.³³ Textual amendment is a simple and workable criterion for drawing a dividing line between the two terms, and may indeed contribute to a clearer and more transparent legislative process.



³³ Compare the Opinion of AG Mengozzi of 7 May 2015 in Case C-88/14, *Commission v Parliament and Council (Visa)*.